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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2022-001626
State v. Eubanks, Ct. App. Opinion No. 5933 (filed August 10, 2022)

The State, ...Respondent,

v.

Michael Cliff Eubanks, ...Petitioner.

APPENDIX VOLUME II OF III

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him.

Q Now, you sent J.L. and Cliff to counseling in Greenville for about four or five months?

A Cliff never went to counseling.

Q Not Cliff. Excuse me. L.L. .

A Yes, sir.

Q And part of L.L. 's problem was that you were going to homeschool J.L. ?

A That wasn't his problem.

Q That wasn't?

A No, sir.

Q Was he upset about your homeschooling J.L. ?

A Not that I remember. He was more upset that he wanted Josh in his life.

Q Wanted Josh in his life?

A Yes, sir.

Q And that counseling lasted, I believe, was it four to five months?

A Somewhere around in there.

Q Now, the Gilchrist Group, the counselor that you went to on May the 16th.

A It was the week prior. When my son went, I went with him.

Q So L.L. went the week before?

A Yes, sir.

Q And what was the purpose of L.L. going to that counseling?
A He was struggling with anger. He was upset a lot. I assumed it was about Josh.
Q And is part of it also he was kind of withdrawn?
A He was upset, like I said.
Q And you had never been to that counselor before?
A No, sir.
Q And just get it out of the phone book?
A No, sir. His doctor over at HomeTown Pediatrics referred us to her. She was the same one that referred us to Gateway that you had previously discussed as well.
Q So L.L. had been to her one time before the 16th of May and J.L. had never been?
A Correct. Well, he had only went then one time total. But yes, sir.
Q Excuse me?
A He's only been there one time ever. But yes, sir.
Q Now, and you said the last time you and Cliff had sex was January 1st of 2015?
A Yes, sir.
Q And you know he was diagnosed with erectile dysfunction?
A That's what he stated.
Q That's what he said, okay. And he was diagnosed with

low testosterone?

A That's what he stated.

Q That's what he stated, okay. In November, December of 2016 do you remember going over to Cliff's parents house and having a conversation with them on their front porch?

A That was around the same time that Elizabeth stated to me about why did he spend so much time with J.L. . So yes, sir. I remember that.

Q You do remember that?

A Yes, sir.

Q And Elizabeth is Cliff's mother?

A That's correct.

Q And all the kids were there?

A Yes, sir.

Q And you were on the porch talking to them?

A Yes, sir.

Q and you were sitting there and Cliff was out in the yard playing with the kids?

A I assume. Yes, sir.

Q I mean, all of them? More than one was there?

A Yes, sir.

Q And do you recall discussing your relationship with Cliff with Ms. Eubanks?

A Yes, sir. We talked about that some.

Q And did you not make the statement to them that you

know how to get rid of him?
A How to get rid of him?
Q That's correct.
A What does that mean?
Q Excuse me?
A What does that mean?
Q Did you make the statement to them that you know how to get rid of Cliff?
A I don't know what that means, so no, sir.
Q I'm not asking you if you know what it means. I'm asking if you said it.
A I couldn't make the statement if I don't know what it means.
Q So you're saying you did not make that statement?
A I did not make that statement.
Q Now, J.L. , of course, she had a room with B.E. ?
A She was supposed to but B.E. wouldn't stay in there.
Q Excuse me?
A She was supposed to but B.E. wouldn't stay in there.
Q So in the room with J.L. you had a bunk bed and -- you had two bunk beds?
A I'm sorry. Which house are you referring to?
Q Beaver Dam Road.
A Oh, yes, sir. We had two bunk beds set up in that one room.

Q And B.E. was supposed to share it with J.L. but didn't?

A J.L. . Yes, sir.

Q And did J.L. and B.E. get along well?

A Like normal sisters.

Q Now, tell me about the time that J.L. came to you about seeing an alleged movie called Birthday Sex on Cliff's cell phone.

A She never told me that she saw a movie. She told me she saw where he had searched it.

Q And did you ask her about it?

A I said, honey, don't go through his phone. That is his phone. He's a grown man.

Q And did you talk to Cliff about it?

A I did.

Q And what did --

A He said I'm a grown man. Sometimes I like looking at things.

Q And that was Birthday Sex?

A That was his choice.

Q I understand. You understand Birthday Sex is a song with a video?

A I don't watch those kinds of things, so I don't know.

Q Do you realize Birthday Sex is a song with a video that you can look at on YouTube?

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2018-001684

The State,..... Respondent,

v.

Michael Cliff Eubanks, ... Appellant.

Record on Appeal – Volume II of II

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A Now that you've told me, I do. Sounds terrible though.
Q I understand. So it's a song, not a movie.
A Okay.
Q But J.L. felt free enough to come to you with some concerns about that?
A Yes, sir.
Q In fact, when you and -- after -- well --So you and J.L. , I guess, over the first four or five years got very close because you were the sole parent in her life?
A My parents helped me as well because I worked three jobs.
Q But still, you were the sole parent in her life?
A Yes, sir.
Q And so, you all got pretty close?
A Of course.
Q Out of necessity if nothing else, right?
A I agree.
Q And you all would discuss things?
A She would choose. I let her talk about what she wanted to talk about, but we talked about a lot.
Q And you say since -- in the last year, so since July of -- let's say July 1st of last year J.L. 's gained 25 to 30 pounds?
A Since June she's started putting on weight, almost immediately after May '16.

Q Now, you said earlier that when you observed what you perceived to be Cliff paying more attention to J.L. that you all joked about it?

A We joked about it.

Q Right. And you all -- it sounded like you kind of made light of it.

A I did, because I didn't think what I know now.

Q And you made light of it because there was nothing apparent there that alerted you to do anything other than make light about it?

A I would have never thought he would have done it.

Q And you never sat and discussed it with J.L. either, did you?

A Never had any thought that he would.

Q But you never sat down and discussed with J.L. about you thought Cliff was too close to her?

A I spoke with the adult and told the adult he needed to spend more time with all kids. There was no reason to shame J.L. . It wasn't her fault.

Q So you never sat down with J.L. and asked her about it?

A No, sir.

Q One other question. Right after May of 2017 did Josh Lyons come back in your life?

A Into the kids' life. Yes, sir.

Q Did he come back into your home?

A J.L. asked that he -- but since my dad passed away and since I had an injury, she was scared.

Q So he moved into Beaver Dam Creek Road?

A He didn't live there. He stayed on the couch.

Q How long did he stay there?

A To be honest, maybe a couple of nights, but he'd come over every day that she asked that he be there.

Q And you would go out with him grocery shopping during the day?

A If J.L. was there, yes. She was scared.

Q So if we have a picture of you June 11, 2017 grocery shopping with Josh Lyons, that would probably be accurate?

A Sure.

Q So you were able to get out in June of 2017 to at least go grocery shopping with an ex-husband?

A Like I told you, I would do anything for my kids. And if they're okay, I am also.

MR. WISE: Thank you.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. SCOTT:

Q That picture that Defense showed you, I don't want to put words in their mouth, but I assume this is going to be provocative because the girls are up in the air with their legs?

A Correct.
Q And they're wearing bloomers; is that --
A That's correct.
Q Let me ask you, did you ever see J.L. do this? What -- you called it something. That's it called?
A It's called a straddle hold.
Q And so, that is a --
A It's done in cheer, dance. A lot of different things.
Q So if they're going to argue this as provocative -- you taught dance. Did you have a lot of parents say that's a provocative move?
A Never.
Q I wonder why they chose that picture. Is this -- do you recognize this to be the dance studio Facebook page?
A Yes, sir. It is.
Q And what do you see in these pictures?
A I remember Laura going up there and wanting to take a picture of J.L. on the Facebook page. They could have picked several out of that.
Q I wonder why they didn't.
MR. WISE: Objection, Your Honor. That's an improper question.
THE COURT: Sustained. Sustained. Sustained. Not a proper question to ask.
Q Who are these people? Who they -- what do they have to

do with this case today?
A Absolutely nothing.
Q Do you see J.L. ?
A No, sir.
Q See A.E. ?
A No, sir.
Q Is B.E. in that picture?
A No, sir.
Q Where's L.L. ?
A He's not in that picture.
Q So if I go to the Facebook page, if anybody goes to the dance studio --
A They now go by TDS --
Q TDS.
A The Dance Shop.
Q What are you looking at when I scroll through these pictures?
A A bunch of happy kids holding trophies, dancing with their moms. Doing what they love.
Q The straddle hold is the one that they showed you?
A Yes.
Q And you don't know who -- you didn't recognize these people?
A I do. I don't feel comfortable saying --
Q No, we don't need to.

A -- kids' names out loud.
Q But did they have absolutely anything to do with this case we're here for this week?
A No, they don't.
Q You said L.L. is quiet. L.L. is reserved.
A He was in a house full of girls.
Q I happened to see something this morning. Did you all have a group prayer?
A We do every morning.
Q How many people were in that group circle prayer?
A At least 20.
Q And who led the prayer?
A L.L. . He wants to be a preacher.
Q He can't really be reserved, he can't really be quiet if he's going to be a preacher, can he?
A No, sir.
Q I heard something that the lawyers asked you. I don't think I need to -- Cliff and you didn't even sleep in the same bed?
A We slept in the same room, but B.E. would cry if she wasn't in the bed with me. So he slept in a rollaway bed beside me.
Q He didn't want to sleep next to you?
A No, sir. Not after my wreck.
Q Well, let me ask you this. I'm hearing about cuddling

on couches and the bottom of bunk beds. Did he cuddle with you?

A Not after my wreck he didn't. Nothing like that. But I didn't want to make him feel guilty because he couldn't have an erection.

Q Did you know he couldn't get an erection?

A I never saw an erection, so I assumed he couldn't.

Q The last time you even saw his naked body was January 1st of --

A He would undress in front of me, or get in the shower. But I thought he couldn't help it, so I didn't want to make him feel bad.

Q Because he told you he couldn't?

A Right.

Q And did you know that J.L. was 81 pounds at the time of Dr. Pritchard's exam on her?

A Yes, sir.

Q Last thing I'm going to ask you. Who was it that asked to speak with J.L. when she disclosed the sexual allegations?

A Kim Little, L.L. 's therapist.

Q It was Kim Little. Who was it that called the police after hearing --

MR. WISE: Your Honor, I would object to this as repetitive of what he went over on direct.

THE COURT: You raised an issue. You can -- he can touch on it one more time.

MR. WISE: I don't recall raising an issue, but -

THE COURT: You brought up something in cross that's an implication and he's allowed to respond to that. Go ahead.

Q Was it you that ran down to the police department and said, gosh, I've got to report --

MR. WISE: Objection.

Q -- I've got to report some child abuse. Was it you?

A No, sir.

THE COURT: Hold on. Hold on.

A I never reported it.

THE COURT: Hold on. Sustained as it relates to the theatrics. Okay. So no leading, please. I think you made your point.

Q I'm going to ask a non-leading question. Was it you or was it Dr. Kim Little who reported the abuse?

A Dr. Kim Little.

MR. SCOTT: Thank you.

THE COURT: Any recross?

MR. WISE: Nothing further.

THE COURT: Ma'am, thank you very much. You may step down.

THE WITNESS: Thank you.

(Whereupon, the witness stepped down from the witness

stand.)

THE COURT: Solicitor, any additional witnesses?

MR. SCOTT: No, Your Honor.

THE COURT: Ladies and gentlemen, here's what I'm going to do. I'm going to ask that you adjourn to the back. I do need to take up some matters with the attorneys. I might -- I'm going to conference with them real quick on logistics and scheduling, and I might bring you back out here in about five or 10 minutes and just let you go to lunch while we take up a few things and we'll see where things stand. Okay? But don't talk about the case yet.

MR. WISE: Can we approach real quick?

THE COURT: Sure. Come on up.

(Whereupon, a sidebar was held.)

THE COURT: All right. Ladies and gentlemen, I'm going to go ahead and send you all to lunch because I've got to eat, too. I'm going to ask that you be back, if you would -- let me ask that you be back at 1:45, okay, to try and -- try and move this along, but I want to give you enough time to eat lunch. If what I do out here takes a little bit longer and if we keep you waiting, sorry. Be back at 1:45. Okay? Don't talk about the case. See you at 1:45.

(Whereupon, the jury exited the courtroom at 12:19 p.m.)

THE COURT: A genuine five minute break. Back in five

minutes. Okay? So if you step out, please be back in five minutes.

(Whereupon, a recess was held from 12:19 p.m. to 12:28 p.m.)

THE COURT: DV motion is what we need to address. Mr. Wise will be moving for a Directed Verdict and renewing all previous motions. The Trauma Narrative, State's 10, if there's any redaction that you all have not been able to agree to, we need to talk about that. And then there's the issue that was mentioned at the bench, something found on his cell phone --

MR. WISE: Right.

THE COURT: -- that Mr. Wise had an issue with. So let's do it in that order, if we could.

MR. WISE: Do you want me to go ahead?

THE COURT: Sure. Mr. Wise.

MR. WISE: I move for a directed verdict on criminal sexual conduct first degree on the grounds in light -- and taken in the light most favorable to the State there really has been no showing of criminal sexual conduct first degree. At the best, I think the testimony is confusing and appears to be testimony that certainly should -- confusing testimony among the State's primary witness on this issue should not be a basis to allow a jury to pass judgment on it, and I give this example. In the trauma narrative she talks about

the worst experience. Well, the worst experience is only described a lewd act on a minor child. We have no medical testimony to show anything happened. Granted it doesn't have to be, but certainly that is a factor that the Court can consider in a directed verdict. We are dealing with the memory of a six year old, some six years after the alleged incident, to determine whether or not there is substantial evidence to allow a jury to consider criminal sexual conduct first or second degree. And I think that is simply not sufficient evidence.

THE COURT: Do you care to reply?

MR. SCOTT: Just as to -- I assume just the DV on the CSC minor first is what he's arguing?

MR. WISE: First and second.

MR. SCOTT: Oh, the second. So a sexual battery. The testimony for the CSC with minor first, I'm just going to give you one example that we had, and that's just enough. She was eight years old. She was on the couch. She said this man put his mouth on her private part. She said this man put his tongue inside of her private part. She said this man used his penis and put it inside her vagina. She said it hurt. She said this man put it inside of her anus and it hurt. She was eight years old at the time. Therefore would meet the definition of a sexual battery both through cunnilingus and also anal and vaginal intrusion.

Then you recall I used the tissue box as well.

A good way to delineate the first from the second, we know she was 12 when they moved to Beaver Dam Road. So every time she testified to any kind of sexual battery there that would be a CSC with a minor second. Of course, there we talked about the barn. He intruded -- put it -- there was intrusion inside of her vaginal opening. We talked about cunnilingus there as well. In fact, I don't have it in front of me, but there was numerous times she alluded to. He has admitted in his own statement to a lewd act of a child. We have also had witnesses talk about him fondling her in various ways. She herself has talked about him fondling her in various ways. We think this would be something for the jury to consider, Your Honor. We think we have had testimony -- competent testimony regarding all of these incidents through various witnesses. Trauma narrative, I was always just worried about it. I don't think they're discoverable. It's a therapeutic document. He insisted on it. I said just so we don't have any hiccups I'm going to give it to him. And that's what I was afraid of, that he was going to take that and he was going to run with it, this is the sole case right here. We'll it's not. It is a therapeutic exercise. The therapist testified this is by no means to cover every incident that occurred with her. That is one element, one piece of our case, and that

is to be taken in conjunction with all the other testimony and all the other evidence that's come in. And, Your Honor, we do think we have provided sufficient evidence for the jury to consider.

THE COURT: In the light most favorable to the State there is evidence for which the jury could reasonably conclude that the Defendant is guilty of CSC with a minor first and second, as well as the CSC with a minor third. So the Court will deny the Defendant's motion for a directed verdict.

The Defense also renews all prior motions and objections. Same rulings as before. The trauma narrative, have you all been able to agree upon redaction of that item?

MR. SCOTT: I think it's all relevant, Your Honor. I wasn't even going to allude to it, but that was one -- a choice -- a strategy they decided to make when they tried to piecemeal ask her about certain parts of it. Rule of completeness I think it all comes in. I find it all to be relevant at this point. I don't see anything that I would consider irrelevant to this case at this point.

THE COURT: But what part of the --

MR. WISE: Your Honor, the problem -- I think there are three questions at the end she supposedly discussed with her mother that I don't think are relevant. He and I differ as to how much of the trauma narrative -- let me see your copy

a second. I can - Thank you. Once you get past the basic allegations and start with number one, I have a question of whether number one through nine or should -- are irrelevant and should be redacted.

MR. SCOTT: Your Honor, I'm going to hand it up to you.

THE COURT: Please.

MR. SCOTT: In case you want to review what he's talking about. He's alluding to these questions.

MR. WISE: His recall is that she testified to items one through nine. I don't think she did. If she testified to it then I think it probably arguably would be admissible. But if she didn't testify to it I think it should be redacted. And the last three questions in particular.

THE COURT: Under the rule of completeness I think the Solicitor has a point. It was the Defense who brought this up. It was the Defense who talked about it. And again, I understand the State's position that maybe this should have never been referred to in the first place, but that's water under the bridge at this point in time. And candidly, I mean, it is somewhat of a prior recorded recollection. There wasn't much of a fight over whether it was discoverable or not. Now that it's out there I think that it's appropriate for the jury to consider the document as a whole instead of just cherry-picking portions of it.

The questions that start on the third page, one through

nine that Mr. -- Mr. Wise alludes to, there's some -- there's some stuff in there which is consistent with how she testified, things that she talked about on the stand. There's also clearly statements in here which are indicative of the PTSD that she was diagnosed with after the fact. So that's evidence that would support the diagnosis of PTSD. And again, it's the Defense who brought these issues up.

Does the State feel terribly strong about seven through nine, those questions? "I've learned these things about myself in therapy. If I had a friend who went through something similar I'd give them this advice. If a friend -- talking about the abuse is too hard, I would tell them, colon." How she would proceed going forward I don't know is terribly relevant.

MR. SCOTT: I don't -- here's what I would ask.

THE COURT: Yes, sir.

MR. SCOTT: I want to hear his closing argument before we make that decision. And let me tell you why. Let me tell you why. Because a lot of what I suspect they're going to do is say she didn't tell anybody, therefore it didn't happen. The questions at the end are important. I suspect, Judge, and I don't want to put any ideas in their head but they've already insinuated. Grandma, she would have heard if it had happened. Her question at the end, "I wonder if Grandma's noticed anything weird going on." This is

something she was thinking about back then. It's relevant. If they bring it up. Now, it might not be if they don't bring these up. I suspect they will though. And I think kind of the -- these cases, I've done a lot of them, and typically, you know, it's blaming the child, you're making it up. If you weren't making it up you would have told somebody. And here in here therapy she's telling what -- her advice for other people was speak up if it happens to you. Don't do as I did, keep it to yourself. Speak up.

So I think what I would rather do is revisit seven, eight, nine, those questions at the very end just based on his closing. That's all I ask. And I'm not -- right now at this point I'm not -- I think you asked if I had very strong feelings about those. I do not. But I'll reserve those feelings depending on what his argument is, if that makes sense.

THE COURT: My only concern with that is I'm going to instruct the jury that a closing argument is not evidence and we're going to be making a decision on a piece of evidence, namely State's 10, based upon a closing argument. I don't know how appropriate that is. I think it's either up or down relevant or not at this stage, based upon what's been presented today. Maybe things will change after the Defendant's case. I don't know. But I think that decision needs to be made before closing, and I don't feel terribly

comfortable necessarily holding off ruling on that question until after Mr. Wise's closing. That's sort of where I am on State's 10. Any other thoughts?

MR. SCOTT: I will just reserve the right to -- I don't know what he's going to do. And I understand it's not evidence. Certainly, you know, a persuasive trial litigator, somebody who has a persuasive argument, can put a thought in a juror's mind. And even though that evidence was this, he could put that in their mind, and then I have this right there that could go back with them.

MR. WISE: I don't know how seven, eight and nine would ever enter into my closing argument. The three questions at the end.

THE COURT: Right. All right. Well, right now my default setting is to allow State's 10 into evidence and perhaps redact seven, eight and nine. Maybe I'll look at this in greater detail over lunch.

MR. WISE: And I would like to compliment the Solicitor on the ingenious argument about waiting until my closing argument to redact.

MR. SCOTT: Well, they wouldn't have the evidence yet.

THE COURT: I understand.

MR. WISE: It had some logic to it.

THE COURT: It did. I just didn't know if -- I really would rather lawyers be able to deal with evidence in their

closing and they know what that evidence is before they close, and I think that's probably --

MR. WISE: We can deal with it in this respect. If seven, eight and nine's mentioned it's unredacted. But I don't see how they come in play in my argument.

MR. SCOTT: And they may not. And maybe I'm just worried a little bit. Overly worried. But that will be -- that's just -- I'd make that request.

THE COURT: Sure. You all know what my default setting is. I'll let you know if the default setting changes. And the third thing was something that was recovered from a cell phone. Are these -- or is this item something that was taken from a phone that the defense provided last Wednesday?

MR. SCOTT: No, this would be something that we had all along and -- part of a phone dump. And it has a number of searches that we would argue the Defendant made. They were from his phone. It was whatever one that was we just entered. State's No. 11.

THE COURT: 11, yeah. Let me see the --

MR. SCOTT: These are handwritten. I've got the document. But those are some of the dump.

MR. WISE: And I haven't seen what you're looking at.

MR. SCOTT: I'll show you.

MR. WISE: If you've ever analyzed a phone dump you can appreciate the problems, as Mr. Bentley has attested to.

THE COURT: So this was from the phone that Ms. Eubanks provided to law enforcement?

MR. SCOTT: Yes, Your Honor. We had these early on and we had the phone dump done early on. That is not that iPhone that showed up last week. That is a Samsung Galaxy that we've had all along. We provided that phone dump to Rauch ages ago. What he's talking about is accurate. When you go do these phone dumps there's link after link after link and you --

MR. WISE: I got it and spent a couple hours looking through it and I finally just called down and said, Dale, is there any porn on that thing, and he said we -- we didn't find any. And then I think Walter this week was going through it again and found those links. So it's not like anybody's been hiding anything, I don't think.

MR. SCOTT: No. And there are no pictures. Those are searches that were done on that phone. And, you know, I don't want to -- I'm not going to introduce in my case in chief. But I do reserve the right, if he takes the stand, to ask him about them. I think they're highly relevant in this case. If he denies it, then I'll explore calling rebuttal witnesses. But if he has a plausible reason for those searches to be on his phone I can just move on.

THE COURT: All right.

MR. WISE: I think it comes up with that case out of

Lexington where they found a bunch of sex toys and the Court said no, that's just not relevant. None of -- as I understand from Mr. Bentley, none of that involves child pornography.

MR. SCOTT: I think all of it does actually.

THE COURT: Well, I'm looking at some of the sites. I guess this is -- I'm having a hard time reading some of your writing. But the third one, Teen Kittens, I guess, Young Girls Sex dot com, Teen Sex mania. Eight -- number eight, numeric eight, Teen Triple X. Teen Message Porn dot com. Your writing is atrocious, Solicitor.

MR. SCOTT: That's Walter's.

THE COURT: Oh, I'm sorry. Mr. Bentley, your writing is atrocious.

MR. SCOTT: Mine is too, Your Honor.

MR. WISE: And I -- you know, are any of those sites illegal?

THE COURT: I have no knowledge.

MR. WISE: If they're all legal I don't think they're relevant. And I don't have any knowledge either, frankly.

THE COURT: Well, I think the State's theory of the case is the Defendant is predisposed to engage in sexual relations with minors.

MR. WISE: Well, I would point out those refer to teen and not preteen.

MR. SCOTT: I'll just ask him some questions about his sexual kind of desires. He may have an answer for me that makes a lot of sense, and -- but if he denies being attracted to young girls, if he denies making those searches, I would reserve the right to call rebuttal witnesses. I think they're highly relevant. He's saying none of this happens. That's pretty much a smoking gun that he's attracted to very young girls.

THE COURT: All right. According to the little notes at the top there were 1,285 cookies apparently that Mr. Bentley found in the phone. He's nodding yes. And 215 of which were deleted. Let's see where his testimony goes. Before you go into this I want a heads up. Okay?

MR. SCOTT: Yes, sir.

THE COURT: Is that fair?

MR. SCOTT: Yes, sir.

MR. WISE: It may be, quote, fair, but it certainly puts the Defendant in a dilemma.

MR. SCOTT: It's a strategic move putting him on the stand. I know that.

MR. WISE: I understand.

THE COURT: I understand. I mean, a witness can be questioned about any relevant matter. I don't know what he's going to say. I don't know what the --

MR. WISE: Yeah. I just think of a 403. Unless the

state can prove these sites are illegal, they're certainly more prejudicial than probative. Now, if they're illegal, then we got a different discussion.

THE COURT: I don't know that I necessarily agree. In a homicide prosecution where we agree that it's a .357 Magnum that killed the decedent, but the firearm was never located, it might be relevant. That the Defendant on trial in that case Googled multiple websites for .357 Magnum and maybe even made a call.

MR. WISE: I understand. But that's a totally different relationship, because the State is not, at least from what I've heard, saying that he Googled any site about child porn.

THE COURT: I don't know if those sites are legal or not. That might be something that perhaps, Solicitor, if these were pedophilia type sites that are totally inappropriate, that might be -- your argument might be a little bit stronger obviously. If this is run of the mill online porn, maybe Mr. Wise has somewhat of a point. I'm not really encouraging you to obviously -- I'm not even going to go there. But let's just leave that question open. I'm not able to give a definitive answer because, A, I don't know if it's a legal site or an illegal site. Obviously something that depicts child pornography may be more probative to the state. I would think that somebody would

be able to shut down the sites if it shows child porn, but I don't know how that stuff works.

MR. SCOTT: Judge, let me -- even if it depicts girls who are of age who are labeled as teens or younger girls somehow, that shows his state of mind. And if the argument- - I heard it in opening, it's not the act; it's the intent. Do you remember that? I have got to show what his intent was, and I think his predisposition to being attracted to teens and younger girls, that plays a very relevant role in -- if the argument is it didn't happen, well, this is circumstantial evidence. And it was consistent with every other piece of circumstantial evidence. It leads to one conclusion. I think that's a pretty strong link in that whole circumstantial evidence chain.

THE COURT: I understand. I can't say at this particular point in time whether or not questioning the Defendant about those sites will be relevant. I have to reserve judgment on that. I may allow you to. I may not allow you to. Obviously I think your argument is stronger if it's an illegal site or if it clearly depicts underage girls. I'm assuming that those don't, because I'd like to think that there's some mechanism or that some server would shut something like that down. But I don't know how that works.

MR. SCOTT: Even Young Girls Sex dot com there's not

young -- I mean, Young Adults Sex dot com, I wouldn't even think hardly anything of it. Teen Kittens. I understand, Your Honor. I understand your ruling.

MR. WISE: The only thing I would request is before he asks the question about it he excuse the jury and let the Court rule.

THE COURT: Well, I'm going to let him walk up here. I may not necessarily kick the jury out. But if necessary, I'll kick the jury out. I just want a heads up before he goes there. You know, again, we're dealing with websites of a unknown character, let's say. And let me put it to you this way. Gentlemen, I'm -- I remember reading in The State newspaper about two years ago some study that they were trying to do. I think it was at USC where they were trying to find -- they were wanting to study the psychological affects of pornography on people. And because they were looking to use college students, which most research does, they were trying to find a controlled group. One group that had never seen pornography before, males who had never seen pornography before. I understand they couldn't find anyone. That was what the report was in The State newspaper. I don't know what those sites are. I'm leaving it at that and we'll get lunch. All right?

MR. WISE: All right.

THE COURT: Let's try and be back as close to 1:45 as

possible if we could, please. It's probably going to be closer to 2:00, but --

MR. WISE: Were any dates on those websites?

THE COURT: Yes. Go ahead and show that again. Make a copy, if you would, for Mr. Wise. See you all around 1:45, slash, two o'clock.

(Whereupon, a lunch recess was held from 1:00 p.m. to 2:00 p.m.

THE COURT: Mr. Eubanks, I've got to question you and make sure that you understand your Fifth Amendment rights, okay. Raise your right hand.

MICHAEL CLIFF EUBANKS, having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q You are Michael Cliff Eubanks; correct?

A Yes, sir.

Q Mr. Eubanks, I'm not going to ask you anything about the substance of these allegations, but I do need to review with you briefly your Fifth Amendment rights under the Constitution. You do understand that at this point in the trial you and your attorney will be able to present a defense. Mr. Wise alluded to the fact, in his opening, that you anticipated taking the stand or that the jury was likely to hear from you during the course of this trial. Do you understand?

A Yes, sir.
Q So, I'm assuming that you and Mr. Wise have already discussed what we are going to talk about, but you do understand that you do not have to testify in this case. You've got the Fifth Amendment right to remain silent throughout these proceedings and obviously this is a personal right that only belongs to you. Nobody can waive it. Not you, your attorney -- only you can waive your right to remain silent. Do you understand that?
A Yes, sir. I do.
Q Now, if you take the stand you understand you'll have to answer all questions put to you. Any questions that I find relevant, you'll have to answer that question whether it's coming from your attorney or the Solicitor. Understand that, again, no one can force you to testify in this particular case. I'm assuming, however, you have made the decision to testify. Is that correct?
A Yes, sir. I have.
Q Do you have any questions about your Fifth Amendment right to testify?
A No, sir. I don't.
Q Or Fifth Amendment right to remain silent, rather. You're good?
A I'm good.
Q Very good.

THE COURT: Mr. Wise, I'll assume that when you call him to testify that he waives his Fifth Amendment. Let's have the jury, please.

The record will reflect that the jury is back and seated. Ladies and gentlemen, we've finished with the State's presentation of evidence. At this point, Mr. Wise, your case, sir.

MR. WISE: I'd like to call Alexis Eubanks.

ALEXIS EUBANKS, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WISE:

Q Please give us your full name.

A Alexis Eubanks.

Q Where do you live?

A I live at 103 Countryside Circle.

Q How are you related to Cliff Eubanks?

A I am his niece.

Q Who is your momma?

A Christy Eubanks Cline.

Q Who?

A Christy Eubanks Cline.

Q Who is his sister.

A Huh?

Q Who is Cliff's sister.

A Yeah.

Q How do you know Cliff? You know Cliff obviously because you are his niece?

A Uh-huh.

Q Tell us have you had a chance to -- let me back up a second. When you grew up, where did you live?

A With my grandparents at Colin Road in Clinton.

Q When did you start living there?

A When did I start living with them?

Q Right.

A I've been living with them since I was a baby.

Q So virtually all your life?

A Yes.

Q And was Cliff living there while you were living there?

A Recently, yes.

Q So, you've known him pretty close for a number of year?

A Yes.

Q Have you -- what happens at your grandparent's house on most Fridays and Saturdays? Excuse me -- Saturdays and Sundays.

A Most of the time my family gathers, especially during holidays, but most of the time on Sundays we get together and cook out and all the children are around outside playing or inside.

Q Is this a pretty regular thing?

A Yes.
Q Did you have occasion to see Cliff there with his -- with J.L. , A.E. , B.E. , and P.E. ?
A Yes, plenty of times.
Q Did occasionally L.L. come?
A Yeah. He didn't come as much as the others, but he did.
Q But he would -- what about Deanie?
A I mean, for the most part she did come, but toward the end there she didn't come a lot.
Q Did you have, during these visits, occasions to observe Cliff with these children?
A I did see him with his children, yes.
Q How long at a time would you see him?
A At my grandparents house?
Q Yes.
A For the whole time he was there he was with his kids unless --
Q And that would generally be about how long?
A A few hours out of the time he was there.
Q Can you tell us what you observed regarding any favoritism that Cliff may have shown?
A No. I've always seen him be very equal with his kids.
Q And that's with --
A Even with the step-children, yes.

Q Even with the step-children?
A Uh-huh.
Q How did he get along with J.L. ?
A He got along with her well as to what I've seen. He treated her just as he would his regular kids. I didn't see any difference in how he acted towards her or nothing. From what I see he's been a very good father.
Q Did you see -- ever see any conduct that you would deem to be inappropriate?
A No, sir. I did not.
Q Anything close to it?
A No.
Q And you've been -- you were there basically the whole time he was married to Deanie?
A Considering I lived there at the time, yes.
Q And I believe you have a daughter that lives there now?
A She lives with me, but my grandmother does watch her on a daily basis.
Q Watches her on a daily basis. Okay. So and your daughter is two years of age.
A Yes, sir.
Q Okay. Thank you very much. Answer any questions Mr. Scott may have.

CROSS EXAMINATION

BY MR. SCOTT:

Q You live with Cliff now?

A No, not at this time.

Q Were you living with him recently?

A Yes. I moved out about four months ago.

Q How long did y'all live together?

A Since this started and then four months ago I moved out, so...

Q Y'all talk a little bit about this case?

A I mean, pretty much.

Q So you would see the kids on weekends for a couple of hours at a time?

A However long he was there is when I would see the kids, and then on holidays as well. Sometimes he would just drop by whether he needed to grab something.

Q Just a minute ago you said one or two hours during the weekends though. Is that how long he'd be there with the kids?

A He'd be there longer, but what I meant was I'd see him with the kids for one to two hours at the time he was there.

Q So you really can't answer what he may have been doing with the kids when he was alone with them, can you?

A Alone at my grandparent's house?

Q When he was alone with children, you really don't know

what he was doing with them, do you?

A I mean, I wasn't there to see anything.

Q Right. So you can't really say what he's doing when he's alone with the children. You can only testify to what you see when he's with them a couple of hours during the weekends in front of you; correct?

A I mean, I can testify on how I know him and...

Q Okay. Well, how deeply can you testify to how you know him?

A I mean, I think of him as being a great man. I've never seen otherwise. Never known otherwise.

Q Do you know anything about his sexual desires or anything like that?

A No.

Q You don't know that?

A No.

Q Where is Countryside Circle? Is that in Clinton?

A Yes, sir.

Q Your mother is his sister?

A Yes, sir.

Q And your daughter is his blood relative?

A Uh-huh.

Q Thank you.

MR. WISE: Thank you very much. We'd like for this witness to be excused.

THE COURT: Thank you for coming. Mr. Wise?

MR. WISE: We call Jessica Eubanks.

JESSICA EUBANKS, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WISE:

Q Please give us your full name.

A Jessica Lynn Eubanks.

Q Where do you live?

A I live at 578 Little Acres Road in Clinton.

Q You are what kin to Cliff Eubanks?

A He's my brother.

Q Older brother or younger brother?

A Fourteen months older than me.

Q So you grew up with him.

A Yes, I did.

Q And you go to the family get-togethers at his parent's house?

A I do.

Q Is that a pretty regular thing?

A It is.

Q If you're looking for a Eubanks on a Saturday or Sunday, where are you going to find them?

A I'm going to find them at my mom and dad's house.

Q Did you ever see Cliff come by there with his children,

both his step-children and his natural children?

A Yes.

Q On more than one occasion?

A More than one occasion, yes.

Q How often would he be there?

A For my brother, he would probably be there almost every Saturday or Sunday of the month.

Q And two of his natural children he only had every other weekend.

A Right.

Q So obviously they wouldn't be there every weekend.

A Right.

Q Did you have occasion to see him with J.L. , A.E. , and P.E. ?

A All together?

Q All together.

A Yes.

Q And did he tend -- what did you notice about his interactions with them?

A He treated all the kids the same. Nothing different. Very playful with them all. If they did something bad or talked back to somebody he'd do what any other parent would do as far as correcting them, disciplining them, any other parent should do.

Q While he was married to Deanie, did you also visit with

him on Teague Road?
A Sometimes, but not much.
Q What did you observe when you saw him on Teague Road?
A I noticed he would either be cooking, cleaning, out in the yard doing something, continuously always hands on doing something. I would be in the majority in the livingroom talking to Deanie most of the time.
Q Did you ever notice any favoritism over on Teague Road?
A No, I did not.
Q And you have a fourteen-year-old daughter?
A I do.
Q Did you bring her over to Cliff's house on Teague Road?
A I have.
Q Have they ever spent the night over there?
A My daughter has one time when they had some type of birthday gathering a few years back.
Q How often did you notice Deanie around your parent's house?
A Pretty much most of the time she would be with them. There's been quite a few times that I've noticed that she was not with them.
Q Was that more recent than previous or what?
A I think it would be fair to say more recent than now, yes.
Q That she's been absent more recently than earlier?

A Correct.

MR. WISE: Thank you. Answer any questions Mr. Scott may have.

CROSS EXAMINATION

BY MR. SCOTT:

Q Cliff is your full brother?

A Yes, he is.

Q Your daughter is his full blooded niece?

A Yes.

Q What, if anything, do you know about your brother's sexual interests or sexual desires?

A I have -- I don't know that type of business of what his sexual stuff is.

Q So you don't know what his interests are sexually?

A I don't.

Q Thank you.

THE COURT: You may step down. You are free to go.

MR. WISE: I'd like to call Mitchell Allen Eubanks.

MITCHELL EUBANKS, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WISE:

Q Please give us your full name.

A My full name is Mitchell Allen Eubanks.

Q Where do you live, Mr. Eubanks?

A 102 Lick Creek Circle, Waterloo, South Carolina.
Q Where are you employed?
A I'm employed at Ace.
Q Ace Hardware?
A Yes.
Q The one right down the street?
A Yes.
Q And what kin are you to Cliff?
A He's my cousin.
Q Your first cousin?
A Yes, first cousin.
Q You've known him how long?
A All his life.
Q All your life?
A All his life.
Q Okay. First of all, let me ask you how well do you know J.L. ?
A I've known J.L. ever since they've been married.
Q So since 2010?
A Pretty much, yes.
Q Where have you seen J.L. ?
A Spook trail, when they have family outings at their house on Teague Road and on Beaver Dam Church Road, and occasionally at Cliff's parents' house.
Q So you've been around J.L. both on Teague Road and

Beaver Dam Church Road?

A Yes.

Q What occasion would you go to Beaver Dam Church Road?

A Family gatherings like Thanksgiving or just an occasional visit, or during the Spook trail.

Q Have you seen -- how does J.L. act?

A When she don't know you she's kind of shy in the beginning, but once she gets to know you she's very talkative and -- she's very talkative.

Q Have you been around her and seen any activities of hers that you would not necessarily -- activities of hers that you thought were inappropriate?

A The only thing I ever seen that was very inappropriate to me was an incident on Teague Road where they was -- she had friends over and they was having what they call -- you know, they was out on the -- near the pool twerking. That's a type of dance.

Q What is twerking?

A It's a type of dance.

Q Is it a -- how would you describe it?

A It's where they move their butt up and down. I mean, there's really no way to --

Q And she was twerking with who?

A She was what?

Q She was twerking with whom?

A It's just her and her friends out there.
Q Something that -- what was your opinion of it?
A I find twerking very vulgar in a child to be doing.
Q Did you see -- have you ever seen P.E. do anything about sitting in relative's laps?
A P.E. ?
Q Not P.E. · J.L. ·
A I've seen her sit in her grandfather's lap. I've seen her sit in her mother's lap.
Q What was she doing in her grandfather's lap?
A I've seen her, you know -- the girl liked to dance. I mean, she danced in her mother's lap. She danced in her grandfather's lap.
Q Music went on and she was dancing in somebody's lap?
A There wouldn't be music on. She likes to dance.
Q Regardless of whether music is there or not.
A Yeah.
Q Now, you've seen -- have you been to some of her dance recitals?
A No.
Q Have you seen pictures of them?
A I've seen pictures of them.
Q I believe I'll show you Defense Exhibit 3. Is that one you downloaded? Did you find that one?
A Yes.

Q Is that something you would approve of?
A No, not really.
Q Do you have any children?
A Yes. I've got two sons.
Q You've got two sons?
A Yeah.
Q What else did you notice about some of the attire that J.L. and them would wear at these dances?
A Their makeup would be more of an adult -- you know, more adult makeup. Some of the dress, you know, they'd be showing a lot of skin as far as, you know, middle section and stuff like that. They would be showing more of the buttocks in certain cases. Just real tight dressed.
Q I think you -- how did you describe the attire at one point? Daisy Dukes?
A Yeah.
Q That type?
A Yeah. That short.
Q Thank you very much. Answer any questions that Mr. Scott has.

CROSS EXAMINATION

BY MR. SCOTT:

Q I've got a daughter that does ballet. Do you approve of that?

A Ballet, yes.
Q You do approve of that? But you don't approve -- you found that picture?
A Yes.
Q Why did you look this picture up?
A Why did I look that picture up?
Q Yes.
A I was just looking at pictures and seen that.
Q Why?
A Why?
Q What did you Google search to find that?
A I didn't Google search anything.
Q Tell me how you found this picture.
A I found it on Facebook.
Q Okay. What made you go on Facebook and look at pictures of little girls dancing?
A I was asked to find pictures of J.L. and that was pictures that was on a Facebook profile.
Q Whose Facebook?
A Huh?
Q Whose Facebook?
A Her mother's.
Q Okay. Her mother had this picture on Facebook?
A Yes.
Q Who asked you to go on Deanie Eubank's Facebook page

and try to find photos of little girls dancing?
A No one.
Q You just said somebody asked you to look on Facebook.
A I was asked to look on Facebook and I seen that and I showed it to them.
Q You're under oath. Who asked you to look for that picture?
A The attorney.
Q Why did he think you were somebody that needed to look up pictures of little girls dancing?
A I don't know.
Q By the way, can I go into Ace Hardware after today?
A Yeah.
Q You find twerking vulgar. What is twerking again? Can you get off the stand, please? Stand down here. I want you to show me something. Can you stand up?
A Yeah, I can stand up.
Q Show us what twerking is.
A I'm not going to do that.
Q Why not?
A Because I find it vulgar.
Q You just testified -- how do you know what twerking even is, let me ask you that. Where have you seen it?
A I've seen people doing it.
Q Why are you watching such vulgarity?

A I mean, you see it.
Q Tell me what twerking is. I need to know and these jurors, who don't know what this vulgar twerking is, they want to know too. Show me. You're not going to do it are you?
A No.
Q Is there a reason?
A My knee won't allow me.
Q Okay. Do you find it vulgar when a little girl sits in somebody's lap?
A Not just sitting, no.
Q Would you find me vulgar if I told you my daughter sits in my lap sometimes?
A No.
Q Okay. So you're not saying that's vulgar. Let me ask you this. What do you -- describe it when a little girl sits in a man's lap and he ejaculates in his pants.
A I call that -- that's not good.
Q It's not good?
A No, sir.
Q Twerking is vulgar. Twerking is terrible, but a man climaxing when a little girl sits in his lap is just not good? Do you want to explain any more?
A (NO VERBAL RESPONSE)

Q Are you here to say this is all J.L. 's fault?
A I'm here to find the truth.
Q Okay. Is it J.L. 's fault that he ejaculated in his pants when she sat in his lap? She's twelve by the way.
A I mean, he's his own boss. You know, if he ejaculated in his pants that's him.
Q Have you ever ejaculated in your pants when a girl sat in your lap? A young girl.
A No.
Q Thank you.

THE COURT: Sir, you can step down.

MR. WISE: Just a couple of questions.

REDIRECT EXAMINATION

BY MR. WISE:

Q Mr. Eubanks, we were meeting last night?
A Uh-huh.
Q You were requested to find pictures of the dance that J.L. was doing. Anyone request you to go to a specific place to find it?
A No.
Q That was your decision?
A That was my decision.
Q Thank you.

THE COURT: Sir, you can step down. Thank you. Mr.

Wise, call your next witness.

MR. WISE: We call Amy Philson.

AMY PHILSON, having first been duly sworn, testified as follows:

THE COURT: Spell your last name, please.

WITNESS: P-h-I-l-s-o-n.

DIRECT EXAMINATION

BY MR. WISE:

Q Please give us your full name.

A Amy Philson.

Q Ms. Philson, where do you live?

A I live at Countryside with Alexis.

Q That is Alexis Eubanks?

A Yes.

Q How long have y'all been friends?

A For nine, almost ten years.

Q Where are you employed?

A At the hospital in Laurens.

Q How long have you been employed there?

A Two years.

Q When did you get out of high school?

A 2015.

Q So virtually since you got out of high school?

A Yes.

Q Tell us first of all how do you know the Eubanks?

A Alexis and me met in middle school, which is Cliff's niece, we met in middle school and we've been best friends ever since. The Eubanks took me in because I didn't have a good childhood.

Q They kind of took you in?

A Yeah. So, they're like my family.

Q When was that?

A So, all throughout our friendship, but recently like seven or eight months ago I started really like I stay with Cliff's parents some and with Alexis.

Q So starting about ten years or so how much contact would you have with the Eubanks?

A At first not that much, but since I started high school is when I really started going over there a lot. Like, I would go over there for holidays and stuff like that.

Q And you got to know Cliff over this period of time?

A Uh-huh. Yes, sir.

Q How was he when you first met him?

A When I first met him I didn't really have a lot of contact with him. I was young, you know. I would just spend a lot of my time with Alexis, but I never observed anything.

Q About how old were you when you first got to know Cliff?

A I was probably -- do you mean when I really got to know

him or when I first started coming around him?
Q First started coming around him.
A I was twelve.
Q And then when you really got to know him.
A Just recently I really started to get to know him.
Q Have you been over at the Eubanks house when all the kids are there?
A Yes, sir.
Q You know J.L. ?
A Uh-huh.
Q You know L.L. ?
A Yeah.
Q And you know A.E. ?
A Uh-huh.
Q And Becka and P.E. ?
A Uh-huh.
Q Is that correct? Say yes or no.
A Oh, yes. I'm sorry.
Q No problem. What have you observed about Cliff when he's around all his kids?
A That he was just a good loving parent is what I think anyways. He never showed more attention to one child than he did the other.
Q Did you notice any conduct on his part that would cause you any concern?

A No, sir.
Q You've been around them on how many occasions?
A Several occasions.
Q Are you usually there on the weekends when the family has a get together?
A Uh-huh. Yes, sir.
Q How often is Cliff there for those get togethers?
A He was there just about every time.
Q So it would be once every four weeks you would see him an average of --
A I didn't go to every -- when I first started coming around I didn't go to every gathering, but I was, you know, a couple of times a month I would say.
Q Okay. What about recently? You see him --
A I see him a lot recently.
Q Let's go back recently being before May 2017.
A I didn't see him that much before then.
Q But you were at some of the gatherings before then.
A Yes. Some of the gatherings, yeah.
Q What activities would -- I mean, you see Cliff much on a regular basis now?
A Uh-huh.
Q Yes or no.
A I'm sorry.
Q That's all right. Do you get along fine with him now?

A Yes, sir.
Q Thank you. Answer any questions Mr. Scott may have.
CROSS EXAMINATION
BY MR. SCOTT:
Q Hey, Amy.
A Hey.
Q So, you didn't really -- you weren't really around Cliff that much before May 2017?
A Not that much. I seen him, like, at holidays. But that was about it.
Q Now, which children do you remember seeing him with?
A I remember seeing him with J.L. and Beck -- B.E. . I don't think I remember seeing L.L. there, but I remember seeing, like, P.E. and A.E. there.
Q Would it surprise you to know that A.E. and J.L. have no idea who you are?
A Yeah. I've seen them a few times.
Q Did you talk with them?
A Not that much, no, because that was when I was younger and I was Alexis' friend, so I would mostly hang out with Alexis.
Q Okay. Thank you.
THE COURT: You can step down.
MR. WISE: We call Cristy Cline.
THE COURT: Spell your name, please.

WITNESS: You want me to speak into the mic?

THE COURT: Yes.

WITNESS: C-r-i-s-t-y C-l-i-n-e.

CRISTY CLINE, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WISE:

Q Ms. Cline, where are you employed?

A At Hickory Tavern Elementary School.

Q What do you do there?

A I work in the lunchroom.

Q Do you live in the Hickory Tavern area?

A Yes, sir.

Q How do you know Cliff?

A He is my brother.

Q So you've known him his entire life?

A Yes, sir.

Q Do you have any children?

A I do. You want all of their names?

Q Yeah.

A I have -

Q How many do you have first?

A I have six all together. Two are my step-children.

Q Let's go with your natural children right now.

A Okay. There's Alexis, Elizabeth, Matthew, and

Savannah.

Q How old is Savannah?

A She will be twelve in December.

Q Do you come to the Eubanks gatherings?

A Yes, sir. I do.

Q How often are they held?

A With cook outs and family get togethers it's usually just about every weekend and then holiday times.

Q And you also visited Cliff at his residence.

A I have. Yes, sir.

Q On which road?

A On Teague Road and on Beaver Dam.

Q First of all, what have you observed of Cliff at the -- let me back up. Did he bring the children to the family get togethers at your parent's house?

A He did.

Q Would that be all the children?

A Yes, sir. There were several times that L.L. wasn't with them.

Q Would Deanie always come?

A In the beginning she would, but towards the end I didn't see much of her.

Q What can you tell us about Cliff's attitude towards his children and step-children at these family get togethers?

A From what I observed and seen he was good with them. He never directed any attention towards one particular child. He was always playful with them, doing things with them.

Q How did he get along with them?

A He got along with them fine.

Q Did you have a chance to -- you said you had a chance to see him going by his house on Teague Road and on Beaver Dam Road.

A Yes, sir.

Q What did you observe there?

A On Teague Road I actually stayed overnight there with my children as well to help participate in the Spook trail. I observed nothing inappropriate at all. I observed my brother always doing the house cleaning as well.

Q Was that before or after Deanie had her wreck?

A That was before.

Q I assume he continued afterwards.

A Yes, sir.

Q And your daughter Savannah is eleven?

A Yes. She'll be twelve in December.

Q She's been staying for the last week or so where?

A At my parent's house with me.

Q Has Cliff been there?

A Yes, sir.
Q Did that cause you any concern?
A No, sir.
Q Thank you. Answer any questions Mr. Scott may have.

CROSS EXAMINATION

BY MR. SCOTT:

Q Cristy, do you have any knowledge of your brother's sexual interests or desires?
A No, sir.
Q Thank you.

THE COURT: You may step down.

MR. WISE: We would call Lou Ann Price.

LOU ANN PRICE, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WISE:

Q Please give us your name.
A LouAnn Price.
Q Where do you live, Ms. Price?
A 168 Smith Irwin Road, Cross Hill.
Q Do you know Cliff Eubanks?
A Yes, I do.
Q How do you know Cliff Eubanks?
A He started going to the church --

THE COURT: Hold on, please. Do we need a break?

Ladies and gentlemen, if y'all will step to the back for just a moment. Let her stay around, please.

(Whereupon, the jury exited the courtroom at 2:40 p.m.)

THE COURT: Ma'am, I got the impression you needed to tell me something.

(Whereupon, Juror #16, Carolyn Blackstock, speaks to the Court privately.)

THE COURT: I appreciate you telling me that. If you would, just rejoin the jury in the jury room, please.

(Whereupon, juror exits courtroom.)

THE COURT: Let the record reflect that one of the jurors approached me. It was Juror number 16, who indicated to me that the last witness, Ms. Cline, actually works with her in the lunchroom in Hickory Tavern. The witnesses -- there hasn't been an objection yet. I was kind of waiting. My Clerk actually passed me a note some time ago. I was kind of waiting for an objection, because none of these witnesses have been listed initially.

MR. WISE: I gave your clerk a witness list.

MR. SCOTT: I don't have one in front of me, but the Philson woman -- at first I didn't really recognize that name.

THE COURT: The only one I called out was the witness list that I had here.

MR. WISE: I made up a witness list. I gave one to the State and one to you.

MR. SCOTT: He might have given you a different list.

MR. WISE: He didn't even ask for a witness list.

MR. SCOTT: This is the one I have.

THE COURT: Mr. Wise, as I mentioned the other day I got your voir dire. It's five pages.

MR. WISE: Before we started I thought your clerk came out and asked for a witness list. I gave her one, and then I turned and gave one to the State. That's what I recall.

THE COURT: I'm looking through the materials up here. I will double check.

MR. WISE: I made three or four copies and I've got one left.

THE COURT: Okay. The list that you have, Mr. Wise, I never got. It's not up here in any of the paperwork. We haven't moved anything that's associated with this case to the back and I called out the State's potential witnesses and I assumed they were the same as the ones --

MR. WISE: I noticed you didn't call mine out, but you didn't ask me if I had any either, so I figured -- Judge Hughston never calls out Defense witnesses for some reason. Don't ask me why, but he never has.

THE COURT: I always call out all witnesses just to make sure we don't run into this issue.

MR. WISE: I understand, but, you know, --

THE COURT: I never got it. I looked out at you and asked if that was all the witnesses I think.

MR. WISE: I don't remember that.

THE COURT: From both sides.

MR. WISE: I don't remember you asking that.

THE COURT: Can I see your witness list now?

MR. WISE: Sure.

THE COURT: You can step down for a moment, okay?

(Whereupon, witness steps down from witness stand.)

(Whereupon, a recess was held from 2:50-2:55 p.m. Juror Carolyn Blackstock returned to the courtroom by herself.)

THE COURT: Ms. Blackstock, you're not in trouble. I just need to ask you a couple of questions on the record, ma'am. Here's what happened. The last witness, I think it was Ms. Cline, apparently you and she work together in the lunchroom. What happened was basically, for whatever reason, some witness names never made it onto the witness list. Ms. Cline has already testified. Are you able to still serve as a juror even though you work with her? Are you able to still be fair to both the State and the Defendant and judge this case based on the law and the evidence even though she testified?

JUROR BLACKSTOCK: Yes.

THE COURT: Are you certain of that?

JUROR BLACKSTOCK: Yes.

THE COURT: Okay, good enough. That's all I need to know. Just hang out in the hallway, because the Bailiff is going to bring the other twelve here in a moment.

(Whereupon, juror exited the courtroom.)

THE COURT: Go ahead and bring the other twelve back in.

(Whereupon, all jury members entered the courtroom at 2:55 p.m.)

THE COURT: The record will reflect the jury is back and seated. Ladies and gentlemen of the jury, here's kind of what happened. For whatever reason some of the witnesses names, mostly witnesses that have just been called, never made it onto the master list of potential witnesses in this case. The ones who have testified this afternoon -- and Ms. Blackstock, I've already spoken to her so she doesn't need to respond. Do any of y'all know any of the witnesses who have testified thus far? Just raise your hands?

(Whereupon, no hands were raised.)

THE COURT: There are two additional witnesses that are going to be testifying. LouAnn Price, that was the lady who was just up here, and there's a Kathleen Shumpert who will be testifying next. Those two names were also not on the master list. Anybody know those folks? Any relationship with any of those folks? No?

(Whereupon, no hands were raised.)

Solicitor, I think we're good. Is the Defense good with the inquiry I've made so far?

MR. SCOTT: Can we have a side bar?

THE COURT: Yes.

MR. WISE: Yes.

(Whereupon, a sidebar was held off the record.)

THE COURT: Let's have Ms. Price back up, please. Come on up, please.

(Whereupon, witness retook the stand to resume direct examination.)

DIRECT EXAMINATION

BY MR. WISE:

Q Ms. Price, I was asking how do you know Cliff Eubanks. If you can be sure to speak into that microphone it would be helpful. You can move it around.

A I've seen him at church and through when we have plays at church and when --

Q Excuse me.

A -- and he does work for me at the lake.

Q You'd forgotten about that.

A Yes. Sorry.

Q Let's go back to how you know him through the church. What church is that?

A Beaver Dam Baptist Church.

Q Who would he come there with?

A His wife.
Q That would be Deanie?
A And children.
Q Do you know Deanie?
A Uh-huh.
Q Did Cliff ever come with his two natural children?
A They would come with them, yes, occasionally.
Q A.E. and --
A Yes.
Q Did you have a chance to observe Cliff around all of his children, both natural and step-children?
A Yes. Some.
Q What have you observed as how he treats them?
A Nothing came to mind. As a matter of fact, I didn't even know the two older girls weren't part of the natural family I guess.
Q You learned that later? You learned that later?
A Yes.
Q So, everybody appeared to get along with each other?
A They looked like the perfect family.
Q Any favoritism shown?
A I didn't see any.
Q Now, you've also known J.L. through the -- what do you -- the plays at the church?
A Yes.

Q What plays are there at the church?
A They do Easter plays and then they do Christmas plays. J.L. is very very talented. She's a very talented girl. She loves to dance and she's a wonderful actor. You give her a part and she can -- she nails it.
Q Have you seen her at -- with Cliff at plays?
A Yeah. He'd be in the audience. Usually the kids are already there early and the parents come later on.
Q What about at rehearsals? Would they come to rehearsals?
A Yeah, but the grandmother usually brought her.
Q To the rehearsals?
A Uh-huh.
Q What did you notice about J.L. from her activities at the church?
A She's a teenage girl.
Q Even though she's twelve.
A Even though she's twelve, she's a teenage girl.
Q What do you mean by that?
A Well, she would dance around kind of flirty with the guys and everybody. You know, she's a teenage girl.
Q Thank you very much. Answer any questions Mr. Scott may have.

CROSS EXAMINATION

BY MR. SCOTT:

Q Describe what you mean by flirty.
A Well, I mean, you know, we used to throw stones at boys when we wanted to get their attention. She would just dance around. She loves to dance.
Q Okay, so you flirted with boys too?
A Of course. I'm 72 years old. I'm not dead.
Q All right. Did you see her doing things that you just disapproved of?
A Well, I don't approve of -- even my granddaughters. I don't approve of the new age dances.
Q It's different than it used to be.
A Yes. You are a lady before and you should act as such.
Q You danced didn't you?
A Yes.
Q There's nothing wrong with dancing.
A I didn't say there was anything wrong with dancing. I just don't like the moves.
Q Do you know what twerking is? I'm not going to make you twerk.
A Okay. No. Yes, I do know what twerking is.
Q What do you think about a man who ejaculates in his pants when a girl sits in his lap?
A Disgusting.
Q Yeah. I agree. That's all. Thank you very much.
MR. WISE: We call Kathleen Shumpert.

KATHLEEN SHUMPERT, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WISE:

Q Please give us your full name.

A Kathleen Eubanks Shumpert.

Q Ms. Shumpert, where do you live?

A Teague Road.

Q Where is that in relation to Cliff Eubanks when he lived on Teague Road?

A Across the road.

Q What kin are you to Cliff Eubanks?

A I'm his aunt.

Q You're what? You're kin to -- you're his father's sister? Is that correct?

A No. His dad is my brother.

Q Right. Now, so how long have you known Cliff?

A Since he was a baby. Since he was born.

Q Tell us, if you would, about the Eubanks tradition of getting together.

A I didn't go that much because of my husband, David, but I lived across the road from him so I would go over occasionally.

Q On Teague Road?

A On Teague Road.

Q You saw Cliff more at -- now, his parents live where?
A In Clinton.
Q You saw him more at the Clinton residence or the Teague Road residence?
A The Teague Road residence.
Q Living across the street, how often would you see him there?
A I would see him out in the yard or I would go over, you know, and visit. I would take meals over to them or call Cliff to come by and I would cook supper for them.
Q And did you see him on a regular basis on Teague Road?
A Pretty much.
Q You saw him primarily around J.L. and B.E. ?
A J.L. , B.E. , P.E. , A.E. .
Q You saw him around all of them?
A Uh-huh.
Q What did you observe about his conduct toward the children and step-children?
A When I would go over and visit they would be playing or out in the pool, playing in the yard, or they would be doing homework. I didn't see anything any different than any family, you know, doing homework together or cooking. Just being together in the afternoon.
Q Did you see anything that remotely indicated that there was any favoritism?

A No, sir. I did not.
Q You lived across from him on Teague Road even when he was married to Jennifer?
A Yes, sir.
Q Do you have any grandchildren?
A I have two granddaughters.
Q How old are they?
A Taylor is a senior at Wofford. She's 21. I have a tenth grader at Laurens High School. She will be 15.
Q When they were growing up did they stay with you?
A They would visit, yes.
Q Would they go visit over at Cliff's too?
A They would go over some. Not often, because they live out of town.
Q Now, you remember when Deanie had a wreck?
A Yes, sir.
Q How did you help out with that?
A I would take them meals over or if I baked, like, a peach cobbler or something like that I would take over. You know, I have stayed with B.E. when she was a baby so they could go out to dinner together.
Q When Deanie had a wreck did you help with A.E. and P.E. ?
A I took -- this was before the wreck. I think I took P.E. and A.E. to school one morning because Cliff had

to be at work early and I took them by the nursery.

Q Did you ever observe any inappropriate conduct by Cliff when he was around his children?

A No, sir.

Q Did you ever notice anything that would raise even a scintilla of suspicion about anything he did?

A No, sir.

Q Thank you very much. Answer any questions Mr. Scott may have.

CROSS EXAMINATION

BY MR. SCOTT:

Q Ms. Shumpert, on Teague Road do you have other neighbors?

A (No verbal response.)

Q Do you still live there on Teague Road?

A Yes.

Q Do you have any other neighbors besides Cliff when he was there?

A There's some across the road, but we don't have any dealings with them. Then there's another family down the road. It's in a rural area, so our house is off the road.

Q Do you interact with any of these neighbors?

A No, sir.

Q Do you have any brothers or sisters?

A I have a brother, Billy, Mike, and a sister, Ann.
Q Do they have families of their own?
A Yes, sir.
Q Do they appear happy?
A They seem to be, yes.
Q Do you know everything that goes on behind closed doors when they go home though?
A No. No one would.
Q Nobody would, would they?
A No.
Q I asked you about your neighbors. Do you know what they go home and do when they close the doors?
A No.
Q Of course, you know what they display in public when they're around you, but you don't know what goes on when they go home and shut the doors, do you?
A Nobody would.
Q I agree. Nobody would except for the people who are behind those closed doors, right?
A That's their business.
Q That's right. Thank you.

MR. WISE: Ms. Eubanks.

ELIZABETH EUBANKS, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WISE:

Q Ms. Eubanks, give us your full name.

A Elizabeth Lawson Eubanks.

Q You're the mother of Cliff Eubanks.

A Yes, sir.

Q Where do you live?

A 439 Old Colony Road, Clinton, South Carolina.

Q Who do you live there with?

A Well, I live with my husband, Mike Eubanks, and my son lives there, Michael Cliff Eubanks.

Q Do you have a grandson?

A A grandson. Yes, I have some grandsons --

Q That lives there.

A Uh, my great grand daughter, while my granddaughter works I watch her a lot. I watch her about every day. She's like --

THE COURT: If you could, move away from the microphone.

WITNESS: I'm sorry.

Q Tell us about the Eubanks get togethers at your house on Saturdays and Sundays.

A A lot of times on the weekends we cook a big meal and we'll have all of my children there and my grandchildren. We'll just cook and eat dinner.

Q How often would y'all do that?

A It would be almost every weekend. Maybe not every, but

every now and then they didn't come, but most of the time it was every weekend.

Q The entire family get together?

A Yes.

Q Would Cliff come by with his children and step-children?

A Yes.

Q Tell us about that.

A He would come there. He would have, like, A.E. and P.E. on the weekends he had them. With J.L. and B.E. . Sometimes he would have L.L. and sometimes L.L. wouldn't come.

Q What about Deanie?

A Deanie used to come over all the time, but it seems like after her accident and everything with this came up that we hardly ever seen her.

Q What did you observe about Cliff with his children and step-children?

A From what I observed he is a good father. He played with his children. He never showed special to one child. He was always fair to all the children. There was no favoritism. I seen him get onto the kids and discipline them, you know, and tell them you can't do this. As for anything else, I never seen it.

Q Did you notice any inappropriate conduct on his part?

A No, sir.
Q Any touching that would be suspicious to you?
A No, sir.
Q How did he and J.L. appear to get along?
A They got along like they were real daughter and father. My son was actually -- him and Deanie had agreed a while back for my son to adopt the children.
Q But that obviously didn't come to fruition.
A No, sir.
Q Now, did you have occasion last November/December to be sitting on the porch with Deanie?
A Yes, sir.
Q And tell us about that conversation.
A First it was me and Deanie hanging out, just talking and just like cutting up and this and that, and my husband came out there and sat with us. Deanie made the remark, you know, get rid of somebody, and she made the remark she said well, I know how to get rid of somebody.
Q How did that strike you?
A Well, it sort of shocked me. I didn't know how to take it. My husband looked at her and looked at me. But then, you know, I didn't know, you know what she meant.
Q Didn't have a clue what she meant.
A No, sir.

Q Thank you very much. Answer any questions Mr. Scott may have.

CROSS EXAMINATION

BY MR. SCOTT:

Q That was in November or December?

A Somewhere in there. Yes, sir.

Q What year?

A 2016.

Q '16?

A Uh-huh.

Q These allegations are in May. Okay. What were y'all talking about for that to come up again?

A We were just picking around and kidding, talking about, you know, about getting rid of somebody or something, you know. Like, when we watch movies we talk about what the movies are about.

Q Okay, so y'all were picking around and kidding about getting rid of somebody.

A We were kidding.

Q Okay, was she kidding?

A Well, when she made that remark I don't think she was kidding, sir.

Q Well, how about this. If you and me -- I don't know why y'all were talking about that, first of all, but if you and me start picking and kidding and we're talking

to one another about getting rid of somebody, why can't I joke and say I know how to get rid of somebody? If that's the topic, why wouldn't she make that statement?

A It was just odd.

Q Well, I think it's odd that y'all were joking about that.

A Yes, it could've been, you know.

Q The whole thing is weird. Why were y'all even talking about getting rid of somebody on your front porch?

A We were just talking.

Q And you were picking and kidding, is what you said?

A We were just picking and kidding about stuff at first.

Q All right. I don't know how to take that. You said you didn't know how to take it. I don't either. But anyway.

A Okay.

Q Let me ask you this, how old was Cristy when you stopped bathing her?

A Cristy?

Q Your daughter. Isn't that her name?

A Uh-huh.

Q All right. How old was she when -- did Mike ever bathe her?

A No. I don't think so. No, sir.

Q Okay. At what point did you think Cristy is old enough

where she can bathe herself?

A About four or five.

Q Okay. What about Mike? Did he need help bathing when he got to be seven, eight, nine, ten?

A Mike? You mean Michael Cliff?

Q There are so many Michaels in this family. Cliff Eubanks, your son. How old was he when he didn't need your help anymore bathing?

A Well, he was probably five or six.

Q He needed a little more time. Did y'all go in there and look at them when they got to be seven, eight, and nine? Did you go in there and look at him when he was naked in the shower for any reason?

A No, sir.

Q Okay. I think that's all. Thank you.

MR. WISE: Mr. Eubanks.

MIKE EUBANKS, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WISE:

Q Please give us your full name.

A Michael Eubanks.

Q Mr. Eubanks, you're the father of Michael Cliff Eubanks?

A Yes, sir.

Q Tell us also what you've observed on your family get togethers.
A Usually mostly every weekend we would get together and smoke stuff, stuff like that. Mainly at Easter and stuff like that the kids would like to come over and we have a ham and do eggs and stuff like that.
Q Could you move a little closer? Okay. And who all would do that?
A Mostly everybody. Especially on holidays or something like that. Usually everybody. On Cliff's side everybody would come on that side.
Q Did Cliff come by?
A Yes.
Q With the children and step-children?
A Yes.
Q Is that a regular event?
A Most every weekend. Mostly every other weekend they would eat and stuff with us. I love to have all the grandkids there. Mostly them two would be every other weekend when he gets them.
Q Tell me what you observed about Cliff and his relationship with his children and step-children.
A He's a great father. There's no doubt in my mind. I never seen anything out of the ordinary. Mostly he would play with the kids. He enjoyed -- he always

wanted to be a father. Right now it bothers me to see them.

Q Did he ever show any favoritism with the children?

A No, he hasn't.

Q Did you ever see anything to indicate that?

A No.

Q Did you ever see any type of conduct by him with any of the children?

A No, sir.

Q Anything that would be suspicious?

A No, sir.

Q He and A.E. going off to the corner or something?

A No, sir.

Q Or missing for a while?

A No, sir.

Q Tell us about the conversation on the porch last fall.

A Well, every weekend they usually come over with most of the kids. I can't remember if L.L. was there or not. Sometimes he comes and sometimes he don't. I always ask where he's at. I always ask where everybody is at. My wife, Elizabeth, and Deanie was on the front porch and there was a conversation. By that time everybody else had come up and it was, you know, it was about getting rid of somebody. The first thing that come out of Deanie's mouth was I know how to get rid of him.

Q Get rid of who?
A She looked at Cliff and said, "I know how to get rid of you."
Q And Cliff was out in the yard playing? How did that strike you?
A At first I didn't think a lot about it. It was kind of odd, but I didn't think really anything about it until later on the first of the year when things started changing. I just noticed things like that. I noticed that things were changing. I'm not seeing everybody, you know.
Q So she wasn't coming over as much?
A Not as much. She likes Clemson and I like Carolina. I always picked on her about that.
Q Tell us if you would about going to Cliff's house to retrieve the safe.
A Well, it was the day right after he got locked up. We got him out. He was asking about his medicine, and his medicine was at the house. While he was texting back and forth about the medicine with Deanie, you know, she was wanting to leave it on the church steps instead of -- and I told my wife to call the cops, 'cause he was going to get his medicine. It was his heart medicine. We got there first and went down to the building.
Q When you say "went down to the building", tell us about

that.

A Just a little storage building and everything was in it. Went in there mainly to get some clothes, usually -- we were going to get the winter clothes. Then he mentioned something about the safe --

Q Let me just -- did you know there had been a safe at the place?

A Yes.

Q Had he mentioned it to you before?

A Yes. We looked and the safe wasn't there. After that we just didn't bother nothing else. We went back up and met the cop, get the medicine.

Q What was Cliff's intention for going down there and looking at the safe? Do you remember.

A Well, basically when we went there it wasn't about the safe, we were just talking about it and he got to looking and looked around and it wasn't there.

Q Do you know what was in the safe?

A What was told to me it was $40,000 in the safe.

Q Cash?

A Cash in the safe.

Q Thank you. Answer any questions Mr. Scott may have.

CROSS EXAMINATION

BY MR. SCOTT:

Q Had you ever seen that cash in the safe?

A I've seen the cash, sir.
Q Did you count it?
A I probably looked at it coming out of an envelope. Yes, sir.
Q $40,000 went missing is what you're testifying to?
A I didn't say it went missing. I said he showed me $40,000 before, because they were wanting to buy a home or something to live in. That was the goal.
Q And you and Cliff went back over there looking for the safe and it was gone.
A We wasn't planning on looking for the safe, sir.
Q You weren't planning on it?
A No, sir. We went there to get his medicine. Nobody was there yet. We drove down and we was going to see if we could get some more clothes or whatever in the back. We looked around and everything, and he said -- he told me there wasn't no safe there.
Q Okay. What has that got to do with anything?
A Nothing, sir.
Q Why is he bringing it up?
A He asked me about a safe.
Q I'm just trying to follow you guys, because that was you guy's conversation.
A Well, I answered the question. He asked me about the safe. We got down there and that's when I was explaining to him about the safe in the storage

building. I noticed it's been mentioned in the court.
Q You're not following that either are you? What's that got to do with child molestation?
A Nothing, sir. I was just answering the question.
Q Let me ask you this, if it wasn't there and it went missing, did y'all file a police report?
A No, sir. At the time everything just -- your head freezes and everything is going on. And going through, you know, taking care of him.
Q Well, help me so --
A And not being able to see my grandkids.
Q Listen, I'm sorry about that. They're good kids, aren't they? They're real good kids and -- have they ever made any real big lies to you, those good grandkids?
A They're good grandkids.
Q Huh?
A They're good grandkids.
Q Not the kind that would make up big lies, right?
A I can't say that, sir. Kids is kids these days. Sometimes an older person is different. Kids today are different.
Q They're good kids though, aren't they?
A They're good kids. I've never seen anything out of the ordinary with the kids.
Q Just like I asked Ms. Shumpert -- that's your sister.

A My sister.
Q You don't always know what people do behind closed doors, do you?
A No, sir. All I can say is kids is kids these days. Everything is different.
Q Everything is different, yeah.
A Yes.
Q Well, all right. I'm just going to ask you. I think I know the answer to this. Do you know about Cliff's sexual interests? Has he talked to you about that?
A No, sir. Never. It's none of my business. I always worried about my girls.
Q Do what?
A I always worried about my girls, not the boys. That's a Daddy.
Q Did you and him used to collect old Playboys and stuff maybe?
A No, sir.
Q And he wouldn't discuss with you --
A No, sir.
Q -- things like that?
A None of that.
MR. SCOTT: Thank you. You can step down.
MR. WISE: The next witness will be lengthy, Your Honor.
THE COURT: The next witness is going to take some time, so we're going to go ahead and take a brief break to make

sure we don't have to break in the middle of their testimony. Adjourn to the back.

(Whereupon, the jury exited the courtroom at 3:29 p.m.)

THE COURT: The record will reflect that the jury is back and seated. Mr. Wise, if you'll call your next witness, please.

MR. WISE: I call Michael Cliff Eubanks.

MICHAEL CLIFF EUBANKS, having first been duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MR. WISE:

Q You're Michael Cliff Eubanks?

A Yes, sir. I am.

Q Where are you living now?

A I live with my mom and dad on 439 Old Colony Road, Clinton.

Q Is that where you grew up?

A That is where I grew up, correct.

Q Where -- are you employed right now?

A No, sir. I'm not. I do like odds and ends.

Q Where were you employed last?

A I was employed in Simpsonville at BlueLine Rental.

Q And what is that?

A That is a rental company that rents out equipment.

Q And how long you been working there up until May of last year?

A Maybe a year and two to three months maybe.
Q A little over a year?
A Yeah, a little over a year.
Q Where did you work before that?
A Before that I worked at the State, SCDOT.
Q And what did you do with them?
A I operated -- I cut brush on the side of the road with a John Deere tractor and a bush hog.
Q And where before that?
A I worked at International Paper for 10 years, right out of high school.
Q And how long did you work for the Department of Transportation?
A Maybe roughly two years maybe, somewhere along in there.
Q Let's go back first. You were first married to Jennifer Newsom?
A Yes, sir. I was.
Q And you all had two children?
A Yes, sir.
Q And that was --
A A.E. -- A.E. and P.E. .
Q And where were you all living at that time?
A At one time when had A.E. we was living with her mom and dad, and then basically we ended up getting a place of our own off on East Cherry, and then we moved out to Teague

Road and bought a double-wide out there. It has a mortgage. And then we had -- ended up having P.E. around that time.

Q Did you buy a double-wide and the land or --

A Yeah, it was like a package deal.

Q Package deal?

A Yes, sir.

Q But eventually it would have been you all's?

A Yes, sir. It has a mortgage.

Q You and Jennifer ultimately broke up?

A Yes, sir.

Q Let's go back a little bit actually while you and Jennifer were still together. How did you come to meet Deanie?

A I met her at the Blind Horse.

Q And where is that?

A That is in, I believe, Greenville.

Q And how did you meet her?

A She was sitting at a table with her boyfriend, Michael Lyons, and he --

Q That's not her husband Joseph?

A No, sir. She was -- Deanie was sitting at the table with Michael Lyons. That was her boyfriend. When me and Jennifer walked in Deanie stood up and pretty much introduced herself. And then that's where I seen her and pretty much met her.

Q Did you later contact her about -- how long after --

about how long after that did you and Jennifer break up?

A I don't really recall, but it was like within a few months, somewhere along after that.

Q So that was on the tail end of your marriage with Jennifer?

A Yeah, it was on the tail end of the marriage.

Q So after you and Jennifer broke up did you contact Deanie about Spook trail?

A Well, after mine and Jennifer's final divorce, you know, I stayed in my home on Teague Road for a while. A few months. And I seen on MySpace where Deanie was offering, you know, help for a Spook trail. So I wrote her on MySpace and offered her my help, and that's when we started, you know, talking and communicating and I'm going out there helping them build things.

Q Did she correctly describe it as no intention of any great relationship in the beginning?

A No, not really. Just, you know, start off as friends kind of deal.

Q Over time?

A Yeah, over time we kind of, you know, fell for each other.

Q She was living where then?

A Denise?

Q Yes.

A She was living with her mom and dad on Beaver Dam

Church Road.

Q You still had your home on Teague Road?

A I still had my home on Teague Road. Yes, sir.

Q Would they come over there?

A They would come over there, you know, very often. Well, Denise would mainly, and sometimes very rarely the kids. Her kids.

Q Before you got married?

A Yeah, before we got married.

Q Before you got married did Denise come over and spend the night?

A I think the first night she actually spent the night was the night I offered -- because I had my kids that weekend and I wanted the kids to get to kind of know one another. So we got pizza and movies, and Deanie offered to stay herself. And then that night -- you know, we kind of hit it off that night.

Q And that was probably the -- so to speak, the magic moment?

A Yes, sir.

Q Did you all eventually get married?

A Yes, we got married.

Q In September of 2010?

A Yeah, roughly around there.

Q Did you have a formal wedding, or whatnot?

A We went and had some papers signed and then just took

it to the court. You know, just -- we didn't really have a all full out, you know, church wedding.

Q Had she moved in with you prior to the marriage?

A No, I don't believe so. I don't recall.

Q And what makes you think that she didn't move in before the marriage?

A Well, her father told her, and Deanie told me what her father said, that pretty much she cannot move in until she marries me. You know, he was an old school guy. You know, he was a good man. A very good man. And that's the way he was.

Q So eventually you all get married and move in?

A Yes, sir. You know, all the kids moved in, she moved all her stuff in.

Q So you all lived on Teague Road. You were working then with the Department of Transportation?

A I believe I was also employed with International Paper.

Q Do you know when you left International Paper and went to the Department of Transportation?

A I started in 2004 and I did 10 years of it. So roughly around 2014 maybe when I -- when I quit, because I got assaulted by the plant manager and I left from there.

Q And went to work at DOT?

A Yes, sir.

Q And was Deanie working at that time?

A I believe Deanie was -- at first she was working

Beltram, I think, and then she got a job working at the Detention Center.

Q Now, financially you all were in what kind of shape?

A Starting off, you know, by myself after Jennifer, you know, had left I was doing okay. You know, my mom and dad was helping me a little bit. And then, you know, Deanie and the kids, they came along. And, you know, I really didn't have, you know, a problem taking on two other kids and ourselves. You know, me being the man I am, I stepped up to the plate and, you know, I'll bat. You know, I'll take care of these kids even though they're not my biological kids. And really we didn't -- I mean, we was okay financially.

Q I mean, Deanie was working, so --

A Yeah, Deanie was working. You know, I was working. I mean, we was okay financially.

Q You weren't rolling in money, but --

A Yeah, we weren't rolling in -- we wasn't throwing it around or nothing but, you know, we just pretty much made it paycheck to paycheck.

Q Then there was that wreck in November of 2013?

A Yes, sir.

Q And she was involved in an automobile wreck and pretty well, I think, tried to go back to work for a short period of time?

A Yeah. After the wreck -- I believe that day she came and brought me breakfast at work. She left from there and

went back home. I think it kind of happened -- it happened here in Laurens County right in front of the Post Office. She got rear-ended.

Q Right.

A And that was pretty much, you know, with the wreck and all. But she did try to work a few days, you know, prior to that -- well, after that. And when I came home -- see, she didn't tell me she was in a wreck that day. She didn't tell me until I got home. And I asked her why didn't you go by ambulance if you felt any kind of pain or anything getting rear-ended at 50 something miles an hour. And she just, you know, wanted to tough it out and go to work.

Q It didn't work out?

A It didn't work out.

Q So she eventually had to leave work?

A Yeah, she eventually had to leave work. I think the doctor put her out of work because they seen that she had some plates in her back that needed to be -- you know, put plates in her back.

Q She needed to have surgery?

A Yeah, needed to have surgery. Yes, sir.

Q And had she -- up until from the time of the wreck and -- or shortly after the wreck in November of 2013 up until May of 2016 did she ever go back to work anywhere else?

A I don't recall.

Q So from November 2013 you all were on Teague Road?

A Yes, sir.

Q And I assume after she lost her work, her job, financially it became difficult?

A Yeah, she was -- she was getting a disability through the state. I guess some standard. And they seen that it wasn't work-related, so they ended up cancelling it. Put a lot of stress on me, you know, and all the family because I was the only one working and trying to, you know, take care of the mortgage and, you know, basically gas, food. You know, for me to get back and forth to work and put food in the house. I mean, just a big stress.

Q And eventually did you end up losing the house on Teague Road?

A Yes. I eventually had up settling with the bank and taking a loss.

Q And where did you all move then?

A We moved into Denise's mother and father's house.

Q I believe there's testimony of being that was about April 1st of 2016?

A That sounds about right.

Q Now, when you went to live on Beaver Dam Road -- Beaver Dam Church Road who all was living there?

A It was her father, her mother, her grandmother, and then it was me, Deanie, L.L. , J.L. , B.E. , and every other weekend my two kids would come over.

Q Let's go back a little bit when you all first got

married. How would you describe L.L. ?

A How would I describe L.L. ?

Q Uh-huh.

A He was more -- like more focused on his past and what went on in his past versus what he could have had in his future. I know he wanted a dad, and I tried everything possible I could to be there for him by talking with him. You know, we would have talks. I would take him outside and talk with him. I even built him -- prior -- at Teague Road, a tree house for him. You know, I tried everything I could with him. But even just -- he was stuck in the past of what he, you know, pretty seen the way Josh treated his mother.

Q You were in racing.

A Yes, sir. I was.

Q That started about when?

A It's been in the family for years. I started driving maybe 2002, 2003 as a four cylinder and then progressed up to a super late model.

Q Did you ever take L.L. to the race track? Take any of the kids to the race kids?

A I know there was a practice. It was a practice. I took J.L. , I took A.E. and I took P.E. . We all walked around and looked at cars. Then when they started racing I took L.L. three times to the races, and every third time -- every time I took him, you know, he would complain he was tired. He wanted to go home.

Q He wasn't a racing fan?

A He didn't -- I tried to get him into it, you know, get his mind occupied, but he just wasn't -- wasn't into it.

Q There's been some talk about a pretty good sized go-cart at Beaver Dam Road. Is that --

A Yes, sir. We bought that, I think, shortly after Christmas. It was one of their Christmas presents. And we bought it them for all the kids to ride and have, you know, enjoyment on it.

Q Now, when you got to Beaver Dam Church Road -- let me back up a second. How was your relationship with J.L. at Teague Road?

A It was -- I mean, it was pretty normal. I mean, all the kids -- you know, I tried to show attention to all the kids. The attention we had -- you know, me and J.L. , you know, it was normal. It was like a father/daughter. I mean, like I said, everybody had their little say that she wanted a father. Well, I always told the kids, look, I'm not your father, but I'll be whatever you want me to be. I'll be there for you. I'll be your friend, you know. I'm just here for you if you need me. And it was that way with L.L. and J.L. .

Q Been some comments that J.L. liked to do things outside more than perhaps L.L. and --

A J.L. was more of an outdoorsman, you know, kind of girl, you know. Outside kicking the ball around or

something like that. L.L. was more of a video gamer, and he liked to stay in the house playing video games.

Q And B.E. was --

A And his -- his grandfather, Johnny, would always tell him, boy, you need to get outside, you know, and live a little.

Q How did you get along with Mr. Wilson?

A Oh, I got along great with him. I mean, if he -- if he needed anything fixed, you know, he always came to me because it got fixed. There was no going back redoing anything. You know, I'm pretty smart when it come mechanical-wise.

Q Is that basically what you were doing with BlueLine Rental?

A Yes, sir. I was working on heavy equipment.

Q And what equipment did he have around the place on Beaver Dam Road?

A He had a hauling big tractor. I can't remember the size of it. But he had a Kubota, and that Kubota is probably maybe over 30 something years old and, you know, I kept it running for him. The deck was flying out from under it, parts flying out from under it, but I would always, you know, make sure it was running for him.

Q And obviously A.E. was also close to Mr. Wilson?

A Yes. A.E. was real close to Mr. Wilson.

Q You noticed that?

A Yeah, I noticed that.
Q Even though she was a step-grandchild, so to speak?
A Yeah, she was a step-grandchild, but she -- she loved Johnny.
Q So going back in the wreck before you moved to Beaver Dam Road?
A Yes, sir.
Q What did you -- where did you -- when did you start working then and where did you last work?
A I think once we moved in over at Beaver Dam I finally got a good job opportunity. My cousin is maintenance. He's over maintenance at BlueLine and he pretty much helped me get the job as a mechanic, too.
Q And do you remember what you were making there?
A When I left I think it was like 17 -- a few cents over $17.00.
Q An hour?
A An hour. Yes, sir.
Q So once you got on at BlueLine and you were living with her parents how were you doing financially?
A We was doing pretty great.
Q Now, at the house on Beaver Dam there's been some testimony that Johnny was not in the best health. Mr. Wilson.
A No. No, sir. He was not.
Q And then how did that manifest itself?

A He -- like I say, Johnny was a good man, but he wanted to do it his way and nobody else's. He would try to pretty much get up, go outside and get on his riding mower or his tractor. He didn't want nobody to help him. And, I mean, he would just -- he wanted to be outside, and that was his thing. And there was one time we -- me and him both was in the barn and I was servicing his tractor, and as I was laying down pulling the tires off of it, he was propped up on the tire and he -- he fell back and hit his head pretty hard, you know. And I was concerned about him. I tried -- tried my best trying to pick him up. But, you know, he just -- he was pretty much dead weight. Like picking someone straight up off the floor. But, you know, he was -- he was all -- all straightforward man. I mean, he just -- solid. You know, like I said, it was his way.

Q He wasn't working outside the house?

A Sir?

Q He wasn't working outside the house? He didn't have a regular job?

A Well, he had -- he owned Wilson Curb Market. And I think shortly after that they closed it down, when he -- when he got to where he couldn't hardly move around.

Q So from the time you moved in in 2016 was Mr. Wilson going to work on a regular basis?

A I don't think he was going to work when we moved in over at Beaver Dam Road.

Q So during the -- during the day, 24 hours a day, Mr. Wilson would be there?

A Yes, sir. He would.

Q And what about his wife?

A His wife would be there most of the day until it was time to go pick the kids up from school.

Q She helped pick the kids up?

A Yeah, she -- she helped pick the kids up.

Q And what about the grandmother?

A The grandmother stayed home and cooked southern home food.

Q So she could get up around the house?

A Yeah, she could get up around the house. She loved being in the kitchen. I mean, you couldn't tell her to get out of the kitchen.

Q Did she go anywhere out very often?

A She -- very rarely. You know, she would -- you know, like if she had a doctor visit or something or -- you know, she would try to go herself sometimes.

Q So eventually you all settled the civil suit involving your wife's wreck?

A Yes, sir.

Q And there's been testimony about $89,000.

A It was 89,000 after taxes and after lawyer fees. Yes, sir.

Q And what did you all do with the money?

A Deanie agreed to put it into my account at SunTrust. SunTrust Banking out of Laurens. We both had to put our signatures on it, because it was in mine and her name, and we took it to the bank and deposited it, and it cleared the next day.

Q And that was a regular checking account?

A Yes, it was a regular checking account.

Q I hand you this and ask you if you can identify this.

A Yes, it --

Q What is that?

A It's a copy of different transactions out of my checking account.

Q Starting on what day did you -- I think they may be in reverse order. What's the first date on that page?

A The first date on this one is July the 24th.

Q And then let's go to the bottom page. Here we go. And this bottom page, what does it show in relation to a deposit? A big deposit.

A On December the 28th, 2016, $89,812.55 was deposited into mine and Deanie's joint checking account.

Q So these go from December of 2016 to basically July of, I believe, '17?

A Yes, sir.

MR. WISE: I'd like to introduce these.

THE COURT: No objection?

MR. SCOTT: Judge, the only question I have, the

testimony is just regarding one deposit and he's attempting to introduce 36 pages of transactions.

MR. WISE: Correct. It'll involve -- the testimony will involve a lot more than one deposit.

THE COURT: All right.

MR. SCOTT: I guess I don't have any objection.

THE COURT: Very good. We'll let it be one exhibit. That's Defendant's 4 or 5? 4. Defendant's 4 will be in evidence.

(Whereupon, Defendant's Exhibit No. 4 was admitted into evidence.)

Q So I hand you Defendant's 4, and as you mentioned it reflects a deposit on December 28th of $89,812.25, right?

A Yes, sir.

Q After that deposit was made was there anything about that account that you began to observe?

A It started drastically coming down.

Q Did you -- was it money that you were spending?

A It was money that I was spending and also Deanie. But most of the money that I was spending would be while I'm getting lunch, or when I'm at work or putting gas in my truck, or doing something for my kids.

Q What other money went into that account?

A My payroll.

Q Went into the joint account?

A Yes, sir. It did.

Q Direct deposit?
A Yes, sir. It did.
Q What did you eventually decide to do with a substantial portion of that money?
A I decided to invest it and put it into a money market account.
Q But before that even. We'll get to that -- we'll get to that in a minute. I think I'm in the correct order. Hold on. No, you're correct. I'm wrong. So how much did you take out and put in a money market account?
A I believe it was 25,000 I put into a money market account.
Q I hand you this and ask if you recognize that.
A Yes, sir. It's 25,000.
MR. WISE: I'd like to introduce this as --
MR. SCOTT: No objection, Your Honor.
THE COURT: Defendant's 5.
(Whereupon, Defendant's Exhibit No. 5 was admitted into evidence.)
Q So do you know of the dates you -- approximate date you withdrew 25 and put it into a money market account?
A The date here is January the 12th.
Q Of what year?
A I believe it was 2007.
Q '17?
A Yeah, 2017. I'm sorry.

Q Did you later make another decision concerning some withdrawals from that account?

A Yes, sir. I did.

Q Not the money market but the regular checking. You've got the money market in your hand.

A Yeah, shortly after that --

Q Hold on. Not the money market. The regular checking. Did you make another decision about a substantial withdrawal from that account? I believe in March of that year.

A There's a lot of pages.

Q Hold on. Excuse me. January 10th of that year. My mistake.

A Oh, yes. January the 10th, 2017 me and my wife, Denise, decided to take out $40,000 for a home that we were going to put down as a down payment to try to get.

Q What did you do with that money?

A At the time we decided to get a safe and put it into a safe, because at that time by around -- she was having problems with her father, and he was -- and he pretty much went into the hospital. So we decided just to put it into the safe.

Q On the property?

A On the property inside a little storage building that I was paying for monthly that was in her mother's name.

Q Did you have the combination of that safe?

A Yes, sir. I did.

Q Did Deanie have it?
A She did not want it.
Q Was there any other reason to take the cash out at that time and put it in a safe?
A We never took cash out until the week before we went to the beach which was --
Q Well, let me ask a quick question. Any other reason for taking cash out of the checking account on January 10th and putting it in a safe? Let me back up. You took the cash out before you took out the money market?
A Yes. I took the cash out before I took out the money market.
Q So you took about $65,000 out in January of 2017, between the money market and the cash?
A No, sir. I didn't take out 60 something --
Q Well, you took out -- excuse me, 40,000 in cash?
A Yeah, 40,000 in cash.
Q And 25,000 in the money market?
A Yes, and I put it --
Q About 65,000?
A The 25,000 come out of checking --
Q Correct.
A -- to go to the money market.
Q Right.
A The 40,000 come of checking --
Q To go to cash?

A -- to go to cash to go into the safe.

Q So when you took the 25,000 out in January of 2017 what was the balance in your checking account approximately?

A After the 40,000 came out?

Q After the 25,000 came out. The second one. If you can't find it quick, I think I can.

A Yeah. These are too many.

Q Let me see it real quick. We might be missing a page, I believe. Yeah, here we go. January the 12th is when you took out for the money market. The bottom of the page.

A Yes. That was --

Q And that left you a balance of about how much?

A It came down to 15,000.

MR. SCOTT: Wait a minute. You all said -- testimony on January 10th 40,000 came out, and now you're saying January 12th?

MR. WISE: 25,000 came out.

MR. SCOTT: And you said January 12th?

MR. WISE: The 25 on the 12th, 40 on the 10th.

MR. SCOTT: Both 2017?

MR. WISE: Yeah.

Q Still a nice sum of money?

A Yes, sir. It is.

Q And what were your deposits? How much were you depositing in there?

A My -- it just depended on like overtime.

Q Right.
A It would be anywhere from maybe 920 up to a little over $1,000, my payroll.
Q And that would be per week, every other week?
A That was biweekly.
Q Biweekly?
A Yes, sir.
Q So financially you all were in good shape?
A Yes, sir.
Q You had a good job?
A Yes, sir. I did.
Q Bring in after taxes a little over 2,000 a month?
A Yeah, right around in there.
Q Didn't have any real expenses for housing?
A No, sir.
Q What happened to the 15 or so thousand dollars that was in the account?
A In the money market.
Q No, in the regular account. Is that balance increasing or decreasing?
A It is decreasing.
Q And do you know why it was decreasing?
A There was funds coming out.
Q And both of you had access to that account through debit cards?
A Yes, sir.

Q Then eventually the funds in your checking account somewhere around March get real low?

A Yes, sir.

Q And what did you have to do then?

A That was when I had to create a money market account.

Q Create or withdraw from?

A The checking account.

Q The checking account got low?

A Yes, sir. It did.

Q What did you do to help the checking account?

A I took 1,000 out and put into checking. At the time me and Deanie was kind of having an argument because she needed money to go and spend it in Greenville as far as getting the kids their dance stuff --

Q Right.

A -- and $1,000 was enough, and we just got into kind of like an argument that day and I just -- I just kind of had, you know -- I put 15,000 over into checking from the money market.

Q Over into checking. So in January -- middle of January roughly you had 15,000 in your checking account?

A Yes, sir.

Q And you were putting about another 2,000 a month into that checking account?

A Yes, sir. I was. I was also -- with the money market I had money coming directly out of my paycheck going into

the money market.

Q Don't worry about that. So and again in March you had put another 15,000 into the checking account?

A Yes, sir. I did.

Q Did you all have discussions about that?

A Yes, sir.

Q Were they pleasant discussions?

A I mean, they wasn't heated arguments but, you know, it was just a little bit of, you know, bickering.

Q It was what?

A A little bit of bickering back and forth.

Q About finances?

A Finances. Yes, sir.

Q And there really shouldn't have been?

A Yeah, there really shouldn't have been.

Q So you're sitting there in March with about $40,000 in cash in a safe on your property?

A Yes, sir.

Q And did you all ultimately decide to go on a vacation in May?

A Yes. We decided to go to the beach because the kids had a competition that week. I believe we took out around 2,000 for the food, the gas, the kids to do activities and stuff like that. We took an additional 900 out to finish paying for the hotel that we had down there, because her mother and grandmother went with us, so we had to get extra

rooms. And another 300 because it was -- J.L. , L.L. and B.E. took. So we gave them $100, you know, just to put in their pockets.

Q So how did you get the money out of the safe?

A That day -- it was the day before we walked up there to the barn. It was me, Deanie -

Q Walked up to the barn or the shed?

A I mean, we walked up to the little utility building. It was me, Deanie, B.E. and J.L. . We went in there. We uncovered it, because I had like a blanket and like a star that I made for Christmas that was covering it. And like when you walk in it was to the backside on the right as you go in. And we punched in the key code --

Q Who punched in the key code?

A J.L. did, because she wanted to punch it in. So I told her the key code. So it was about -- you know, we proceeded to get the money bag. It was in a blue money bag. Also was in there was like checks, because when money market you can only draw out like -- you can only write six checks out of money market and maybe draw off of it four, five times a year --

Q Right.

A -- and then they won't let you get any more. So we got that amount of money out, and Deanie, of course, gave the kids, you know, the $100 to put in their pockets, we closed it and went back to the house.

Q Prior to that day had you gone into that safe any?
A No, sir. I have not. Once we -- once me and Deanie purchased that safe at Walmart we brought it home and we stuck it in the building.
Q How heavy is that safe?
A I struggled with it a good bit, you know, and Deanie helped a little bit to get it off of the truck on -- into the building, and we cut the straps and unboxed it.
Q And that was the only time you're telling me was for the beach trip?
A That was the only time we opened it up was for the beach trip.
Q How was the beach trip?
A The beach trip went great. I mean, when we got there, you know, we got -- everybody was excited about the hotel and all, and we got, you know, to swim a little bit, and they were going back and forth to their, you know, conventions there. Also L.L. had an incident there where he passed out on stage. I was the first one there.
Q So you all were at the beach how long?
A We left that Friday and came back Monday.
Q Roughly three, four days?
A Yeah, roughly three, four days.
Q So you get back from the beach and then what happened?
A We got back from the beach. We got back into town. We stopped at the store, got some food to take home because it

was kind of late and nobody wanted to cook and everybody was with us. When we stopped into -- J.L. had -- J.L. had bought some hermit crabs at what they call Sparky's. She brings them into the restaurant, you know, goes into the women's restroom, and I hear them both in there screaming, crying, you know, and laughing. And then J.L. swings the door open and says they're loose. I mean, hermit crabs were running everywhere in the bathroom.

Q So you all get home on Monday?

A Yeah, we got home that Monday.

Q Tell us about the day the allegations arose?

A The day the allegations arose I was at work, of course. I had been communicating with Deanie off and on throughout the day.

Q And we've seen some of those text messages?

A Yeah, we've seen some of the text messages. I think it was about around maybe three o'clock I received a phone call from J.L. . And I was in the office with my boss and I'm not allowed to answer my phone in front of my boss, you know. It's disrespectful. And so, I ended up calling her back, and she was basically telling me how excited she was because she was in a talent show. And I told her, you know, that's great. I'm proud of you. And I told her that -- that I would see her shortly at the thing that they had at the Dance Shop that day.

Q All right. And that was -- then at the dance?

A Yeah, they had some kind of award thing at the Dance Shop. My mom met me there. She wanted to watch.

Q And what happened then?

A When I got there they wasn't there. I mean, I panicked. I thought maybe they were in a wreck, because that's not like them. They're always -- they're either the first ones there or the second ones there. Like I say, the kids love to take dance. And, like I say, when I got up there they wasn't there and I panicked. I worried. I had this app on my phone that was like a family sharing app where it showed the location of, you know, whoever was in your family sharing group, which was J.L. and L.L. .

Q And how long had that app been on the phone?

A Every since I got the iPhone, I do believe, because they only worked on the iPhone.

Q When did you get the iPhone?

A I got the iPhone when I started working for BlueLine, I do believe, because that was the only time I could really --

Q So sometime around mid-2016?

A Yes.

Q And what -- what led putting this tracker app on the phone?

A At first, you know, I keep trying to call them. No answer.

Q Back up. Back up. When you got -- you put a tracker out on L.L. 's phone and J.L. 's phone?

A Well, it's not really like a tracker. It's a family sharing where you can see where everybody's at. I mean, it's not like a tracker. It's like a -- kind of like a GPS, but --

Q Right.

A -- it's family sharing.

Q They knew it was on there?

A They knew it was on there.

Q Go ahead.

A Like I said, when I got to the Dance Shop they was not there. Like I said, I panicked. I thought maybe they was in a wreck. I got my mom and I called Deanie and she did not answer. I think I called J.L. and she did not answer. But L.L. answered, and I asked L.L. , I said, where are your momma and them. You all are supposed to be here at the Dance Shop. His reply was he was still at school and did not know.

Q He was what?

A He was still stuck at school and did not know. So I turned on -- you know, looked onto the family sharing app and it took me to some kind of place off of, I believe it was, West Main, and they were all -- her mom's car was parked there in the parking lot. I proceeded to walk in and this woman came around and asked me who are you looking for. I said I'm looking for, you know, my wife Denise. You know, her car and everything is here. And by that time an officer

come around and took me outside.

Q And that -- and he explained to me what was going on?

A He explained that my step-daughter J.L. had made some allegations.

Q And that was it?

A And pretty much the best thing I should have done -- I should do was to go home and to get some of my clothes and go to my mom and dad's.

Q Did you do that?

A Yes, sir. I did. I didn't argue. I didn't --

Q Just -- what was your state of mind at that point?

A My state of mind was, you know, what's going on, you know. Has somebody been hurt or, you know -- I mean, I didn't know what the place was. All I know was nobody would talk to me.

Q No. No. I'm talking about after the officer told you?

A Oh, after the officer told me, you know, it -- it shocked me, you know. Like what kind of allegations -- and at first I didn't even know what allegations meant, you know. And he told me, you know, basically she told the therapist and all that I'd been kissing her on her neck and kissing her ear and rubbing her across her butt and, you know, stuff like that.

Q So your mother was with you?

A Yes, my mother was with me.

Q So you all went home?

A No. We proceeded to Mountville to get my clothes and stuff because that's --

Q Get your clothes and stuff.

A -- where the officer told me to go. And then when I got there everything was shut down, the garage doors, everything was locked up. My clothes were supposed to be on the front door. They were not there. So I texted Deanie and ask her where were my clothes because, you know, Deanie's mom was supposed to put everything out. I think me and my mom sat there for maybe 10 to 15 minutes.

Q Anything happen?

A Only -- well, we went back and sat in the truck and kept waiting, and by that time -- I didn't ever see anybody put it on the front porch, but when I waited and went back around it was there.

Q And you got your stuff and went home?

A I got my stuff and went back to my mom and dad's.

Q Did you go back the next day?

A I went back the next day after I talked to Hunnicutt that morning.

Q And what happened then?

A When I went back that day -- because I needed my medicine. I didn't have my medicine. And we called an officer to -- because Hunnicutt -- at first Hunnicutt, when I spoke to him that morning, he told me, you know, just basically get an officer and let the officer take you out

there, so long as you got, you know, law enforcement there with you, to get your stuff. So when I got there -- you know, their house is like real far off the road and the grass is real tall. So I couldn't tell if an officer was there or not. And me and my dad --

Q Who was with you at this point?

A Huh?

Q Who was with you?

A My father.

Q Your father was with you?

A Yes, sir. When we pulled up we sat there for maybe five minutes. You know, we thought maybe an officer was already down there, because it was maybe kind of more convenient and quicker for the officer to get there than it was for us. And so, we proceeded down the driveway. As we proceeded down the driveway I noticed that the barn -- the building, utility building, the door was pried open. The back latch was bent all the way around, and I opened it up to get, you know, at least what I could get as far as winter clothes and I noticed the safe was gone.

Q Is that the first time you noticed it?

A That's the first time I noticed it.

Q What did you do then?

A Tried to close the door back, turned around and went back up to the driveway, because the cop wasn't there, and we waited until he got there. And he met us and he told me

and my father -- he told my father to stay in the truck. And I got out and he told me to sit tight. He knocked on the door. And I can't remember which child came to the door, it kind of sounded like B.E. , but he proceeded in and told them that, you know, I -- I don't know exactly what he told them, but they knew I was there.

Q Did you get your stuff then?

A The only thing I was able to get was like toiletry stuff, like toothbrush, deodorant, some what was left of my clothes.

Q And your medicines?

A Yeah, and at that time I was able to get my medicines.

Q And that afternoon you went back to see Officer Hunnicutt again?

A Yes, sir. I got a call later on after we got back home. I was expecting it might have been around 3:00, 4:00, somewhere in there. He said that he wanted to meet up with me to just, you know, go over some stuff. So me, my dad and my sister proceeded up there. When I got there he met us at the door and --

Q And this was where?

A I believe it was -- the building in front of SunTrust. You know what building that is?

Q Yes.

A I don't know what they call that one. But we got into an elevator, and I remember going up and going into a room

that had a big glass in the background, and then a table with like maybe six chairs at it, and cameras in all four corners. And the room was like dark. No lights on or nothing.

Q I assume they cut them on eventually?

A They did not cut the lights on. No, sir. We was in the dark.

Q Did they have lights through the window?

A Just -- just the light through the window is the only light we really had.

Q So it was during the daytime?

A Yeah, it was during the daytime, yeah.

Q And they did have windows in --

A Yeah, they had like one big window in the back. I could see another building in the background.

Q And then what happened in that interview?

A He proceeded to say that -- you know, the first thing that I wrote when I went and seen him that morning. And he said, you know, we're just going to go over some stuff, and, you know, basically we went over that first statement that I wrote and then he said he would be right back. Well, when he came back he had a clipboard with a CD inside like a little green case. He told me, he said -- he said, Cliff, I'm going to be -- he said you need to be honest with me. There was a video camera up in the barn. He said if you're honest with me, he said, I can help you. And, of course,

there was other -- two officers there. Matthew Polson, and I can't remember that other guy's name. So at that time, you know, I didn't know what was going on. I was kind of panicking. I was scared. You know, I didn't have my medication like I was supposed to be taking it. I was drowsy, and it was just a bad issue.

Q Right.

A A bad vibe me sitting there.

Q You were very nervous?

A I was very nervous, yes. And he --

Q Tell me what happened after he told you that they had a nanny cam, or video?

A He told me to tell him about what happened in the barn. And, of course, I told him what happened in the barn, which was what I wrote in my statement.

Q And you wrote that?

A And I wrote that.

Q Did you intend for any of that to happen?

A I did not have any intentions of that happening. No, sir.

Q Did you want it to happen?

A No, sir. I did not.

Q You put in your statement you were embarrassed?

A I was embarrassed. I was, you know, kind of in shock, and I didn't know what to --

Q Is that an accurate statement?

A Yes, sir.

Q Did you intend for her to sit in your lap and cause this?

A No, sir.

Q Did you ask her to?

A No, sir. I did not.

Q Did you even ask her to sit in your lap?

A No, sir. I did not.

Q So after you gave that statement you were arrested?

A After I gave that statement they left the room and came back and said you know what I'm going to have to do, and I was like no, what are you going to have to do. He said I'm going to have to place you under arrest. And I said okay, can I at least speak to my father and sister downstairs and let them know what's going on, and Matthew Polson commented that I will go down there and tell them, you know, what's going on. And it wasn't Hunnicutt, but it was the other guy that pretty much put the handcuffs on you.

Q Did they ask you at that time anything about a cell phone?

A No, sir. They did not.

Q Now, let's go back a minute. I show you Defendant's Exhibit 1. Do you remember getting this from J.L. ? And that's the -- your birthday greeting.

A Yes, sir.

Q Tell me about that.

A This was DOB of 2016. The DOB, which is my birthday. It has a picture of a father and daughter. The pictures says, "One of the greatest gifts I've ever gotten come from God and I call him daddy."

Q Did you believe her?

A Yes.

Q And what did you respond to that?

A I responded, "Thank you so much, sweet girl, and I love you to the moon and back, and I'm proud to call you my daughter." And then she responded, "I love you, too."

Q And that was Month of 2016, correct?

A Yes, sir.

Q Now, you got out on bond after you were arrested on the 17th of May?

A Yes, sir. I got out the next day for -- for the first charge.

Q And then on roughly a month or so later you were arrested again?

A Yes, sir. I was.

Q And that's part of the charges we're here today on?

A Yes, sir.

Q Mr. Eubanks, have you ever in your life touched J.L. inappropriately?

A No, sir. I have not.

Q Would you ever do that?

A No, sir.

Q Let me go back. You sat here through the testimony of J.L. , didn't you?

A Yes, sir. I did.

Q Let's go back and talk about one specific thing she mentioned. The time B.E. was at the house with you and her and part of the family had gone to L.L. 's band competition.

A Yes, sir.

Q The testimony was that she heard you tell B.E. to turn off the water -- how old was B.E. then?

A Maybe four or five. Somewhere around in there.

Q Told B.E. to turn off the water when the water gets to her bellybutton.

A No, sir.

Q Do you remember that testimony?

A I remember the testimony.

Q Is that something you would have ever thought about telling B.E. ?

A No, sir.

Q Why not?

A If you put a child into a bathroom versus cold and hot water, why would I take advantage of my child trying to turn off the water faucet and scalding her.

Q Something you wouldn't do?

A Something I would not do.

Q When that band competition was taking place, Johnny was at the house?

A Yes, sir. He was. I was helping taking care of him.
Q And the grandmother?
A The grandmother would go occasionally.
Q Would go occasionally?
A Yeah. The great -- great-grandmother.
Q I think J.L. may have testified the grandmother was there that day also.
A The grandmother would go like off and on. It depended on how she felt --
Q Right.
A -- I mean.
Q You've heard testimony of numerous allegations of abuse both at Beaver Dam Church Road and Teague Road. Did any of that even remotely happen?
A No, sir. It did not.
Q Describe, if you could, when you were on Teague Road before the wreck how the morning normally progressed.
A When we was on Teague Road I believe I had the job working for the State, and I had to be at work at like 7:30, somewhere along in there. I would -- I would get up. And Deanie, she was like a real heavy sleeper, and I would kind of like help her, as far as helping her wake up, and then going and getting the kids and everything. But I pretty much left them there and went straight to work.
Q Deanie went to work after you? On what shift was she working back then?

A Back then she was working third. Third shift, I believe.

Q Would she come in before you left, or how would you all --

A No. When she was working third shift some of my kids would stay with her mother.

Q Excuse me?

A When she was working third shift some of my kids would stay with her mother.

Q With Deanie's mother?

A Yeah, with Deanie's mother.

Q So you would carry them over to Deanie's mother's house in the morning?

A If they -- yeah, if they stayed with me.

Q And you came over to the house the next morning?

A Yes, sir.

Q There's been testimony also about -- tell us what you all would do as a family at night about activities and so forth?

A We'd play like games -- board games. We had this thing where if it was on the weekend we would go to like late night Waffle House. If they had friends over we would go, or there were nights where we'd go bowling. They loved to bowl.

Q Let's go back to when you were at home at night. A lot of television watching?

A Yeah, pretty much at night when we got home and settled down, after we got through eating, you know, we'd kind of go lay down and watch TV.

Q Where would you watch TV?

A Of course, Johnny and big momma would watch TV in the living room. Sometimes Deanie. I would be in mine and Deanie's room watching TV. L.L. would be either in the living room or in his room playing like a video game, and B.E. and J.L. would just be playing.

Q Be what?

A Be out playing somewhere.

Q Would they ever come watch TV with you all in your room with you?

A Yes, they would sometimes come in there and watch.

Q Did you ever get under covers with them?

A Yes, sir. I would get under the covers with them.

Q Ever do anything inappropriately?

A No, sir.

Q This was when you were watching television?

A Yes, sir. This was at night.

Q What would you do -- or what would -- there was some talk about bathing B.E. and washing J.L. 's hair. What was the policy on that?

A Over at, let's see, Teague Road, I would help, you know, as far as being -- when she had the wreck and all I

would help, you know, bathe the kids. You know, and Deanie had the saying, you know, when the girls --

Q Had what?

A Deanie had this saying, when the girls started growing body parts it was my time to step out.

Q Right.

A And that's exactly what I did.

Q Did you wash -- help maybe B.E. on Teague Road while Deanie was out?

A Yes, sir.

Q There's been some talk about J.L. being underweight. What did you observe about that?

A To me, I mean, she's like real petite, plus being in dance. I mean, she does dance a lot. And, I mean, with her dancing all the time, I mean, I don't see how she could, you know, gain as much weight. But, I mean, she would eat. That wasn't an issue. She would eat.

Q And she always --

A And it was either food that big momma cooked, or if she didn't like it, it was junk food.

Q How was her energy level?

A It was -- she was like bouncing around. I mean, she had good energy level. She loved to go outside and shoot hoops at the basketball goal.

Q Showing athletic abilities?

A Yeah, athletic things.

Q Participated in dancing?

A Yes.

Q Was there ever a time that you noticed her not taking a bath?

A No, sir.

Q Was there ever an issue where Deanie said anything to you about J.L. 's not taking a bath, anything like that?

A No, sir.

Q Did you ever notice anything about her having nightmares or something?

A Not nightmares. I mean, she would kind of like talk in her sleep. I mean, especially she kind of like sleepwalked, too. I mean, we had to keep -- make sure the doors were locked. I mean, my daughter, A.E. , even kind of sleepwalked, too. For instance, we was at the beach one year and we was all in the livingroom. A.E. walks in there, and not knowing where she's at and just completely scared the crap out of all of us.

Q Did you ever give J.L. money?

A I would give her money occasionally, like when she --

Q Money --

A Occasionally, when she would ask for it, like for an extra snack or something. But I would never toss her 10s, 20s and 50s or anything like that.

Q Is it true to say that Deanie never made a decision on money involving more than $50 without you?

A No, sir. She always made her own decisions.
Q And is that shown on the bank record with withdrawals?
A Yes, sir. It does.
Q The grandmother in the home, what was her routine?
A She would get up when the roosters crow, pretty much. She pretty much -- I don't even know if she even slept.
Q She what?
A I don't even know if she even slept. She would get up and like make breakfast for -- like if it was a school day, she would make breakfast for L.L. . Make him an egg sandwich. But not really make anything for J.L. or, you know, pretty much B.E. . It was always make sure L.L. had an egg sandwich in the morning.
Q Did you ever buy a jacket or a gold necklace for her?
A No, sir.
Q I assume you did buy some clothes for her occasionally?
A I don't even know their sizes. You could ask my Aunt Kathy, every time it come around Christmas time she would text me and ask me the kids' sizes and I would have to respond, let me talk to my wife because I do not know.
Q Now, the allegations this occurred -- the sexual abuse occurred almost on a daily basis. Particularly on -- particularly after Deanie had her wreck in November of 2013, could that have possibly gone unnoticed?
A I don't understand.
Q The testimony from J.L. was -- from J.L. was the

alleged abuse occurred almost on a daily basis.

A Yeah.

Q Remember that?

A Yeah, I remember that.

Q After Deanie had her injury she was at home?

A Yeah, she was at home.

Q 24/7 just about?

A Yeah, pretty much 24/7 right after she had the surgery.

Q Would it have been possible for any of this abuse to have occurred without her being literally at least in the same house, if not the next room?

A No, sir. And also, it was right after she had the surgery she wanted to stay at her mom's for a few weeks and the kids stayed over there with her.

Q The kids stayed over there with her?

A The kids stayed over there with her.

Q And you stayed at Teague Road by yourself?

A I stayed at Teague Road. Yes, sir.

MR. WISE: Give me one minute.

Q Did you ever show J.L. any x-rated movies on your iPhone?

A No, sir. I did not.

Q There was testimony about a piece of plywood in the barn being set up. Do you know anything about that?

A I mean, I've built a lot of stuff in that barn. There was plywood, there was pallets, there were farm equipment,

there was tools. Everything was in there.

Q There's been some testimony about your medical condition, correct?

A Yes, sir.

Q When you lived on Teague Road what was your medical condition?

A I believe it was low testrone (sic).

Q And some erectile dysfunction?

A Yes, sir.

Q Do you recognize this?

A Yes, this was from Dr. Brownlee.

Q And what's the address on that?

A Teague Road in Mountville.

Q So that would have been when you were living on Teague Road?

A Yes, sir.

MR. WISE: I'd like to move to introduce this.

MR. SCOTT: I don't think he's laid a foundation, Your Honor. I've never seen this. I'd like to take a minute and look at it.

MR. WISE: I didn't know it would be relevant until today.

MR. SCOTT: Judge, my only concern is that it's a doctor's report. Dr. Joanne Brownlee has generated this. I've never seen it. I think we have to have some testimony from Dr. Brownlee to interpret some of these medical

findings in this document. I think he can question him on some things he's experienced and whatnot. I don't think that document is admissible.

(Whereupon, a sidebar was held.)

THE COURT: Go ahead and mark it. It'll be Defendant's 6, in evidence subject to Defense -- or State's objection.

(Whereupon, Defendant's Exhibit No. 6 marked and admitted into evidence.)

Q Is this the record you obtained from Dr. Brownlee?

A Yes, sir.

Q Excuse me?

A Yes, sir.

Q All right. On page two it has two diagnoses that relates to testimony from Deanie Eubanks about testosterone and erectile dysfunction. Can you find that and read it to us on -- it's on the top of page two.

A Where it's got history?

Q No. Let me see. Under --

A It's small writing. I can't really --

Q Yeah, under history, the bottom part. The last two on history.

A Has some erectile --

Q Dysfunction.

A -- dysfunction --

MR. SCOTT: He can't do that. He's testifying for him.

THE COURT: Sustained. Let me see that document again.

Hold on. Hold on. Let me see that again.

MR. WISE: Do you see what he's talking about, Judge? Under history the last two items, top of the page.

THE WITNESS: I can barely read it.

MR. WISE: Yeah, it's hard to read.

THE COURT: Ladies and gentlemen of the jury, if you would adjourn to the back for a few moments. Go ahead and take a break. Understand it's my intention to finish with this witness for today. So there will be some additional examination when Mr. Wise finishes on direct. Okay? So we're going to go to around 6:00, or whenever it takes to get done with this witness. I do believe this may be the final witness that we hear from. That way, we can have this case to you in the morning. Okay? Adjourn to the back. Don't talk about the case yet. If you need to make a phone call, let somebody know that you're going to be running late, ask the bailiff. They'll get you your cell back or they'll get you to a landline. Okay?

(Whereupon, the jury exited the courtroom at 5:05 p.m.

THE COURT: The jury is out. Here's what -- here's what I'm struggling with, Mr. Wise. First of all, there's no indication on this document what -- when it was created. Okay? So whether it's -- it shows that it was faxed on --

MR. WISE: Correct.

THE COURT: -- 6/12 of 2018.

MR. WISE: We know it was created before April of 2016

because that's when he was living on Teague Road, and they didn't put a date on it and don't ask me why.

THE COURT: Okay. There's -- under notes it has a line that says created by, and I can make out C. Brownlee, M.D. The rest is obscured. Typically on that line I can make out AM, ante meridian, at the very back of that. And in records like this, typically when the document is created it will be stamped with a time and -- and a date. Okay?

MR. WISE: They emailed it to me that way. I didn't -- I didn't think it was going to be relevant in this case until she testified.

THE COURT: The other problem --

MR. WISE: Now, I can -- I can bring Dr. Brownlee in.

THE COURT: And it may be necessary to do that. Here's the -- here's the other problem. Under history, yeah, it does note testosterone low times two. It does -- has some erectile dysfunction. It does say that. But I don't know whether this is from Dr. Brownlee's prior medical records or a patient's self-report, because very often you come into a doctor, you have any problems, yeah, I've got -- I'm being treated for A, B, C, D and erectile dysfunction, so --

MR. WISE: I understand. Now, you would not know low testosterone unless there's a test. The only reason -- like I say, I don't even -- I had this stuck in a pile, the back part of it, until the testimony today about he was lying to her about low testosterone and that refutes that, even --

period.

THE COURT: I understand. But without really -- I don't know how to put this gingerly. But without knowing when this document was generated, obviously it would have -- I presume when it was on -- when he was on Teague Road. But there maybe does need to be just a little bit more --

MR. WISE: And the only way we can do that is Dr. Brownlee. I can contact her and see if she can be here tomorrow.

THE COURT: Or we can have a clean copy of this that doesn't have the portion --

MR. WISE: That's the cleanest copies I got. I mean, like I said, I didn't think it was relevant until they made it relevant.

THE COURT: Right. Your objection, did I center on the objection or did I miss something?

MR. SCOTT: You did. Because here's the thing, I had the same thought. There's a lot of guys who go to a doctor and say I'm having erectile dysfunction because they like to have the erection pill.

THE COURT: Viagra.

MR. SCOTT: They want to have that thing. And, you know, a lot of people say I have low T so they can get testosterone prescribed to them. I want to know if she diagnosed it medically. And again, that is also important. You hit the nail on the head, when was that generated,

because he was living on Teague Road well before he even met Deanie. She testified when they first met they were having normal sex. So I don't know what to make of that. Yeah, they were having normal sex. The testimony --

THE COURT: All right. And, of course, there can be varying levels of erectile dysfunction. Just because it's dysfunction doesn't mean it won't work 100 percent. But that's -- we're really getting into some kind of medical stuff here, and maybe it's best to call Dr. Brownlee.

We're going to go ahead and take a break because we're going to finish with this witness on your cross today, but it's only going to be a 10 minute break. Okay? So I'll be right back.

(Whereupon, a recess was held from 5:05 p.m. to 5:23 p.m.)

THE COURT: Go ahead and get the jury moving. I'm sure they'll be here in just a moment. Go ahead and get the jury moving for us. Bring the jury back in, please.

THE BAILIFF: I can't hear you.

THE COURT: That's okay. I can't hear either. Go get the jury, please.

THE BAILIFF: You're ready?

THE COURT: Yeah, go ahead and get them, please.

Here's where we are. He can testify as to his physical condition. What he reported to the doctor, what he said to the doctor, that kind of thing, his understanding of his

physical condition, but we're going to need more authentication for this to come in. Okay? So we're going to pull 6 out. All right. 6 is not in evidence at this point.

MR. WISE: And, for the record, we've called Dr. Brownlee.

(Whereupon, the jury entered the courtroom at 5:23 p.m.)

THE COURT: The jury is back and seated. Mr. Wise, if you'll please continue your examination.

Q Mr. Eubanks, you don't -- do you have low testosterone?

A Yes, sir.

Q All right. Has that been reported to the doctor?

A Yes, sir.

Q Okay. That and erectile dysfunction?

A Yes, sir.

Q Okay. Now, you saw in here yesterday a big, green box?

A Yes, sir. I did.

Q Tell us about it.

A That box is -- it's got pornography in it. It's been accumulated since I lived on East Cherry and it's just --

Q Lived where?

A Since I lived on East Cherry when I was with Ms. Newsom, and it went from East Cherry to Teague Road. And then, when I was living at Teague Road, I had it all up in the top of my closet where nobody could get to it. Me and

Deanie shared the same closet. She knew it was up there.

Q She knew where it was at?

A Yeah. She knew it was there, because her clothes were in there and you had to see it every time you go in the closet.

Q How did it get from Teague Road to the shed?

A Well, in the process of when we was moving, you know, we was boxing everything up. They came down to the bathroom. Deanie was in there, L.L. was in there --

MR. WISE: Have you got --

THE WITNESS: I'm sorry.

MR. WISE: Excuse me. Give me -- there you go.

A When we was in the bathroom boxing everything --

MR. WISE: Pull your chair up a little bit more.

THE WITNESS: All right.

MR. WISE: Okay.

THE WITNESS: Is that better?

MR. WISE: Yes. Yes.

A All right. When we was in the bathroom, we was in the process of boxing everything up. We was taking clothes out, of course, and putting them in boxes. Like winter clothes and stuff like that. And then, we got to where the stuff -- the pornography was at the top. At the time, Deanie was in there, J.L. was in there, L.L. was in there, even B.E. . We was all moving stuff out each room one thing at a time. We was all helping one another. Particularly, the kids didn't

see what I was pulling down from the top of the closet to put in there. But once I put it into that green bin, I put the lid on it and duct taped it with grey duct tape and wrote on top of it, Cliff's stuff, do not open. Then when we loaded everything up --

Q Now, when you saw the green box yesterday did it have duct tape residue on it?

A It had duct tape residue on it and it was missing the lid.

Q It was missing the lid?

A Yes, sir. It was.

Q Okay. All right. Go ahead.

A So we was in the process of loading everything in the trailer. We got everything over to Paula's house. We had to get a storage building so we could start putting stuff into it because we couldn't pile everything into the house. It would, you know, be cluttered. So we ended up getting a storage building. We started packing it out and, you know, it started getting real tight in there. The storage building had two lofts and it was maybe -- I could jump up and try to touch the floor. There was already enough weight up there. Well, I couldn't get up there without being afraid of it breaking, because at the time I was overweight. Deanie couldn't get up there because, you know, of her accident. L.L. couldn't get up there. The only person who could really get up there was J.L. . So we handed -- I

picked the stuff up, put it up over head and kind of slid it to her and she just kept pushing stuff back one at a time until eventually we packed out that top loft.

Q And was it -- it had a lid on it?

A It had a lid on it.

Q Ever tell J.L. what was in it?

A I never told J.L. what was in it.

Q Have you ever opened it in front of J.L. ?

A I never opened it in front of J.L. .

Q All right. Now, your wife unfortunately, or fortunately, I don't know, testified about it and, you know, it was good up until the wreck, your marriage was pretty good, even including your sex life. Is that an accurate story or condition?

A Yeah. Somewhat accurate. Yes.

Q After the wreck, how did -- how did the marriage go?

A It started going downhill a little. I mean, she had a wreck. She was injured and, you know, pretty much bed rest for a little while and, you know, even after that she would just lay around a lot. I mean, she told me that, you know, she just feels worthless because she can't do nothing. She can't -- I mean, she said it's hard for her to even hold a pencil and to write a letter.

Q Now, was a rollaway bed in the bedroom?

A Yes. There was a rollaway bed in mine and Deanie's bedroom.

Q And how did that come about?

A It came about -- Deanie kind of got up and down throughout the night, so she started off sleeping on the rollaway bed where it wouldn't kind of wake me up in -- you know, in the process. B.E. didn't really want to sleep in the room, you know, by herself, so sometimes she would sleep, you know, in the bed beside me. But, you know, she would end up like kind of sideways with her feet in my back waking me up, and I had to get up and go to work. So, you know, I needed more rest than, you know -- I'm not saying, you know, Deanie needed rest, but I had to get up and go to work. So we ended up kind of swapping, you know, off and on. I'd get in the rollaway bed and she'd sleep in the other bed.

Q And did the sex life drop off appreciably after the wreck?

A Not necessarily. We -- we've had a few times.

Q More than one January -- December 31st, right?

A Most definitely. Most definitely.

Q There was testimony about a video called Birthday Sex.

A Yeah. That's a video on Youtube. I mean --

Q That's -- and what kind of video is it?

A It's plainly about someone singing about birthday sex.

Q It's a song?

A Yeah. It's a song.

Q Did it have anything to do with pornography or

anything?

A No. There was no pornography in it. I mean -- no.

MR. WISE: All right. Thank you very much. Answer any questions --

THE WITNESS: Yes, sir.

MR. WISE: -- Mr. Scott might have.

CROSS-EXAMINATION

BY MR. SCOTT:

Q The thing I've been wanting to ask you.

A Yes, sir.

Q What have you been smiling about all week?

A What I've been smiling about?

Q Yeah.

A I mean, I'm always like real cheery. I mean, I'm not kind of like a down person, I would say.

Q Okay.

A I mean, I'm not trying to -- I mean, I've overheard some people say here that all I do is smile, like in rude comments.

Q All right.

A But I'm not doing that.

Q Okay.

A I mean, it's just who I am. I mean, my family will tell you that.

Q If somebody thought you were smirking during testimony, that's just not --

A No. No. No. No. I'm not smirking. I mean, I don't -- I don't even know that term or even know how to.

Q All right.

A Even like rolling my eyes. I don't even know how to roll my eyes. I mean --

Q You don't know how to roll your eyes?

A I mean, I probably could learn if you teach me. I mean, I can --

Q All right. Let's see. We were talking about -- I want to talk about L.L. first.

A Yes, sir.

Q How old is L.L. ?

A L.L. is -- he'll be turning 16.

Q Okay. And when's his birthday?

A Let's see. DOB -- DOB . I mean, I'm not good with birthdays. I mean, I have five kids.

Q What's J.L. 's birthday?

A I know -- the only way I know their birthdays is I know that P.E. 's and J.L. 's and L.L. 's is in the same month.

Q And what's P.E. - I mean, J.L. , her birthday is when?

A It's in DOB . I mean, I know all of them are in the same month.

Q Month . You don't know a day?

A No, sir.

Q B.E. , when's her birthday?

A Let's see. B.E. is -- she was a Christmas baby.

Q She was born on Christmas?

A No. She wasn't born on Christmas, but it was during Christmas. I believe the DOB , if I ain't mistaken.

Q DOB ?

A Yeah. DOB .

Q What year?

A I think in DOB .

Q She is six now?

A I believe so.

Q You believe she's six? You don't know how old your daughter is?

A Well, I mean, I haven't seen them in over a year and a half and it's been like real stressful on me.

Q Okay. All right. P.E. , when's her birthday?

A P.E. is in Month , also.

Q What day? Do you know?

A I could -- I think I could remember P.E. 's because I used to race against a guy with a number that I didn't really like and it was the 18th.

Q Okay. And how old was she?

A I believe nine.

Q Okay. A.E. , when's her birthday?

A A.E. 's is in DOB . The DOB , I believe.

Q Okay. And how old is A.E. ?

A She would be turning 14.

Q Okay. So she's 13 now?

A She's 13 now. Yes.
Q The BlueLine Rental --
A Yes, sir.
Q -- that was the last place you worked?
A Yes, sir. The last place I worked.
Q All right. And you were making, I think you said, about 17 and some change?
A Yeah. Seventeen and some change.
Q How many hours a week?
A It varies on the overtime and whether they wanted me to stay if someone was bringing some equipment in late. So, I mean, it varies.
Q Typically, would you just work a 40 hour week?
A Yeah. Typically, it'd be like a 40 hour week.
Q Okay. So before taxes, I have $680 a week.
A No. That's not right.
Q Well, I just did the math. I did 17 times 40.
A I mean, even on my bank records, like 900 and something, because I claimed two or three dependants.
Q Okay. So I've got about 1,360 a month. 1,360 a month that you were -- I mean, every two weeks.
A Yeah. It was every two weeks.
Q So 1,360 every two weeks?
A I mean, roughly, it'd be around nine to a little over 1,000.
Q And then, did you pay child support on P.E. and A.E. ?

A Yes. I paid child support on A.E. and P.E. .
Q Okay. So what was your take home?
A Let's see. It was biweekly. So I was paying 375 out of my check every time I got paid.
Q $375?
A Yes. It was biweekly, so it was 750 a month.
Q Okay.
A And plus, I had benefits on them. I was paying that, too.
Q Well, so really what I'm saying is, the 89,000, that was Deanie's money. That was her payment for that nearly fatal wreck, I guess, she had -- or not -- maybe not fatal, but, I mean, life-changing wreck.
A Yeah. You're correct. But from my understanding, when we sat down with her lawyer, he sued on my behalf and her behalf.
Q Okay. Did you get in a wreck?
A I did not get in a wreck. No, sir.
Q Did you have any injury?
A No, sir. Not physically injured.
Q Okay. So that 89,000 was for her wreck that she was in and she got injured in, correct?
A Yeah. It was for her wreck. Yeah. She was in it.
Q Yeah. That's right.
A Yes, sir.
Q So that 89,000 -- and you had access to it, right?

A Yeah. We both -- we both had access. It came in both of our names.

Q She had agreed to give you access to it even though it was money for her pain and suffering, I guess, and her wreck and injuries, right?

A Yes, sir.

Q She was concerned about spending money and you were spending some money, too, weren't you?

A Yes. I was spending money.

Q Okay. I mean, she had to remind you a few times, shouldn't we be saving, Cliff?

A No. Not necessarily. I mean, my payroll check was going into the --

Q Look at this real quick and just see if you recognize it.

A Yes. I remember this text. I was at Harbor Freight buying tools for work.

Q Okay. Well, I mean, does it not say -- she says, "Don't spend a lot of money. We need to save, if possible".

A Yeah. I understand that.

Q So she's reminding you, too, Cliff?

A Yes, sir. Yeah, she is.

Q Okay. So it seemed during your direct testimony with your lawyer you were always having to tell her we've got to save money, but it was kind of a two-way street, correct?

A It was kind of a two-way, but it was more -- I mean,

I'm at work, my payroll's going in there and we're trying to build up enough money to get, you know, a good home and have education for the kids as they got older.

Q With your paycheck, making $750 -- every two weeks?

A Yeah. About right along in there, after child support.

Q All right. After that. How long would it take you to make $89,000?

A Well, if I was still at my job, I would have been making $21 an hour. So it probably wouldn't have took long.

Q To save up 89,000?

A Yeah. I'm a good saver. You can -- my parents can vouch for that.

Q With child support and making 17 or $21 an hour, you think you could save up $89,000 pretty quick?

A Not in a year's time. No, sir.

Q No. You wouldn't be making $89,000 in a year?

A No, sir. No.

Q But regardless, she shared that money with you, correct?

A Yes, sir.

Q And you, at some point, made the decision to put it in a SunTrust account; is that right?

A Yes, sir. We both made that decision to put the -- when we got the check, her lawyer called, and he called me, and said the check was ready. Me and her both went on our way to get it, we both signed the back of it because our

names are on it and we deposited into my account. She agreed to put it into my account because it would have cleared the next day.

Q Okay. And then, you made the decision to put $25,000 into a money market account?

A We both agreed to do that.

Q All right. You did that in January 12th? I believe that was the testimony earlier. Do you need to see the --

A I believe it was.

Q Okay. All right. And so, you would know, though, that -- what did you call Deanie's dad?

A Johnny.

Q Okay.

A I called him Johnny.

Q Okay. So you took that money out on January 12th. Do you know he went to ICU on January 9th? So Deanie was with him in the ICU looking after her dad and you took that money out and put it into a money market account?

A Yes. She was there and we both agreed on it.

Q Okay. How --

A Because I had -- that day I made the money market account, we had to have two signatures. One was mine and the second was hers. She told me to go ahead and go there and open it up, and then the woman gave me the piece of paper to bring home for her to sign, and then we had to take it back.

Q Okay. Why was that something you needed to do while she was with her dad in the hospital?
A It's just something that we both agreed upon.
Q I mean, why right then? Why was that the time to do it?
A I couldn't tell you, sir.
Q Why not?
A Because I do not know.
Q And then, you actually took some money and you bought a -- is it a Chrysler Pacifica?
A Yes, sir. I did. My truck -- I had a Ford F150. It was down. The motor was pretty much shot. I had no way back and forth to work and Paula needed her vehicle to go back and forth to the hospital. Me and Deanie both agreed upon to get me a car to get me back and forth to work.
Q Okay. So you bought a Chrysler Pacifica. How much did you spend on that?
A I believe it was around maybe 1,800 or so.
Q $1,800?
A Yes.
Q Okay. And what did you do with the truck? It started working again, didn't it?
A No. No. The truck, they came and got.
Q Okay. And who helped you picked out the Pacifica?
A The guy -- it was on Facebook. I found the picture, I showed it to Deanie and Deanie said go ahead and get it.

Q J.L. helped you pick that one out, though, didn't she?

A No, sir. She did not.

Q She didn't?

A No.

Q Okay. But it's safe to say both of you all were dwindling the money in that account; is it not?

A Yeah. At that time, yes, sir.

Q I'm still trying to follow this safe and figure out why it's relevant. Tell me about -- describe the safe. Was it a big safe, a little safe?

A It was maybe like this wide (indicating), and maybe this tall (indicating), all metal with a big latch on the front with a little round dial on the front. But it wasn't a dial, it was a push button.

Q Okay. And you told J.L. ? Why did you tell J.L. the pass code?

A I did not tell J.L. the pass code.

Q Well, if memory serves, when you all went to the beach, you testified maybe 30 minutes ago that you had her type in the code.

A That's correct. Because me, Deanie, J.L. and B.E. went up to the building and we was all in there. J.L. wanted to punch in the code, so I told her the code.

Q Okay.

A Deanie was in the building with us.

Q You didn't tell Deanie the code, but you told J.L. the code?

A Deanie did not want to know the code. It was on their property.

Q Why wouldn't she want to know the code? I don't --

A Sir, I could not tell you that.

Q Okay. Now -- all right. So the safe, it was -- it was a big, heavy safe?

A It had some weight to it. Yes, sir.

Q Well, you testified earlier that you struggled with it.

A Yeah. I struggled with it a little bit trying to remove it from the truck.

Q You're a muscle-y man. You've got some muscles?

A I mean, I used to be. But, I mean, not -- I done got some age on me.

Q How old are you?

A Thirty -- thirty-two.

Q Look at that.

A Yeah. That's me on a float.

Q When was that?

A That was this past maybe -- June or July maybe.

Q A couple months ago?

A Yeah. That don't -- I mean, to me, I look kind of fat.

Q You think you're a fat guy?

A Yeah. I'm a fat guy.

Q Is that why you can't get up there to the porn that's

up in the loft?

A Yeah. Because I was scared I would fall in because of all the weight up there.

Q All right. And why can't J.L. -- I mean, not -- you knew J.L. could get up there. That's who you sent up to get the porn. Why can't L.L. go up there?

A Because he didn't want to get up there.

Q All right.

A It was -- it was all of our decisions to -- because J.L. was the smallest and it was packed out, for me to hold the tote up -- every tote that we put up there and -- like right there at the edge, and push and she would pull it.

Q How much do you weigh, or how much did you weigh -- how much do you weigh in this picture?

A Maybe 195. Somewhere along there, give or take.

Q Okay. And that doctor said J.L. was 81 pounds, I think. Is that what your recollection is?

A I think it was like 84. Somewhere along there.

Q I think we've got the records, but I remember 81. So you're 195 and she's 81 and you've got some muscles on you. You can pick up a safe.

A I can't --

Q You struggled with it, but you could pick it up.

A I couldn't pick the whole thing up by myself.

Q Who helped you?

A Deanie helped me remove it from the back of my truck

that night?

Q You think Deanie could pick it up with her broken neck?

A Yeah, she can. I've seen her weed-eat out in the yard with a broke neck.

Q And she can pick up that safe?

A Not by herself. No, sir.

Q Okay. But, anyway, my recollection of the testimony was you go to get your clothes and you're driving down the driveway and can see that broken latch on there. And so, you say, I'm going to check it out.

A Now, hold on a minute. I didn't understand what you just said.

Q What were you talking about the broken latch on that outbuilding?

A You said broken glass.

Q Latch.

A Oh, latch.

Q Isn't that what you talked about?

A Yes, sir. The broken latch.

Q And the door was pried open?

A Yes, sir. It was.

Q And you could see that from the driveway?

A Okay. Not from the driveway. As I explained to Rauch -- okay? -- we had to have a police escort to escort us out there to that property that day, you know, because of what all was going on. They farmed the land. The grass was so

tall you couldn't see what was going on at the house because the house was too far off the road. The grass would grow tall. And me and my dad figured the cops may already have been down there. We couldn't see. We didn't know. So we drove in, and as we drove in there's a road that kind of does like this (indicating), and it goes to the barn. Well, right when the road goes like this that little building is right there, and I noticed the door was swung open and you could see the latch kind of all beated (sic) up and the wood like pried.

Q All right. And then, you wanted to go over there and get some winter clothes?

A I wanted to go in there and get, you know, some of my clothes, because I didn't receive -- when they put all my stuff out, all my stuff.

Q You said you went to go get your winter clothes out of there.

A Yeah. I went to get -- yeah. As much as I could find that was mine.

Q Why did you need winter clothes in May?

A Because I wanted to go ahead and get as most as I could.

Q Okay. And that's when you were looking for the safe, though, right?

A I wasn't really looking for the safe. I wanted to have proof that there was a safe in there.

Q Okay.

A And my father was with me.

Q All right. How many of the -- how many of J.L. 's performances did you go to? The dance performances.

A Well, every competition they had, I was pretty much there with all of the kids. L.L. danced, J.L. danced. They both danced.

Q Okay.

A Because I was the one mostly driving, you know, to the destination where they were going to dance at.

Q Okay. And, I mean, the dances. What kind of dances were they?

A I mean, there were some dances that were kind of a little, you know, over the limit. But, you know, the bigger -- when the bigger kids gets up there and dance they kind of, you know, show more than what, you know, the little kids was.

Q Okay. Was J.L. a big kid or a little kid?

A She was like -- she wasn't probably like one of the little kids, but she was in the -- like the big girl's dance. Like team dances and stuff like that.

Q Okay. Were there provocative dances?

A Some of them that I seen, yes, but not most of them.

Q Okay. Well, did you ever say, you know, this is it, I can't stand this, I'm not coming to these anymore?

A There's been times and there's been times that I have

talked with Deanie and discussed it. You know, I don't -- I don't think, you know, my daughter should be waved above someone's head with her legs out and the crotch behind the dude's head. You know, I just don't --

Q You don't like that?

A I don't like that.

Q Did it stop you from going to watch?

A Well, I did it to support my kids. I was always there. Just like all my kids had activities. I tried my best to be in one place, you know, but I had -- well, in five places just being me.

Q What was it that was the most provocative to you? Was it clogging, ballet or jazz?

A It wouldn't have been clogging. It would have been more like hip-hop kind of deal.

Q You don't like that?

A Yeah. I mean, in most videos in this day and time, if you turn on a video and watch hip-hop, I mean, there's a lot of -- too much shaking going on.

Q Yeah. That hip-hop is provocative. How do you compare that to that tube of porn that you've got back there? What's more provocative to you?

A Well, that tube is something -- I mean, it sounds -- and I know it is provocative, but it's something I accumulated over the years when I was with Ms. Newsom and I didn't really keep it out for anybody to look at it.

Q You're kind of just a connoisseur? Like a collector?
A Well, I kind of -- I kind of collected it.
Q Okay. Would you be comfortable like taking it out and showing us some of your favorite collectibles, I guess?
A No. That's -- I mean, that's kind of personal.
Q I see.
A I mean, when I moved it, I always moved it and it had a lid on it. Apparently, if you look at the tote, the tape that was on there has been ripped off and there's no lid on it.
Q There's certainly not a lid on it.
A Yeah. The tape that I had on it has been ripped off and --
Q Okay.
A -- the lid -- on top of the lid, I had wrote, Cliff's stuff, do not open.
Q Would you agree with me that it's obscene stuff?
A Yeah. I mean, it's got some obscene stuff. But what man -- you know, you may not look at porn, there might be men here that don't, but there are some men that do. I mean, they read it for the articles, you know, and it's just kind of -- I mean, I understand where you're getting to.
Q Okay. You read those magazines for the articles?
A Well, I mean, you read it for the articles and you look at, you know, the pictures and stuff. But, I mean --
Q Come on.

A I'm being -- I'm being honest with you.
Q Okay. And in the movies, what artistic value do those hold for you?
A It just -- like it's kind of like roleplay like, you know, realistic kind of deal.
Q You like the storylines?
A Well, it's not really like a storyline. It's just got like -- I mean, it's hard to explain.
Q Well, I mean, now's your chance. Tell me your favorite storylines.
MR. WISE: Your Honor, if I may, I think he has explored this area as far as it needs to be explored.
THE COURT: I understand. I'm going to give him a little bit more latitude. He is on cross. So go ahead.
Q Tell some of your favorite storylines. Tell me some things -- you've got low T. You testified about that. Testosterone.
A Yes.
Q Low testosterone. How does that effect you?
A It is harder for me to like get an -- you know, an erection.
Q But you're still aroused. I mean, like you said, some men like looking at porn.
A I mean, yeah. I mean, some men like looking at it, but -- there was somewhere that I read that, you know, maybe if you start to kind of like looking into magazines and

everything, it was boost your testosterone.

Q What medical journal was that?

A I mean, I'm not -- I'm not no medical person. But, you know, it's something -- I was trying to help me and Deanie.

Q I see. Instead of being with your wife, you looked at porn in hopes that would boost your testosterone. And tell me some of your favorite storylines. What does Cliff Eubanks -- I kept asking all your family. You know, what are your sexual interests and desires? What are you attracted to?

MR. WISE: Your Honor, that is going too far beyond anything that's relevant to this case.

MR. SCOTT: From the testimony, Your Honor, he has low testosterone, he has erectile dysfunction, dancing is provocative and --

MR. WISE: Your Honor, if we're going to discuss this in detail, it should be out of the presence of the jury.

(Whereupon, a sidebar was held.)

THE COURT: Mr. Scott, please continue, sir.

Q All right. I'm going to ask the million dollar question. Are you attracted to young girls?

A If they're over 18. Yes, sir.

Q Okay. Over 18. Are you attracted to teens?

A If they're over 18.

Q Are you attracted to younger looking females?

A If they're over 18.

Q I'm not asking you if you're attracted to women over 18. Are you attracted to younger appearing females?

A No, sir. I mean, you need to describe how --

Q All right.

A -- what you mean by young.

Q All right. I will. Let me ask you about a couple.

MR. WISE: Your Honor --

THE COURT: This now fair game.

Q Let me ask you if you've heard of any of these --

MR. WISE: Your Honor, I'd like to be heard.

THE COURT: Ladies and gentlemen, I need you to step outside. We'll have you back in just a second. Okay? Don't talk about it yet.

(Whereupon, the jury exited the courtroom at 5:56 p.m.)

THE COURT: All right. Solicitor, I assume that you're wanting to now inquire of the witness about the sites that were recovered off of his cell phone?

MR. SCOTT: Yes, sir. And I've got a number of cases -- or rather two cases. During direct, intent was questioned regarding J.L. sitting in his lap a number of times. That's what I was waiting for and they went for it and it was the intent. That was not his intent. So now it's fair game. And then, after he indicated that he -- no, he is not attracted to younger females, it is my belief that he has opened the door, at least, for me to question him regarding his familiarity with these. And then, he can

either deny or accept these websites and his familiarity with them. If he denies it, I would hold the right to call rebuttal witnesses. If he accepts familiarity with these, I can move on.

MR. WISE: Your Honor, here's the problem. During the break, I got in touch with Lawrence Daniel, who is a computer expert, cell phone searcher and all that, and I went over this with him. All right? The problem is this. Based upon what they've given me and what I've seen and discussed with him, these cookies they refer to could possibly be a pop-up site where if you're going on a site that says, you know, my favorite girlfriend or sex with my favorite girlfriend, up pops a site that's one of these. Never looks at it, but it would show up, as I understand it from Mr. Daniel, as a, quote, cookie because it popped up on his screen. It doesn't mean he looked at it or anything. It doesn't mean he intentionally went to it.

Now, if they want to go into that, fine. I would simply request this. That after the testimony in this case, we recess until I can get the CD from Mr. Daniel in North Carolina and have him look at it, possibly even over the weekend, and get down here Monday or Tuesday of next week, and if they want to do that, that's fine. But I don't -- one, I don't think it's relevant because it just goes to show -- I mean, they have not even come close to establishing that any of these sites are illegal and Mr.

Daniel tells me that he can't figure out how they would be legal -- illegal. So you have -- you have someone going on a -- on a porn site that's totally legal and they're going to use it to influence the jury.

Now, I think that falls directly under the case out of Lexington where they had all the sex stories on the rape case. Showing that he likes sex doesn't mean he's guilty of child sex abuse.

THE COURT: All right. Mr. Wise raises a point that in my personal experience has some validity. I will just throw it out there. Okay? My wife -- there's a furniture company called Hooker Furniture and about eight years ago she was looking to purchase something from Hooker Furniture and she Googled that and there was a whole bunch of stuff that started popping up on her computer completely unrelated to the new chaise lounge that she was looking for. Until Mr. Wise mentioned that, I mean, that -- without an expert, we do run the risk, in my opinion, perhaps, of going somewhere that's not accurate. At the same time, I feel like, Solicitor, you are entitled to inquire about whether he visits internet sites and that kind of a thing. But if these are in fact just cookies that we're inadvertently -- like my wife when she entered in Hooker Furniture. Okay? I mean, maybe the Defense has a point. I don't know. Obviously, these cookies don't pop up just for any old reason.

MR. SCOTT: Right. And these are multiple cookies, Your Honor. They're all the same type. He can say, I don't know what you're talking about, I don't know how they got on my phone, just like your wife did. But the content matter, the multiple sites, the multiple days.

THE COURT: I understand. But if I'd gone in my wife's computer without that explanation, and then saw some of the stuff which was popping up, I would -- I would sincerely suspect --

MR. SCOTT: It might be --

THE COURT: -- that she was into -- that she was into some stuff that being married to me maybe she shouldn't have been into, if you understand what I'm saying. If you want to question him about searching online for porn, I feel like -- I think he's -- I think he's opened that door, but I don't know about specific instances.

MR. WISE: Your Honor, he hasn't open that door because he answered the question truthfully, I look at -- no -- at girls over 18 -- 18 and over. That has opened the door no more than the green box did. I mean, he really hasn't -- it gets too collateral and it's too prejudice. Under the 404.3 analysis, it clearly is more prejudicial than probative.

MR. SCOTT: If you look at *State v. Miller,* that's the Lexington case he keeps talking about, it cites a case out of Oregon and that is -- or *State v. Nelson* is the one out

of Lexington. *Nelson* cites *State v. Miller* out of Oregon. The key issue is intent in that case. In the Lexington case, he said I didn't do anything. So intent really wasn't an issue. That's why the sex toys and all that come in.

In the *Miller* case, it was kind of like this. He said there was content -- contact, but it wasn't my intent. It was more that my hand slipped down her pants, that kind of thing. Thereafter, they were allowed to bring in the -- it was a sex magazine at that time. It was focusing on girls who appeared younger than 18. So it wasn't internet searches. It was magazines. But the same issue. And that's why in *Nelson*, it was different. He says not only did I not have intent, it didn't happen, period. Our case is different. He's talking about sexual contact, but it wasn't his intent.

THE COURT: The situation involved the ejaculation on--

MR. SCOTT: Yes, sir. Yes.

THE COURT: -- when the girl's -- when the victim --

MR. WISE: That's the intent on criminal sexual conduct in the third degree.

THE COURT: I understand. Mr. Wise, he answered was it his intention to ejaculate when the victim/complainant was sitting on his lap, he's allowed to explore that. You are perhaps correct that the central question in this case is, A, whether it happened, B, what his intention was, at least

with regard to various charges. Okay? Perhaps his defense -- the first and second, as I'm seeing this, to the CSC first and second is it didn't happen. With regard to lewd act, I didn't have any intent. And you're nodding your head as if perhaps that's where you're going with this.

MR. WISE: I understand where we're going. I just don't know how searching a porn site of adults establishes an intent anymore than -- I mean, because it just -- I don't see how that establishes a specific intent on that.

THE COURT: Well, the witness has testified that he's got erectile dysfunction. We don't know the degree of which he does. And yet then he's testified, okay, I do have sex with my wife. It's more than that one occasion that she testified to. So clearly this is not a case of impotence or something like that.

MR. WISE: Right, and we never pretended -- pretended it to be.

THE COURT: The Defendant, in my opinion, has opened the door by saying it was not his intent. I'm going to allow a limited inquiry on we know he views porn and DVDs, we know he views it in magazines, it's -- I'm going to let them ask one additional question, whether he accesses online, and see what the answer is. Okay? But for reasons that you brought out about the cookies I think you are correct. I'm going to sustain your objection as it relates to direct questions about those sites because it is -- the

representations you've made from your North Carolina expert are the only representations I've got to go on from an expert on this kind of a deal. So --

MR. SCOTT: But, Judge, even that, this is a phone call he just had. He's had months and months to have that expert look at that disc. This thing's been on the docket for six months. He could have had that expert review it.

MR. WISE: Your Honor, I am tired of that, and I'm going to tell you why. They didn't know about those websites until this week. I asked him specifically, when I started to spend several hours looking at that download, is there anything -- any obscene pictures on there. No, there isn't. Thank you very much. I closed the file and I quit looking. And then they're coming in here today, or yesterday, and they tell me, oh, there are these cookies on there that we found the day before. So, to say I'm to blame is simply not correct.

THE COURT: I understand.

MR. SCOTT: In discovery, don't take a Solicitor's word for what you may find. Look -

MR. WISE: I will remember that in the future, Your Honor, and abide by it.

MR. SCOTT: And I'll stand by there's no obscene pictures that I found. There are obscene website searches.

THE COURT: All right. You gentlemen are always so very kind and so very polite, I must conclude that perhaps

some of the frustration is due to the lateness of the hour, but it is my intention to continue with this witness until finished.

My ruling stands. I respect your respective positions. I appreciate the passion that you articulated a few moments ago, as well as perhaps some of the frustration that maybe is being exacerbated by maybe a long day.

MR. WISE: And understand, his being on the stand I can't talk to him. I would request permission to talk to him about contacting Dr. Brownlee tomorrow morning.

THE COURT: You may by all means. You want to do that now or you want to do it when you break?

MR. WISE: I want to do it in the break, talk to him about whether he needs to get Dr. Brownlee. So I need to have some conversation with him about his --

THE COURT: Well, I wasn't going to break for the evening. We're going finish with this witnesses.

MR. WISE: Oh, okay. Excuse me. I got the impression you were --

THE COURT: No. It is a late hour but we're going to finish. Okay? Let's have the jury, please.

(Whereupon, the jury entered the courtroom at 6:07 p.m.)

THE COURT: Ladies and gentlemen, thank you for your continued attention on this case. Solicitor, if you'll continue, please, sir.

Q Had you done internet searches where you looked for young looking girls?

A I have done searches.

Q Have you done searches where you looked for younger looking girls?

A Yes, sir.

Q Now, the statement -- you gave a couple of statements. We talked about those. State's No. -- State's Exhibit 1. This was your first chance to tell your side of the story to law enforcement; was it not?

A Yes, sir. You're correct.

Q You went to the station?

A Yes, sir.

Q And I want you to -- I'm going to read it and I want you to tell the jury what you meant by these statements.

A Can I have like a copy?

Q Yeah. Well, here, take that. Following along State's No. 1. I'll read it from the board.

A Okay.

Q "Came in to see Hunnicutt about the allegations my daughter, J.L. , said towards me. She says I kissed her neck, rubbed my arms across her chest, touched her butt and put my hand down her pants. As far as I can remember, I have not touched her in any way that I can remember to make her feel this way." Why did you use the words "as far as I can remember"?

A Just as far as I can remember, you know, while I'm sleeping.

Q Well, so maybe it happened but you just didn't remember? Is that why you wrote that?

A No, I didn't mean it in that way. No, sir.

Q That's what I'm saying. This is your chance. What did you mean "as far as I can remember"? That's your handwriting, isn't it?

A Yes, sir. It is.

Q As far as I can remember I've never touched her that way. What does that mean?

A Well, when you're sleeping, I mean, you're like half and half. And all I was stating was as far as I can remember I had never touched her while laying beside her.

Q But it may have happened though?

A No. I mean, I'm not saying that it may or may not. It's just -- that's just the term -- the term that I used.

Q "She has fell asleep at times with me and my daughter B.E. in the bed, but I have also picked her up and took her to her bed and I have also fell asleep in my bed watching TV with me waking up with her next to me. I have no clue what goes on when I sleep, and I'm not saying I did or I didn't while I was asleep." So instead of saying, "She said what? I would never. I have never. I will never touch her." You said, "Well, as far as I can remember I didn't."

A Yeah. I mean, as far as I can remember I've never

touched her while I'm sleeping.

Q So you didn't deny it, but it's maybe I did and maybe I didn't.

A Well, I mean, you can be sleeping beside somebody and rub across them the wrong way. I mean, in your sleep you move around. When I sleep I move around a lot.

Q Have you ever woken up with your hand down somebody's pants?

A No, sir.

Q And then, you didn't really tell the whole story then, did you?

A That's -- that's my story that I told.

Q Right. But that really wasn't the whole story, was it?

A That was the whole story.

Q Well, that brings me to statement number two.

A Yes, that -- it was statement number two when I went to speak to them the second time.

Q I know, but what I'm saying --

A See, you kind of got me confused there. You were saying --

Q If I confuse you tell me to stop, Mr. Scott. Repeat your question. I don't want to confuse you.

A I didn't know you was coming back with that one. I thought you was still on this piece of paper here. I'm sorry.

Q Stay right there.

A Okay.
Q What time did you go to give statement number one?
A That statement was completed at 10:45 a.m.
Q And after you talked about well, maybe I did and maybe I didn't, you wrote end of statement. Goodbye.
A Yes, sir.
Q And you walked on out. But you left a lot of information untold, didn't you?
A Yes, sir. According to the next statement.
Q According to -- why didn't you tell them the other information?
A Because that day I had not had my medicine.
Q Tell me about the medicine.
A The medicine is for my heart and for my blood pressure. I have very thick blood. I have very -- the oxygen level in my brain, it causes a problem when you have thick blood.
Q Well, did you say, guys, I'm not really feeling like doing this today. Can we do it when I get some medicine in me?
A I understand that. This is the first time I've ever been in trouble. I didn't know what I could do and what I, you know, couldn't do. I tried to do the right thing and just write down as far as I can remember at that time.
Q Why didn't you go to the doctor and get some of that medicine that you needed?
A Because I already had the medicine at their house. And

how could I get more medicine showing that I already had some already.

Q Heart medicine? The doctor's going to give you some heart medicine. If you really need that bad, he'll give you some.

A Well, we got in touch with a cop and he ended up getting us where I could get my medicine.

Q Okay. So you did get it?

A I did get it later on that day.

Q But you didn't need it when you went in this time?

A Yes. I didn't take it -- I didn't take it that night, and then I didn't take it all that day when all this came out. And then after it came out I did not eat. I mean, I was confused. I went home and pretty much stayed up all night on my mom and dad's couch. And then that morning is when he called and my mind was not in the right place.

Q I see. And so, maybe that's why you left some of this stuff out?

A I mean, pretty much. Yes, sir.

Q But then you got your medicine in you? You got some later that day?

A Well, I got some late that day. Yes, sir.

Q And then that night you went back up there, right?

A Yes, sir. Yes, sir. You're correct. Went back up there right around 4:00 or 5:00. It was kind of -- I mean, it wasn't too late, but it was just enough to where the sun

was still shining into that room he took me in.

Q And that brings us to statement number two.

A Yes, sir.

Q You want me to read that one?

A You can read it in -- I mean, however you want to do it.

Q You don't want to read it?

A I mean, I'll read it. I mean --

Q Statement number two. That's when -- let me ask you. Would you have told them that story had they not told you, hey, man, maybe we got you on video? Would you have still told them that story, or did they kind of fool you into telling some truth there?

A Well, they kind of put me in a spot to where I've never been in before and I'm trying to be honest. I was scared. I mean, like I said, I've never been in trouble. I didn't know how these things worked.

Q Well, the way it works for future reference, when you get your Miranda warnings and they tell --

A See, that's -- that's another thing. With Miranda warnings, I know they mentioned about it. But, you know, the first time, you know, I was -- I was drowsy. I mean, it was hard for me to even understand what was going on.

Q You had momma and daddy with you the second time.

A They -- see the first time when we went it was just me and Hunnicutt when I went into the room. Also, his phone

rang and said that the DSS lady was on her way up. She came in that room, handed me a card with her name and number on it.

Q Yeah. Let's talk about number two though. Momma and daddy came right -- or was it sister?

A It was -- it was my father and my sister and they stayed downstairs --

Q Yeah, okay.

A -- because they had to drive me.

Q Did you say, guys, I don't know. Should I do this? Should I go in there and tell the truth or not?

A I was -- I was trying -- I was trying to do the right thing. And I'm a truthful man. I try to do the right thing. I stick by whatever I do. I mean, that's just who I am.

Q Are you sticking by this statement?

A Yes, sir. I wrote this statement. I'm ashamed of it and I wish it never happened.

Q Right now you wish it never happened or back then?

A Back then and now. I mean, I wish it never happened.

Q When you got caught that's when you wished it hadn't happened, right?

A I didn't get caught.

Q You didn't get arrested for this?

A Yes, I got arrested. But I was also tricked in saying that there was a DVD which there was not.

Q You wouldn't have admitted to that had they not done that, would you have?

A I would have told -- if they would have told me that they had some kind of camera in that room, you know, it -- I would have -- I would have told them. I mean, I was trying to be honest and straightforward with them.

Q But you weren't the first time. It was only the second time when they had to tell you about this camera and come forward with this, talk with Hunnicutt as far as what went on in the barn. That was myself and J.L. was working tearing apart pallets, cleaning up. I went to sit down. Was it in that chair? That picture of that chair that we have?

A No, sir. It was not.

Q That's not the chair?

A That's not the chair.

Q What did that chair look like you sat in?

A It was more like a lawn chair, like you put out in the yard.

Q You weigh about 195 pounds when this happened? You said you used to be more.

A Yeah, roughly around probably 210 or so.

Q Two hundred and ten pounds --

A And I was having health issues.

Q Huh?

A I was having health issues at the time.

Q Why you out there tearing up pallets and working out there doing manual labor?

A Because that's just -- that's who I am. I like -- I like to stay busy. I mean, I like woodworking. I like -- I mean, it's relaxing.

Q Okay. You got health problems and you're down there with J.L. tearing up pallets, doing work. Go to sit down and J.L. came to me, sat in my lap. Eighty-one pound J.L., or was she less than that then? More or less 81 pounds?

A I couldn't tell you.

Q She was 81 after the disclosure when she got weighed by Dr. Pritchard. So it was maybe less or maybe more?

A I couldn't tell you, sir.

Q Two hundred and ten pounds. Eighty-one pound J.L. sat in my lap and started wiggling on my leg and moving around. Was it feeling good?

A I mean, not -- not necessarily like --

Q Hey, come here. Can you come down? Would you mind stepping off the stand?

A What do you -- what do you want me to do?

Q I want you to show the jury how she was doing her butt.

A I mean, if I turn --

Q Yeah, move your seat out. If they can see it, because I want you to show them the dance and the wiggle and the --

MR. WISE: Your Honor, I don't -- I don't know if this is a proper demonstration even because it's -- having never

heard of it before.

MR. SCOTT: I want to see it demonstrated.

THE COURT: If he's able to pull it off, then he's able to pull it off. Let's see if he can do it. Go ahead.

Q You play J.L. . Okay?

A I play J.L. ?

Q I want to see how she was wiggling in your lap. Do you want me to sit in the chair and you wiggle on me?

A No. You're a man. I'm not --

Q All right. Stand up. Pretend there's somebody sitting in the chair. Now wiggle like she was doing.

A I mean, she was starting in like on my leg and she was rubbing her butt around in like a circular motion.

Q Yeah.

A And then she started moving closer to me. And then by the time I'm trying to push her away that's when it -- you know, it happened.

Q Okay. So she was just wiggling her butt on you like that?

A Yes, sir.

Q And it was feeling good?

A It wasn't like feeling good. Like I said, I've had problems.

Q How long did it take you to ejaculate?

A It wasn't long. I mean, I could go back to a time before when I was with my girlfriend before Jennifer and

Denise. I couldn't get the condom on quick enough before I ejaculated. I mean, I have a problem.

Q You've got a problem?

A Well, I mean, like a -- I mean, I mentioned in my statement, and I'm sorry that it -- I feel bad about it.

Q Did you ejaculate that quick when you were having sex with Deanie during the better times?

A Sometimes.

Q Did you have an erection whenever J.L. was doing that dance?

A No, sir. I mean, there was -- sometimes I don't even have to have a full erection for it to -- something to happen.

Q Let me ask you this. Do you have to be sexually attracted to have an ejaculation, or is it just a stiff breeze that makes you ejaculate?

A I mean, it's like the wind could hit it the wrong way. I mean, it's just -- I'm not stating that I could walk out there ejaculate. No. I mean, it's just -- it just happened. And like I said, I'm sorry that it happened. My intentions was not to put her in my lap and make her do that.

Q Yeah, that was just her. She took advantage of you, didn't she?

A I wouldn't say she like took advantage of me. But, I mean, she was -- she was always like sitting on my knee or

something like that. My mom and dad and family has even seen it. But she kind of went a little too far and it just happened.

Q What were you saying to her while she was doing that?

A I was trying to push her away, and right when I got up that's when it happened.

Q Show me how you pushed her. She's backing down on you, rubbing around. What are you doing? Just get off me?

A No, I didn't. I didn't. I put one arm and pushed her around and got up.

Q How long do you think the grinding, the wiggling lasted?

A I mean, it wasn't -- it wasn't long.

Q How long?

A I mean, probably not even a minute or so.

Q A minute?

A I mean, probably not even --

Q That's a long time.

A Well, I mean, she -- she was dancing here on my leg at first and started moving toward me. So you can count that time forward.

Q Had you been looking at pornography that day?

A No, sir.

Q Did you run up there Deanie and say, let me tell you what your daughter just did?

A No, sir. I did not. I was ashamed, I was embarrassed

and I was shocked.

Q You're infatuated with J.L. , aren't you?

A No, sir. I am not.

Q You always have been.

A That is like my step-daughter. That's -- I mean, I treat -- I see where you're going with this. I do not prey on kids. You can -- I've been wearing an ankle monitor ever since I've gotten out on bond. I've been doing right. I've been doing what I'm supposed to be doing, and I have not like doing what any other predator would do. I'm not like -- I try to keep my kids away from people like that.

Q Listen, I'm not talking about other kids. I'm talking about J.L. . She held a special place in your heart, did she not?

A All my kids have a special place.

Q J.L. was put on a pedestal over the other kids, correct?

A She was not the only one on the pedestal.

Q J.L. was given gifts and showered with attention that the other kids just didn't get.

A What gifts was she getting?

Q Well, what about the jacket? What about the necklace? What about the lotion? What about the money every day before school that your own blood daughters never got?

A Well, I do know this. I don't know if I can even say this. While I was incarcerated in jail the second time

there were clothes bought off my account and sent to their house.

Q I ain't talking about after you got arrested. I'm talking about when you were doing these things to the girl before, before you got caught. Before you were doing these things. Listen to me. I want to ask you another question.

A Go ahead.

Q Rauch said was it even possible to do these things with Deanie being in the house and you said absolutely not, impossible without her knowing. Didn't you say that?

A I don't understand your question.

Q Listen to me. I'll break it down here. What do you call him, Rauch or Mr. Wise?

A I call him Rauch.

Q Rauch said this could not have possibly happened without Deanie knowing, correct? And you agreed with him, absolutely not. There's no way this stuff could have been happening without Deanie knowing.

A It couldn't have happened.

Q But it did. We just talked about it.

A What do you --

Q She sat in your lap.

A Yeah, she sat in my lap.

Q You let her wiggle on your lap and then you ejaculated in your pants. Did Deanie know about that?

A No, she did not.

Q How was it impossible for you to be doing these things without her knowing?
A It was just that one time.
Q So it's possible for you to be doing these things with this little girl without anybody knowing, correct?
A It was just that one time down there in the barn.
Q You kept that a secret from everybody until you got caught, right?
A Kept what a secret?
Q This.
A I told you I was -- when I wrote this I did not have my medicine. I did not know what was going on. I love my family. I love my kids. And I'm looking you dead in the eyes when I tell you this.
Q Okay.
A My kids mean everything to me and I have not seen them in over a year. I would never put them in a situation like that.
Q But you have; haven't you?
A No, I have not.
Q Tell me about the time when A.E. and P.E. would be coming over and you'd say, man, did I get paid. We don't have the money for them. We don't have money to --
A I'm not -- I did not say that.
Q You deny that?
A I'm not completely denying it. I know everybody else

in that family has said somewhat the same thing. I gave -- I paid my child support to that woman right there to help with my kids. Every time A.E. come over with her ball and glove I was the one out there in the yard playing ball with her. Playing catch. I'm the one that took her to her ball practices.

Q Did you make her call you after school every day like J.L. ?

A That -- that -- I did not make nobody call me. That was something that J.L. wanted to come up with.

Q Did you give her money for snacks before school?

A I give her a dollar or two. That's honestly --

Q A.E. and P.E. ?

A A.E. and P.E. wouldn't be there.

Q You didn't give them any money for school?

A A.E. came to me one day, and Deanie in the same room, and she needed a coat for winter. She said her momma's done spent all the child support. That she was spending that money on her boyfriend to buy her something but wouldn't even buy her own daughter a coat.

Q And did you put a tracker on A.E. or P.E. 's phone?

A At the time she did not have an iPhone that I knew of.

Q You didn't track them on the phone?

A You can't -- you can't track -- if it's not on iPhones.

Q And you're attracted to younger looking girls?

A I'm attracted to young girls, but over the age of 18.

Q And fully admit to this statement, giving this statement --

A Yes, sir. I admit to this statement that it did happen. It was not my intentions of it happening, and I am sorry about it and I didn't mean for it to happen.

Q And that's not all that's happened, is it?

A That's all that's happened, what I wrote.

Q The first time you got a chance to give a statement you didn't say this. It was only when they kind of had to fool you about the nanny cams and you come forward --

A Yes, because the first - The first time I was not all there in my straightforward mind.

Q Are you in your straightforward mind today?

A Yes, sir. I'm focusing on you.

Q Good. Have I confused you at all?

A Not to my knowledge.

Q Oh, I know what I wanted to -- the provocative looks and the flirtation with J.L. . Right?

A Yes, sir. Sometimes.

Q And did you tell her mom about that?

A I told her once or twice, yes, because we would be in the kitchen and she would do it behind her mother's back.

Q Show the jury the kind of provocative looks she would give you.

A I mean, she was like this, kind of wink at me and doing like with her tongue and lick the bottom of her lip.

Q Show us.
A I mean, like -- kind of like that.
Q What does that mean?
A I don't know.
Q Did you tell her mom?
A I told her mom not that part, but I told her about all the -- you know, some of the stuff that she had been doing and some of the stuff she was doing on her phone at night from other boys.
Q What did you tell her about some of the stuff she'd been doing? Masturbating? You caught her masturbating is what you --
A I caught her one time. I told her mom about. And Deanie's talked to her and A.E. both.
Q Well, Deanie was up on the stand earlier. You all got to ask her questions. I don't remember her saying anything about catching her masturbating.
A She has caught A.E. and P.E. masturbating in the bedroom in the closet.
Q A.E. and P.E. ?
A Yes, sir.
Q But you've said you caught J.L. masturbating. Did you tell Deanie?
A I caught J.L. masturbating and I did inform her mother that Deanie needed to have a talk with her.
Q Describe catching her masturbating. Where was this?

A See, the way the rooms were, she had a -- I think she had a friend over that night, because they come in there and borrowed tee shirts for -- I don't know. And me and Deanie in one room, then there's the bathroom, then there's her room. And when you go into the bathroom you can pretty much see into her room, or mine and Deanie's room. And I caught a glimpse of her what she was doing and then I informed her mother.

Q Tell me -- did you open the door and look at her?

A The door was already open.

Q So your testimony today is she's masturbating with the door wide open, at least to your bedroom?

A No. There's a big bathroom --

Q I've seen your house.

A -- in between.

Q That's called a Jack and Jill bathroom, right?

A Yeah, Jack and Jill, correct.

Q You've got your bedroom, there's a bathroom, and then there's her room.

A Yes, sir.

Q So it's your testimony this girl is masturbating with the door open?

A She's got her door closed, but the bathroom door to her room open, and my door where me and Deanie stayed at would most time be closed because the TV in the living room being real loud.

Q So she left her bedroom door open and masturbated for everybody to see?
A The one to the bathroom.
Q And then there's your room? Does that make sense to you?
A Yeah, it makes sense.
Q That somebody would masturbate in an adjacent room to their parents with the door open?
A Yes.
Q Did you ever do that?
A Not that I'm aware of. I mean, it's a different age and time. I mean --
Q I've been hearing a lot about that today, it's a different age and time. So today people just masturbate with doors open.
A I'm not saying just today. I'm saying it could have been prior months or --
Q All right. And then she flirted with you and you just didn't know how to take it, did you?
A I didn't -- I just didn't know how to take it. I just kind of brushed it off.
Q You didn't tell her mom that she's been flirting with you?
A Yeah, I told her mom.
Q So you told her mom that she was flirting with you and giving you provocative --

A Not really like flirting. But being, you know, in a way that it puts off a weird vibe that makes me uncomfortable.

Q What did you do to help yourself feel more comfortable?

A What do you mean?

Q Well, if you've got a little girl in your house flirting with you and giving you provocative looks and making you uncomfortable, I would think you'd do something about it.

A Yeah. I mean, I've talked to her.

Q What did you say?

A I mean, just basically, you know, I'm your step-father and you're -- you know, you're young and all and you shouldn't be doing these type of things.

Q Was that before or after she sat in your lap and wiggled around?

A I think it was before.

Q Before?

A I believe so. I believe it was before.

Q So you had that talk. Maybe just hindsight, if the girl's giving provocative looks, flirting with you, was it a good idea to spend so much alone time with her?

A Well, I didn't really spend a lot of alone time with her. Like I said, I tried to be with everyone as much as possible. I mean, I worked all day. When I got off I went straight to the Dance Shop. And the days I didn't go to the

Dance Shop I would go straight home and they would still be at the Dance Shop.

Q Was it a good idea to spend any alone time with this girl if she was this provocative and you didn't know how to deal with the flirtation?

A Well, I mean, I tried working with her. I mean, I'm no Dr. Phil or nothing like that but, you know, we've had -- parents have talks with their kids, whether it's the mother talking to them or the father.

Q I hear you. You tried your best. You tried. I know. But it was too much. That girl did what she did and she victimized you. She sat in your lap. She forced herself on you and made you do that shameful thing. It's all her fault, isn't it? It's all her fault?

A It's her fault to the extent where she sat into my lap and started moving around.

Q It's that 12-year-old girl's fault?

A Yes, sir.

MR. SCOTT: Thank you. One second. I might have one more question.

Q You know how old she was when this event happened that she's to blame for?

A I can't -- let's see, she'll be turning 14. Maybe at 11 or something like that. I'm not really sure.

Q She was 11?

A I don't recall.

MR. SCOTT: Okay. Thank you. Nothing further.

MR. WISE: A couple of questions.

REDIRECT EXAMINATION

BY MR. WISE:

Q Mr. Eubanks, the first time you went to see Officer Hunnicutt --

A Yes, sir.

Q -- he told you there was an allegation of improper touching.

A I believe so.

Q That morning. Your statement was in response to his allegation of improper touching?

A Yes, sir. I believe so.

Q Did he ask you that morning about anything that went on in the barn?

A No, sir. He didn't ask me that, no.

Q That was in the afternoon?

A Yes, sir. In the afternoon.

Q And when you -- he asked you about the barn is when you gave the second statement?

A Yes, sir.

MR. WISE: Thank you.

RECROSS-EXAMINATION

BY MR. SCOTT:

Q I just don't understand. The first statement, Cliff, there's been some allegations that are sexual in nature made

against you and J.L. . Why doesn't that come to mind? I mean, that's pretty dang memorable when an 11-year-old girl takes advantage of you like she did and forces herself on you and makes you do this. Why didn't that come to mind that morning. I mean, that seems pretty relevant in my mind, doesn't it?

A It seems pretty relevant to you because --

Q Does it not to you?

A Well, it seems pretty relevant. But like I said, when I wrote this statement I was going off what he asked. This is what I told, because I did not have my medication. I was not in the right state of mind.

Q Well, help me out. So you got to ask a specific question for Cliff Eubanks to get an answer. Are there any more specific questions I should ask you?

A Well, I mean, if I had my medication and I'm focused then, yeah, I can answer your questions.

Q And heart medicine makes you focus better and --

A Because it's lack -- it's lack of oxygen to my brain because I have thick blood. I've been diagnosed with thick blood. Every time they draw blood from me they cannot get it out because it's so thick. I am a negative. I'm not a positive.

Q Nobody forced you to give any statements, did they? You're trying to do the right thing. I know.

A I'm trying -- I'm trying to do the right thing and, you

know, you're asking the questions and I'm trying to answer your questions truthfully and honestly as I can.

MR. SCOTT: Thank you. I appreciate that, Cliff.

THE WITNESS: Yes, sir.

THE COURT: All right, sir. You can step down.

THE WITNESS: Thank you. Do I leave these statements?

THE COURT: Just leave those -- just leave those there. We'll get them in a moment. Thank you.

(Whereupon, the witness stepped down from the witness stand.)

THE COURT: All right. Ladies and gentlemen of the jury, I want to thank you for your work today. I want to thank you for your patience today. We're going to go ahead and take a break for the evening because I think we have proven that at least one of out of three of our branches of government works hard. So we're going to break for the evening. That was a joke. If you would, please, do be back in the jury room tomorrow morning. I'm going to ask you to be there at 9:30, and I do anticipate you getting this case for deliberations hopefully sometime mid-morning. Again, please don't talk about the case tonight. Do get some rest. It's raining. Get wet on your way to the car, have a great night. See you in the morning. Okay? Take care. Thank you.

(Whereupon, the jury was released for the day at 6:40 p.m.)

THE COURT: Before we go off the record, I want the record to reflect that I have forwarded to all counsel the proposed jury instructions that my clerk and I have been working on.

Mr. Wise, you're Rauch@simplepc1 --

MR. WISE: No, no, no.

THE COURT? I did the other -- I did the two that popped up and I --

MR. WISE: Gmail.

THE COURT: Okay. Gmail should have gone through. Do you want to check before we leave to see if -- make sure you get it. I assume you guys did receive it.

MR. SCOTT: Yeah.

THE COURT: If there are any -- if there are any suggestions about those, if you could, just respond and --

MR. WISE: Can I get a printed copy?

THE COURT: I'm more than happy to print out a hard copy this evening is what I was getting at.

MR. WISE: Hold on.

THE COURT: My clerk will forward to Ms. Lancaster a hard copy --

MR. WISE: Here we go.

THE COURT: Okay. You got it? Look at those tonight and just give me feedback.

MR. WISE: I'll just give you comment for the Solicitor to think about on criminal sexual conduct third degree, I'm

going to request assault and battery second degree be a lesser included. If you go read it, it's basically the same acts without the intent. So it's clearly a lesser included.

THE COURT: All right. I actually read one of the cases. I think it may have been an unpublished opinion in the advance sheets this week that addressed that very question that said that on a charge of this nature A&B second would not constitute a lesser included offense.

MR. WISE: Criminal sexual conduct first and second, which I agree with. It did not apply to third. The unpublished opinion was the first and -- first and -- not a lesser included first and second which requires the actual penetration, which I agree with. The criminal sexual conduct third degree just requires touching with intent to satisfy lust. Assault and battery second degree requires the touching with no intent to satisfy lust. You look at it.

THE COURT: All right. I'll double check that this evening. I thought that that unpublished opinion also dealt with the CSC with minor third, but I may be mistaken. So let me double check that.

MR. WISE: Well, let me rephrase that. Okay? I am relying upon an email I got this morning as to somebody else who read it, but I've got a lot of respect for that person's ability to read a case and tell me what it means. So I've not read it, but I know it's -- which unpublished opinion

you're talking about. And I'll also add unpublished opinions are not precedent.

THE COURT: Of course they're not precedent, but that's the guidance I've got so far. So let's do this. If you have some information you want to convey to me about that particular topic feel free to email me this evening.

MR. WISE: I will tell you I've done some research and there's really no case that I can find one way or the other except the older cases that about the common law lewd act. Common law high and aggravated nature being a lesser included because it encompasses --

THE COURT: An unlawful touching.

MR. WISE: -- the lewd act, yeah.

THE COURT: Yeah.

MR. WISE: Which criminal -- assault and battery second would not include. So it's like assault and battery second is a portion of the lewd act portion of the old assault and battery high and aggravated nature.

THE COURT: Perhaps you could put it in an email and when my brain is just a little bit fresher two hours from now I can digest it a little bit easier, if that's possible.

MR. WISE: Let me check and make sure I got it.

THE COURT: All right. Mr. Wise, I gave a delayed start this morning so that maybe you call can contact Dr. Brownlee if you choose to go down that road.

MR. WISE: We will be in touch with him first thing in

the morning -- or her first thing in the morning.

THE COURT: If you all could be here at nine o'clock that would be helpful, even though the jury's not coming in until 9:30 and we can do any housekeeping.

MR. WISE: Can we make it 9:30, I mean.

THE COURT: Okay, 9:30. I'll see you at 9:30.

MR. WISE: 9:30 is fine. That 30 minutes is -

THE COURT: Crucial.

MR. WISE: Yes.

THE COURT: I'll be here at 9:00. Don't be later than 9:30.

MR. WISE: I mean, I'll be here at probably 9:15. That's not --

THE COURT: See you all in the morning. Have a good evening everyone.

MR. WISE: Well, hold on. Let me see if I got it. I got it.

(Whereupon, court was in recess at 6:40 p.m. for the evening.)

TRIAL DAY 4: August 3, 2018

THE COURT: Let's go back on the record in the State versus Mr. Eubanks. Of course the record will reflect that the Defendant is present with counsel. I did have a meeting with the attorneys in chambers when I came in this morning. I was informed by Ms. Hudson that one of the jurors wished to speak with me, Ms. Blackstock, Juror number 16. She was

the one that approached the Bailiff yesterday that we inquired about the fact that one of the witnesses for the Defense worked with her in the lunch room up in Hickory Tavern I think it was. Yesterday she indicated that she would be able to continue on the case. This morning, after further reflection, she's -- I met with her and counsel in chambers and she indicated that she was not comfortable moving forward. She was not sure what the result would be, and because she's working closely with this person it could create a problem for her. So, that extraneous influence might affect her decision in this particular case. I went ahead and let her bow out and everybody agreed that was the appropriate thing to do.

I also discussed in chambers jury charges. The State requested an instruction which I am going to decline to give. The Defense also requested instruction on assault and battery second degree as a lesser included offense of criminal sexual conduct third degree. I exchanged emails with the attorneys last night about that particular request. I am going to decline to give the option of A&B second as a lesser included of CSC third for the reasons expressed in the email: namely, that assuming for the moment there was some -- I think it's State's number 2, the statement given by the Defendant the second time around -- assuming that the jury concludes that that is the only contact that took place between the minor and the Defendant, the contact was

initiated by the minor and not by the Defendant. So it would not be an assault by the Defendant. It would not be a situation where he attempted an assault or he attempted an unlawful touching. Basically he was sitting there and, if the jury believes that version of events, arguably he never did anything untoward. Therefore, he's not the perpetrator of any assault. That's my reasoning about the A&B second. Of course, subject to the Defendant's objection, if you want to print out that email stream, Mr. Wise, and add it to the record that will be perfectly fine. Or I'll have the clerk do it at some break that we have.

Yes, sir. Go ahead.

MR. WISE: As related to your -- I'll let you finish, unless you were through.

THE COURT: No. Not quite. State's 10, I'm going to redact the last three questions. That was my default setting yesterday. That's what I've decided to do today. I don't see where they are germane to the issues in this case, so questions seven, eight, and nine will be blacked out. We'll make a copy of it so they can't read through the magic marker. So that will become State's 10.

MR. WISE: Would it be possible to delete it by making a copy of 10 and covering that up so it doesn't look like it's been blacked out?

THE COURT: That's probably not a bad idea. We can do that with a white piece of paper. That's what we'll do

then. You wanted to raise another issue, Mr. Wise?

MR. WISE: Yes, sir. First of all, I'd like to officially move for a directed verdict on all charges on the grounds that taking the evidence in the light most favorable to the State is not substantial evidence to get to the jury. You know, when you've got completely negative, as I mentioned earlier, physical exams. The PTSD is certainly caused by many, many, many things, as these experts recognized and you're simply relying on the recall of somebody that's -- from six or so years earlier.

Also, we would request a directed verdict on the criminal sexual conduct third degree on the grounds that -- as I read the statute last night, the assault and battery second degree -- I have trouble distinguishing differences between the two. And if there are no differences between the two, then the rule of lenity is that Mr. Eubanks should be charged only with assault and battery second degree. There is a lot of overlap and it's hard to find a difference, to be frank with you. So, I think under the rule of lenity the Court should send only the assault and battery second degree to the jury in lieu of criminal sexual conduct third degree.

Also, if -- get away from his statement. If -- as I mentioned in my email, if you get involved in general and specific intent being the difference, then assault and battery second would also be a lesser included of the

allegations other than the one statement that he made. So, I think assault and battery second would come in on -- the statement from the witness about the lewd act on a minor child.

THE COURT: Solicitor, do you want to comment on that?

MS. KEENEY: Your Honor, with respect to the general directed verdict argument, we will rely on our previous argument. J.L. testified to numerous sexual batteries under the age of eleven, and at the ages of eleven and twelve, and she described numerous touchings of the breasts and vagina, which would be criminal sexual conduct in the third degree. She was under the age of 16. With respect to his rule of lenity argument, I've never, quite frankly, heard of that, but I can think of two differences between CSC with a minor and assault and battery second off the top of my head. Number one, assault and battery second requires an injury. CSC with a minor third degree does not require any type of injury. Not to mention, assault and battery second requires a non-consensual touching. CSC with a minor third degree consent is irrelevant. Minors cannot consent. So, just off the top of my head those are the two differences between CSC with a minor third and assault and battery second.

THE COURT: All right. Well, there is not a great deal of law on this particular question to guide the Court. I referenced yesterday an Advance sheet case that came out on

Wednesday and it's an unpublished opinion *State v Benjamin Hernandez*. It's an appeal from Beaufort County from Judge Hayes. The unpublished opinion number is 2018-UP-343. The file log is 120-18. It discusses this question, and the gist of it is that in light of the sentencing reforms which took place in 2010, clearly the Legislature could have made assault and battery second degree the lesser included offense of criminal sexual conduct with a minor, et cetera, just as they did with assault and battery high and aggravated nature being a lesser included offense of attempted murder. I don't see where it meets the elements test either. I appreciate your position, Mr. Wise. I think it goes to the jury. This is a case where the jury is either going to believe there was touching or there was not touching. There was penetration or there was not penetration. I don't know that it's really a question of whether the jury is going to conclude that it's a matter of degree. The Defendant denied ever doing anything untoward towards the minor. The minor's testimony was the polar opposite. This is a credibility issue one hundred percent, and it's for the jury to make that call.

MR. WISE: Could I ask the Court if the Court understands the difference between assault and battery second and lewd act on and assault and criminal sexual conduct third degree?

THE COURT: Say again, please?

MR. WISE: Does the Court -- can the Court articulate a difference between assault and battery second under the lewd touching portion of it, with criminal sexual conduct third degree, which basically says the same thing.

THE COURT: In this case, lewd act involves the non-consensual touching of a minor.

MR. WISE: Correct.

THE COURT: Assault and battery second degree can be an inappropriate lascivious contact with a female -- let's assume it's a male groping a female inappropriately who's an adult. I don't see any --

MR. WISE: A minor would be included in both. I agree with that. An adult is not included in criminal sexual conduct.

THE COURT: I can certainly see the South Carolina General Assembly concluding that it would be inappropriate to make A&B second degree a lesser included of criminal sexual conduct with a minor in the third degree out of the public policy -- or because of the public policy reason that there is a greater desire to protect minors. Even if a minor suffers the same lascivious contact that an adult would, the minor is in less of a position to defend themselves. Therefore it could very well be the public policy of the General Assembly not make A&B second a lesser included of what used to be lewd act.

MR. WISE: And the General Assembly could have said assault and battery second applies to people 16 and older. And they didn't.

THE COURT: I understand fully. Clearly, it's the intent of the General Assembly that A&B second -- it could have been, under the reasoning of Hernandez, it could have been their intent, if they wanted to, to make it a lesser included. I appreciate counsel's argument. I'm comfortable that by codifying lewd act as CSC third degree the General Assembly clearly intended to offer additional protections to minors, that -- both in terms of penalty as well as a different offense with different elements that maybe they did not intend to extend to an adult who suffers the same sort of unwanted contact.

Technically, you had not rested before you made your directed verdict motion, but you did indicate in chambers that you did not intend to call additional witnesses.

MR. WISE: Now that you mention that, we did contact Dr. Brownlee this morning. Her office is closed. He actually went to Laurens County Hospital to see about if they were online there or something, but nothing had come in on that. In lieu of that, I would actually request the Court continue this case to Monday so that we can have Dr. Brownlee available.

THE COURT: I appreciate your request. I've looked at the report that -- Solicitor, you wanted to chime in on

that?

MR. SCOTT: Your Honor, he is -- he has every right to call the witnesses he thinks are necessary to defend the case. He can provide a witness list with these people's names on it and have them available just like we did. He had that opportunity. This has been on the docket for months, and months, and months. He made a strategic move not to call that witness.

MR. WISE: No.

MR. SCOTT: Well, where is she?

MR. WISE: Finish your argument, please.

MR. SCOTT: You're speaking over me.

THE COURT: Here's where I am. The jury has been at this for five days. I don't see where the testimony would necessarily add anything else. The Solicitor's point that she could have been placed on a witness list which, again, we've already had one issue with a juror and contact with a witness. We're down to 12. We run the risk of dropping below 11 if we continue this to Monday. We run the additional risk of one of those jurors being a patient of Dr. Brownlee's. Those are risks that the Court is unwilling to take. It could've been addressed, obviously, during voir dire of the panel and most importantly, having reviewed the report from Dr. Brownlee, the Defendant has testified as to his medical condition. That is evidence that has been produced. I didn't see anything in the report indicating

that the Defendant was suffering from impotence. As we discussed yesterday, there are varying levels of erectile dysfunction. I don't know that her testimony would necessarily offer anything additional and without more of a proffer, the Court is not inclined to push this back.

MR. WISE: I would just like to put one thing on the record. I got that report from Dr. Brownlee back in February of this year. After reviewing with my client and looking at the facts, I had no intention of calling Dr. Brownlee. The only reason it came up is because of testimony of his ex-wife. That was -- you know, when that came up there was then a need to call Dr. Brownlee. She would never have been on a witness list.

THE COURT: I understand. We're in the position that we are. I don't see where her testimony would add anything substantial or germane to this case. I don't see where her testimony is absolutely necessary. We'll allow her -- I think it's been marked as Defendant's number 6 just for ID, so that's not a problem. State's 10, if you want to look at it. What my clerk has done is simply make a copy of the final page of the trauma narrative and after question 6 everything else is simply a piece of paper placed over it. Everything else has been deleted.

MR. WISE: I think to be technically correct on Dr. Brownlee's statement it was admitted and then you sustained the State's objection to withdraw it. I would, of course,

object to your unwithdrawing the document. Or withdrawing the document from evidence.

THE COURT: Very good. One final housekeeping matter before we move forward with closing arguments, because the State indicated they did not intend to call any reply witnesses. I emailed as it relates to the intent charge I removed some language that was in the stock intent charge. Two portions I removed was the second sentence of the intent charge which reads, "For example, the mental state required to be proven by the State for a particular crime might be purpose, intent, knowledge, recklessness, or criminal negligence." I pulled that just because -- I think it's the Ferguson case that dealt with the standard definition of intent. I think that what they did when they created this stock charge is they just copied and pasted. It talks about that extemporaneously, but I don't see any reason to talk about negligence or recklessness in this particular case.

MR. WISE: And I think that I sent an email also to request that you instruct the jury that criminal sexual conduct third degree is a specific intent crime in which the State has to specifically prove that intent.

THE COURT: Solicitor, do you have an opinion on that?

MS. KEENEY: I think the standard CSC with a minor third degree charge addresses the intent that's required. It says in your charge that I have right here in front of me that they have to have the intent to arouse, appeal to, or

gratify the lust, passions, or sexual desires of the Defendant or the child. I think that covers the intent element that he's referring to. I don't think we need to go into anymore detail about that.

THE COURT: I would tend to agree. It sounds like the charge does -- In reading what I've got, does cover that he has to have the intention to engage in the conduct for the purposes of arousing himself.

The other portion that I deleted from the intent instruction was the last paragraph of the stock instruction which reads, "Criminal intent can arise from action or a failure to act. It may arise from negligence, recklessness, or an indifference of duty, or consequences that is considered by the law to be the equivalent of criminal intent." That's a bunch of gibberish, I think, that doesn't really apply in this particular case. Do you agree with that?

MR. SCOTT: Yes, sir.

MR. WISE: Say that again.

THE COURT: I'm sorry. The very last paragraph of the stock criminal intent charge I eliminated. It reads, "Criminal intent can arise from action or a failure to act. It may arise from negligence, recklessness, or an indifference to duty or to consequences that is considered by the law to be the equivalent of criminal intent."

MR. WISE: I agree that certainly is incompatible with

criminal sexual conduct third degree, but I think the Court needs to specifically tell the jury that as to criminal sexual conduct third degree it requires a specific intent to do that act for that purpose. It's not an intent to do the act, it's the intent to do it for a specific purpose. And I can give the Court a very very quick example. Every parent touches the private parts of their child intentionally when they change the diapers. That is not a crime. It becomes only a crime when that adult has the specific intent to touch that part for the purpose of satisfying their lewd disposition. And therefore, they need to be told specifically that criminal sexual conduct third degree requires that specific intent.

THE COURT: Okay. So you would suggest changing my intent instruction to emphasize that it applies to the CSC third?

MR. WISE: No. I think when you charge the law of CSC third you tell the jury that the law requires there be a specific intent to do the act with the intent of satisfying their lewd desires, which is pretty much the way the statute is worded anyway. But I think it needs to be emphasized that that is a specific intent crime.

THE COURT: The charge reads, as the Solicitor stated, "Next, the State must prove that the Defendant willfully and lewdly committed or attempted a lewd or lascivious act on, or with the body or its parts of, a child under the age of

16 years, with the intent to arouse, appeal to, or gratify the lust, passions", et cetera, et cetera. With the intent.

MR. WISE: And then I think you should say under this statute that there has to be this specific intent to satisfy.

THE COURT: Well, I say in the next paragraph, "Willfully means voluntarily and intentionally with the specific intent to do something the law forbids."

MR. WISE: I missed that part.

THE COURT: I think --

MR. WISE: I missed that.

THE COURT: That's my standard definition of willfully. Incidentally, there is no instruction in the bench book for CSC with a minor third. This is something that we, my clerk and I, created in Chester two or three months ago when we tried another CSC third, so this is what we've got and it's what I'm comfortable with. So, we will proceed with closing.

The Court Reporter has marked State's 10. It is in evidence, the redacted portion does not contain the last three questions asked of the minor in her trauma narrative. Just so that the record is clear, we'll let the unredacted portion of the trauma narrative become a State's exhibit for identification.

MR. WISE: My position was questions one through seven.

THE COURT: I know your position that questions one through seven shouldn't have even come in. I appreciate your position. This will be for identification purposes. I've passed it to my Court Reporter and she will mark the State's exhibit for ID. Let us have the jury, please. When the Jury comes out, Mr. Wise, just rest for the record. I will ask the State if they have any reply and you say no. Then we'll move forward.

COURT REPORTER: State's 13.

(Whereupon, redacted trauma narrative was marked as State's Exhibit 13 for identification only.)

(Whereupon, the jury entered the courtroom at 10:18 a.m.)

THE COURT: We're going back on the record. The record will reflect that all jurors are present and the Defendant is present with counsel. The first order of business, ladies and gentlemen, one of your fellow jurors, Ms. Blackstock, juror number 16, for various reasons I've relieved her of further obligations on this case. So, now Ms. Lowe, juror 112, you're now a full member of the jury panel. Of course, your vote counts equally as anyone else's and you'll now participate in this case. With that, Mr. Wise, your next witness.

MR. WISE: Your Honor, the Defense rests.

THE COURT: Any reply from the State?

MR. SCOTT: None, Your Honor.

THE COURT: Ladies and gentlemen, we've reached that portion in the trial where you've received all of the evidence you're going to get in order to judge this case. Now the attorneys will be given an opportunity to give you their closing arguments or their closing summation. The order that we'll go in is Mr. Scott will go first for the State. Mr. Wise will follow Mr. Scott, and Mr. Scott will then have an opportunity to speak with you in reply.

I'll let you know as I said, of course, on Tuesday what the lawyers say -- Wednesday is when I said this. Obviously, just like their opening statements, what the lawyers say in closing is not evidence. You judge the case based on the testimony and the exhibits. Even though their argument is not evidence, you should certainly pay attention to it because it's their contention about what has or has not been proven. So, any time the attorneys make some comment on the facts or the testimony and what their comment -- if their comment differs from what you recall the testimony being, obviously go with your recollection of the testimony because you are the judges of the facts. With that, Mr. Scott, you are acknowledged for your closing, sir.

MR. SCOTT: Thank you, Your Honor. May it please the Court.

THE COURT: Yes, sir.

CLOSING ARGUMENT

BY MR. SCOTT:

Ladies and gentlemen of the jury, we said Tuesday this case is about betrayal. Do y'all remember that? Julie Kate with the Solicitor's Office stood up and said this case is about betrayal. She and I talked about that, and I've been thinking about this case for a year. I've been dealing with it 24 hours a day for this whole week. It occurs to me, maybe betrayal is too kind a word. Maybe betrayal is too nice to describe a so-called father who says he loves the daughter and turns around and does unspeakable things to her. He says he wants to protect his daughter, then he turns around and abuses her.

What is the right word for an adult who turns his relationship with a child into one big mind trick. He does something seemingly kind, shows her attention, he gives her a gift, and then he turns around and does unspeakable things to her behind closed doors. What's the word we use? Is it betrayal? I don't know the right word. Is it evil? Wicked? Insidious? Depraved? What's the word we use for somebody like Cliff Eubanks and what he's done?

Power. In these cases, it's all about power. That is a central theme in every one of these sexual assault cases, whether it's an adult victim or a child victim. There's always an imbalance in power. It's those perceived with

having the power that victimize those who are perceived as being weaker. It can come from one person being physically bigger than another person. It can come from somebody having perceived authority over those subordinate to them. It can come from those who are held out to be influential in the community over those who are seemingly insignificant. It can come from an adult over a child. It's all about power and it's all about the semblance of power. You know, that smirk on his face that he's had this week, that is his last grasp at trying to show her that he's got power over her. "Her" being J.L. . When she identified him and he smirked at her, that's him trying to tell her I've still got the power and I'm still holding the cards. Because he was from 2010 to 2017. He was the head of the house, right? He held all the cards. He'd tell people what to do. When he sits here smiling, that's him holding on. Trying to. I'm happy to tell you guys the paradigm has shifted. He has no power over her in this courtroom. None. So, when you see that smirk, look past it. She has wiped it off his face. All the power in this courtroom today is held in that little girl right there. You can smile. You've got the power. She's got the power, and it has shifted. And I feel good. I feel energized. I feel her power coming through me. And I'm happy. I'm happy to advocate for that little girl.

You know, among all the sadness it occurs to me it could've been so great. In 2010 when he and Deanie got together, it could've been something good. There was a ready-made family for him had he wanted it. He never wanted that. He got J.L. and L.L. . All they ever wanted was a dad. You know, Josh -- we heard about Josh Lyons. I never knew the guy. Never met the guy. Doesn't sound like the best father figure. He isn't the best father figure. He hit the wind while J.L. was still in the womb. Never really knew her. You know, he's Johnny-come-lately when he hears Cliff has been abusing them -- abusing J.L. . He shows up for three days and then he's gone again. They wanted a father and he could've been that father.

You know, they had Papa. By all accounts just a great guy. He was the only father figure they knew, but he was an old man. It could've been great. Cliff could've gone in, stepped into that role that the family needed. Could have been that husband. Could've been that boy, L.L. 's father. You know, every boy needs a male figure in his life. He could've been that for L.L. . He had no interest in L.L. . Could've been that strong figure for J.L. . He could have stepped up for those kids he already had, his blood children, A.E. and P.E. . He could have finally been in their life, but he neglected them. That's not the path he took. He didn't want to be the father to all these kids. He

didn't take that path. Yesterday he didn't even know the birthdays of those kids. He didn't even know how old A.E. and P.E. were. Does that sound like somebody interested in being a father? Instead of being that positive figure, he bullied L.L. . And J.L. , although from the outside -- and certainly to A.E. , P.E. , and L.L. it looked like she had the greatest thing going. She got whatever she wanted. She got all of the attention. He played with her. He took her on trips. Even something minor like, "I'm going to the store. Come on, J.L. . You're coming with me." While A.E. and P.E. sat there. What about us? Y'all stay there. Even when they did tag along I heard A.E. say that she was made to sit in the car.

You know, the signs were there early on, but how good is a sign if you don't speak the language. Do you know what I mean by that? What I'm talking about -- Shauna Galloway Williams. That was the expert on child sexual abuse and the dynamics. I wish every family could somehow just hear her speak for an hour just to hear those signs, because seemingly innocuous things -- you know, he's right. Sometimes they are perfectly innocent. There are perfectly logical reasons for a kid to have recurrent headaches or recurrent nightmares or stomach aches, or drastic loss in weight, insomnia. There's other reasons for that. But taken with all those signs together, sometimes they point to

something more serious. Those signs were there. The family saw them, and in retrospect, I think they may have some guilt over not seeing anything. But how can you read the signs if you don't know the language. You know, the touching. L.L. and A.E. saw the touching. He had his hand on J.L. 's butt. The wrestling where his hand accidentally slipped on her crotch or her chest. But they were young and it was confusing. It didn't seem right, but maybe that's just part of their special relationship. They obviously had a special relationship, and maybe that's just something they do.

You know, the favoritism was obvious. If L.L. wanted something -- she got the money. If L.L. wanted something it was, "Hey, Buddy, you've got your own money; don't you?" Well, maybe that's just -- he's trying to treat L.L. differently to make him be more responsible with money. There's other reasons for this. That's what makes it sadly ironic. Back then, all of the kids were jealous of J.L. . It's sad to think about now, because she was secretly harboring this terrible secret. She was holding this burden on her shoulders. Those kids thought she had it so great. What price did she pay for that gold necklace, or that five dollars before school. What a heavy toll to pay to be invited on trips to the store. How could they have known those trips down to the barn with Cliff weren't the fun and

good times they may have appeared to be on the outside. They longed for that attention that they thought was showered on her. That wonderful life they perceived was just an illusion; wasn't it? Like I say, everyone in the family now feels guilt. They shouldn't. Hindsight is 20/20. It's easy, as we sit here today, to look back. And the signs were obvious, especially after hearing an expert like Shauna Galloway Williams talk about that. They say, how could we be so stupid. How could we? But you can't read the signs if you don't know the language.

Mom saw it. Deanie saw it. She feels the guilt to a higher degree, clearly. She's the mother. She appreciated Cliff's apparent dedication to J.L. . Who wouldn't? Everyone loves to see people treat their children with affection. Everyone loves when people come up and talk about how cute your child is and they seem to be nice to them. Parents like that and Deanie appreciated that. You know, this man had taken these kids -- in her eyes, that weren't his -- in and seemingly treated them like his own. Her major concern was just, hey, that's great. You're so nice and sweet and kind with J.L. , but how about spreading that affection a little more evenly. Because L.L. , he needs some attention too. And what about your kids, J.L. -- excuse me, A.E. and P.E. . They need you too. I appreciate all this attention you're giving my daughter,

J.L. , but how about spreading it a little more evenly.

She'd had that conversation with him. It was always, "That's not true. You're imagining it." It was always an excuse. That's typical in these situations too. There's always an excuse. That's where those nanny cams came in. That's where that joke came in. She explained it yesterday. Those nanny cams become very relevant later on, as you all well know. But the joke was, "Hey, Cliff. I promise you you're spending more time with J.L. than with the other kids." "It's all in your head, Deanie." "I'm telling you, I see it." "I tell you what. One of these days I'm going to put up a camera and I'm going to show you the footage, and I'm going to prove that you do. You always spend more time with J.L. ." They laugh it up and they kind of chuckle about it. But she did notice the favoritism. She just didn't assign any sinister motive to it. And nobody blames you, Deanie. How could you have known. Nobody wants to believe their husband is capable of doing something like that. After all, they hadn't had sex in years. Maybe that just wasn't his thing. I mean, she didn't know about the enormous collection of pornography he had. She didn't know what he was up to on the internet. He just says, "Hey, Deanie, my testosterone is low these days. You know, it's erectile dysfunction, so I tell you what. I'd love to be with you, but I can't." She knows it's weird now. In all

the things it's clear now. It's crystal clear. At the time, though, you know -- school for instance. They have this arrangement where Cliff goes, "I tell you what. I'm going to take J.L. to school." J.L. alone. "And let's get grandma to take L.L. and B.E. . I'll take J.L. . Don't you worry about that." Never mind that he had to go right by the high school to get to work. There was an excuse for that. I mean, why wouldn't he have been able to drop L.L. off? J.L. at Sanders and then L.L. off to the high school and then on his way up to work. There was just always an excuse why he needed to be alone with J.L. .

Weird in hindsight, but not so much at the time. You know, she never knew about the gifts or the money. She didn't know about every day before school, you know, him giving her cash even though her lunches were free. Didn't know about making sure, "You call me, J.L. , when you get out of school." Control. Power. He didn't make A.E. do that. He didn't make P.E. do that. He never made L.L. do that. It was J.L. . She didn't know about him tracking their whereabouts on the phone. She didn't have that app. Persistent child abuse is done under cover. It's not something you do in the open. These are unpleasant things to hear. I understand that. But it's done under cover. That's why it's a little ridiculous for them to -- why didn't great grandma see it. Why didn't Deanie see it. You

don't do these things in the open. They're done behind closed doors.

Wasn't that expert, Shauna Galloway Williams, wasn't her testimony intriguing? That was a woman who studied, lectured, and made it her job, child sexual abuse, for many years now. And the noteworthy thing about her was she doesn't know anything about this case. She's what we call a blind expert. Never spoken with Deanie. Never spoken with J.L. . Never read any incident reports. Hasn't read his statements. We haven't told her anything about the case. She was just here to educate you all on the dynamics of child sexual abuse. But wasn't that interesting though. Some of the things -- y'all had already heard the testimony though, and then to hear her explain the dynamics.

Did y'all hear some things that seemed very familiar when linked up with that testimony you had already heard. She spoke of the process of disclosure. How a victim does not fully disclose every detail and every incident of abuse on the first disclosure. That's kind of -- J.L. , you know, there was a little bit of time and then it was a little more and more detailed. She said that's just kind of how it works. Really, for adults too you never come right out after years of abuse and say, "Okay, I'm ready to tell you every time I was abused and every detail about abuse." It's a process, and that's why she talks about that process of

disclosure. She talked about how that can be affected by the number of people the child speaks with, the number of times they're asked about the abuse, the specific questions they are asked, their age. All these have affects on disclosure and the information given.

She spoke of the reasons kids don't report right off the bat. Why they don't, right when the abuse happens, come running and tell what happened to them. Do y'all remember that part? It could be fear for themselves, fear for the impact on the family. And here's the sad one, fear for the impact on the relationship between the victim and the abuser. It almost doesn't really make sense when we think about it. Why would some victim of abuse be trying to protect the abuser? It is an attempt to keep the family dynamic in place, and the abuser has cultivated the victim.

Over time, they have gained the victim's trust through gifts, attention. That's called grooming. Do y'all remember her talking about grooming? That's a process too, and it started when J.L. was six. And he was good at what he did. She spoke about how 90 percent of the time a child is abused by someone they know, trust, and love. She talked about that grooming process and she gave the examples of giving special attention, giving money, introducing the child to sexual activity and making it seem normal. Does that sound familiar? Those were her words. Those were her

examples. Knowing nothing about this case, those were her examples of grooming procedures that she sees.

She noted that a victim may begin to show physical signs. She talked about gaining weight. She said losing weight. She talked about overeating. She talked about refusing to eat. Those are manifestations that she sees. Not bathing. Having nightmares. She talked about the desire for a lot of them to make themselves unappealing, ugly, dirty, to the abuser. Do y'all remember what J.L. had said before? I stopped eating. I stopped bathing. I just wanted to be dirty. That was just an attempt to keep him away from me. It didn't though. It didn't. And the shower, too, that's just a -- if you're going into the shower and you never know if somebody is going to pick the lock and be sitting there creepily staring at you, maybe a relaxing shower doesn't sound so nice after all.

At any rate, she had stopped showering. Deanie noticed it. Again, the signs are there. Girl, you've been dancing. You've been sweating. We've been at practice. You need to shower. Little girls need to shower. Oh, mom, I'm just so tired. I need to go to bed. In Deanie's mind, well, she's just worn out from dance. I don't know. If the signs are there, but you don't know the language, they're not always going to be relevant are they. Poor A.E. . She saw the touching. She saw all that. She saw the cuddling under the

blankets. She remembers the trips out where she was either made to stay home. She only got to see her dad every other weekend. Then she'd show up, "Hey, dad. I'm here for the weekend." He'd be off with J.L. somewhere. Poor A.E. remembers the gifts J.L. would receive and the attention she would receive. She remembers being told to sit in the car with the other little children while J.L. and he went into the stores. I wonder if, before this week, she ever knew how he complained just before the weekends when she and P.E. would come to visit. I don't know. I wonder if she knew when I asked her daddy wouldn't know her birthday. I don't know. Maybe that really wouldn't surprise her.

L.L. , he saw these things. He talked about the touches. He'd see the wrestling. He'd see him put his hand, you know, go into places where he didn't think that seemed right. But who am I. This is the guy who told me he'd take me outside and let's fight like a man. He was the head of the household. He saw Cliff go into the bathroom with J.L. while Deanie was gone. Even though J.L. could bathe herself. He heard Cliff talk about, "Well, go ahead and take your clothes off while I work on this bathtub for you."

He saw the favoritism. He longed for a father, and Cliff proved to be a colossal disappointment. He needed a father, but it wasn't going to be Cliff. He retreated away

from the family, and he went to his room a lot. When his Papa died it was almost too much. You know, he needed to talk. Papa was always there for him. That was the only father figure he had. Like I said, Cliff was just a disappointment. A bully. He needed to talk. That boy who aspires to be a pastor, who wants to heal through gospel, he needed some help himself didn't he. So he did. He talked to his mom. I need to talk to somebody. This is important, okay? Follow me on this. L.L. initiated counseling by asking his mom for help. By the grace of God -- I don't know how she found her, but Deanie found Kim Little. Do y'all remember Kim Little, one of the first witnesses we had from the Gilchrist Consultation Group. As luck would have it, she dialed up Kim's number. Kim deserves a lot of credit for breaking this case. You know, I've been thinking a lot about her professionalism, because she is there to talk with L.L. , the boy. She's listening to him. You know, she's not just -- mind drifting everywhere. She's thinking about L.L. 's issues, being bullied, and deaths in his family. She says, "Tell me about your Papa." Papa had passed on. "Well, he was the only man in my life, Miss Kim. I'm kind of lost without him." Here's what Kim asked next. "Well, what about your step-father?" "My step-father, he treats me like I'm not even there." Kim, "What do you mean?" "I'm nothing to him. My sister and he -- that's the

relationship. They're always together. It's like I'm not there, but he holds my little sister on a pedestal. Showers her with attention. Does everything with her". Now, Kim Little -- what she could've done right there is say, "Well, L.L. , that's interesting, but it's probably all in your imagination." She didn't do that. Kim Little is a professional. She told Deanie, "Hey, could you bring J.L. in here so I can speak to her?" She didn't have to do that. She was hired to counsel L.L. . And so, when they get up there and tell you that Deanie was driving this train, Kim Little is the one who independently -- you heard the testimony -- asked on her own if she could speak to J.L. , having no idea what J.L. would tell her. I think Kim deserves some recognition for that. I think she's a true professional, and really I think it was just fate that Deanie picked her out of the phone book and went to her. There's probably a lot of counselors who would have just brushed over that and said, "L.L. , that's just in your -- that's not the root of your problem. There's other issues that you need to deal with." But that stuck out to her. She followed up on it, and good for her.

She called law enforcement. She is a mandated reporter and she has to, so she calls law enforcement. That's when we have Deputy Richey showing up. He took the report, spoke with J.L. briefly. I think Cliff Eubanks comes up with his

Momma. Richey has to tell him the best thing for you right now is to go home. Things begin picking up there. Investigator Hunnicutt comes into the picture. You know, he spoke with J.L. that day and got her initial report. May 17, the very next day, he calls Cliff Eubanks into the office. "Mr. Eubanks, there's been a report. Will you come down to the office." Well, what is it. People, your step-daughter, specifically, have alleged that you've been touching her inappropriately. Okay. I'll be right there. He shows up. Give me your name. Give me your social, your date of birth. Can you read and write. Yes, okay. You graduated twelfth grade. Good. Here's your Miranda Warnings that basically tell you that you don't have to speak with us. You can get a lawyer, do whatever you want. You graduated twelfth grade. You're a grown up. Do you care to explain. Well, yeah, let me see what I can do. I came in to speak with Hunnicutt about allegations my daughter, J.L. , said towards me. She says I have touched her, kissed her neck, rubbed her arms across her chest, touched her butt, and put my hand down her pants. As far as I can remember, I have not touched her in any way that I can remember, to make her feel this way. She has fell asleep at times with me and my daughter, B.E. , in the bed. But I have also picked her up and took her to her bed, and I have also fell asleep in my bed watching t.v. with me

waking up with her next to me. Listen to this. I have no clue what goes on when I sleep, and I'm not saying that I did or didn't while I was asleep. Puzzling, I know. And I talked to him yesterday. Please explain this to me. What are you saying happened here. Well, I just -- I don't remember. I can't say whether I did or I didn't. Well, you held back didn't you, Cliff. Why didn't you tell more that day. I was confused. I was drowsy. You know, it's all about excuses with this guy. That wasn't the first excuse. Y'all heard a bunch of excuses yesterday, because he's got a bunch. Okay, well, Cliff you're free to go. And he does. Goes back -- Hunnicutt does. It's just good detective work. Speaks with Deanie again. That's when she gives him the idea about the nanny cams. Good detective work, again. Hunnicutt says I think I can use that. They're going to say you lied to him. You lied to him. You know who was lying? Cliff Eubanks. He had an opportunity earlier to tell the whole truth. Go ahead and tell us everything that happened. He chose not to. He chose to come to them with maybe I did, maybe I didn't. I don't know what happens when I'm asleep. I don't know. Maybe I could've been having sex with girls. If I'm asleep, how would I know. So the ruse, trick, the lie that law enforcement did with him was this. Hey, Cliff, we may know more than you think we know. Because at that time they only knew about the barn incident. At that point

it was all that J.L. had disclosed to them. So Hunnicutt says we may know more than you think. Do you remember those discussions you had with your wife about nanny cams. We may have some more information about things that happened in the barn than you know of. That's when he goes oh, oh, hold on a minute. I've caught her masturbating and she's always flirting with me. She's a provocative girl. He's spilling the beans now, because he know -- or he thinks he knows that they know something that he doesn't know. She's a provocative little girl. Let me tell you, I think I know what you're talking about. Okay. Oh, Okay. Now I remember. Now I remember. Can I do another statement. Here you go, Cliff. Go ahead. Tell us everything. Okay, I talked to Hunnicutt and as far as what went on in the barn was that myself and J.L. was working tearing apart pallets and cleaning up. I went to sit down and J.L. came to me and set in my lap and started to wiggle on my leg and move around. I knew it wasn't right, but I tried -- I tried to push her away. I tried. Lord, I tried. But she still did it to arouse me and I ended up ejaculating in my pants. That is his statement. Those are his words on the paper. Those are his statements.

What did he tell us yesterday? I have low testosterone, Mr. Scott. Do you remember all the excuses? Listen, I've got low testosterone, jury. I've got erectile

dysfunction, jury. Don't you worry about that giant green tub of some of the most obscene pornography you've ever heard of. Don't worry about that. I've got low testosterone. It couldn't have been me. Don't worry about me looking at young girls on the internet. I've got erectile dysfunction. I don't get it. How do we reconcile his testimony? Did you hear him yesterday say sometimes the wind will hit it wrong and he'll ejaculate in his pants. This is a man who is hyper-sexualized. If that's what low T is, then they need to bottle it up and give it to other men for medicine, because he has got -- I don't know. That's hyper-sexualism. That's not being low testosterone in my opinion.

I asked him about the porn. This was a classic response. Well, Mr. Scott, I just like the articles. I'm kind of a collector. Really, that's why I have them. I said well, what about all those DVDs in there. There's a bunch of them. Listen, I'm not some puritan, okay? I'm not saying there's anything wrong with pornography, but if on one hand you're saying I think hip-hop dancing is vulgar. I think this little girl is provocative. I think these dances are disgusting. How do you reconcile that with his interests? How do you do it? You can't. It makes no sense. Mr. Scott, I like the story lines in those movies. I said tell me about your favorite story lines. Oh, well

that's personal.

Mr. Eubanks, why would that little girl know about your stash of pornography? You know, because she told her mother that you had shown her where the porn was and told her what was in it, and she's the one that told Deanie. Who had no idea about it. Deanie had to call law enforcement. Oh, well that was necessary that I told J.L. about that. I said why. Oh, well because Deanie couldn't get up there to move it and L.L. couldn't get up there to move it, and I just couldn't get up there to move it, so we had to send J.L. up there to move it around for me. I don't know. Y'all do with that explanation what you want to. I can't explain it. I mean, here is a healthy man. Sometimes he says, well, I'm suffering from health issues, but then he talks about doing a lot of work outside. A lot of work on machinery. Talks about cutting brush with a bushhog. Talks about picking J.L. up and taking her to her bed. Talks about moving a safe around. But then when I talk about when I talk -- he can't push the porn around. I don't know. I hear everything in this courtroom. I can't explain it.

It's impossible for any of these things to have happened. That's what he told his lawyer on direct. His lawyer said is it possible when Deanie was in the house, is it possible that any of these things could have happened. He said no, sir. It's impossible. Now, how do we reconcile

that with statement number two where he's talking about this encounter. By the way, y'all do understand this is the tip of the iceberg, right? I mean, people are going to tell you as much as they can -- or as little as they can rather. So you just stop asking the questions. Let me explain this. But that's just the tip of the iceberg, and that was his attempt to explain what he thought was the most recent encounter that he assumed they had on video. Which they didn't, but my point is he says it's impossible on the one hand for that to happen, but then he's admitting to doing the thing in the barn with her. So it's quite possible.

These encounters -- it only takes five minutes to do some of these things he's talking about doing. He talks about how he ejaculates when he puts a condom on sometimes. How long does it take to pull a girl's pants down and lay on top of her and do some of those things he was talking about? How long does it take to pull down her pants and put his mouth on her like he talked about all those times? Deanie, her testimony yesterday, it was that of a woman who is feeling an immense amount of guilt. I can't change that. All I can tell her is how would you have known. Nobody wants to think their spouse is capable of this stuff. How would she have know. She talked about that they had this great relationship. And that's the thing. I don't know -- I'm trying to follow the direct examination questions.

We're talking about deposits and Sun Trust accounts, money market accounts, transfers over here, taking out $40,000 deposits there. I don't understand what that has to do with child molestation, but all I can do is try to follow when they start asking questions and they start trying to present their theory of the case. That money has nothing to do with this case, and that's why she was puzzled. She said well, yeah, I got $89,000 after my wreck. He put his $1,300 bucks a month in there too, but what does that have to do with anything. I don't know. She talked about money. She talked about the safe. He talked about how he had the code, she didn't. For some weird reason he gave J.L. the code to the safe. I don't understand that. But here is State's number 12, and this is the day -- this is May 16. This is what's puzzling. Because in her mind, they had this great relationship. This is the day of. She sends some country music song to him. Y'all will have this. Florida Georgia Line, the song is called "Holy". I guess it's a love song. He responds, "I love that song." Deanie, having no idea what she was about to experience later that afternoon, because that was the day they were going to Gilchrist, says, "I was trying to be sweet and romantic, but ..." and he said, "What I said. I know you was. I didn't mean to sound rude. I just said I love that song and I love you." That's what he says to her. She gives a heart emoji and says, "I

love you." I mean, she, by all accounts, in her mind, they had a good marriage. You know. Yeah, they weren't physical with one another, but she said, "I didn't need that, you know. It would've been nice, but that wasn't something that I had to have."

After the disclosure, it's just kind of a whirlwind. J.L. has the emotional disclosure at Gilchrist. That's not fun. See, that initial disclosure she's crying, she's weeping, she's emotional. It only gets worse from there, because then she's got to go meet with Hunnicutt who's a guy and she's got to talk about things that -- you know, to her she's a twelve-year-old girl who still thinks boys have cooties and she's got to talk about these things that no child should really be talking about. White stuff coming out. Him holding a rag. Him putting his mouth on her privates. That's -- that's not something that a twelve-year-old girl wants to talk about with a grown man.

Then from there there's a forensic interview. She had to drive to Greenwood, go to Beyond Abuse, and speak with Heather Bennett about an hour and a half. Spill her guts again about what this guy has been doing to her. That wasn't pleasant. Remember Dr. Lyle Pritchard? She had to go to Greenwood again for that. I assure you that was not pleasant. She had to take all her clothes off, lay on a bed, spread her legs. The doctor -- I mean, this is all

medical clinical practice, but it's not pleasant. As an adult it's not pleasant. And the doctor, as part of the examination, has to do some pretty intrusive practices. I think we all know what a gynecological exam entails. But, on top of that, she's taking pictures under bright lights. It's not fun. We heard from Samantha Black. That's who counseled J.L. . Fifteen therapy sessions. That's about a 45 minute to an hour drive to her office from their home from Beaver Dam Church Road up to Greenwood. Fifteen times, about an hour to an hour and a half per session. I bet there were a lot of other things J.L. would've liked to have done than to have gone to those sessions. Dr. Sharway -- do y'all remember her? That was the doctor who she met with. She's Samantha Black's supervisor, and she met with J.L. once or twice. I can't remember what the exact testimony was, but she met with her, reviewed Samantha's assessment of the girl. Spoke with J.L. and diagnosed her with PTSD. That's Post Traumatic Stress Disorder. That's stuff we see in combat vets. She talked about how it is the after effects of somebody experiencing something traumatic, and she had seen this in this twelve-year-old girl. She's a doctor and her opinion was this girl was exhibiting symptoms of PTSD.

I'm winding down. I need to talk with you a little bit about the law. I told you earlier there's three charges;

Criminal sexual conduct with a minor first, criminal sexual conduct with a minor second, and criminal sexual conduct with a minor third. Those are those three indictments y'all are going to have. The indictments go a little into what the charges are and what the law is, but those are what you are going to consider. I need to explain to you what those mean and I'm going to do it with this timeline, because timing and the age that J.L. is when a lot of this is happening is important. Can y'all read this from there? Everybody can read it? It goes from J.L. 's sixth birthday, because that's when she talks about the first contact. We know that's when Cliff moved in with her. And then it goes to the disclosure at Gilchrist with Kim Little. So, DOB D , 2010, that's when J.L. turned six. Denise and Cliff get married September 14, 2010. Denise had that wreck November 2013. I couldn't remember the exact date so I just put November 2013. That's an important date to me because, really, according to L.L. and I recall J.L. to a certain extent, that's when everything kind of got ramped up a little bit. That's when Cliff really began resenting Deanie for the position that she had put him in. That's when Cliff finds himself alone more often with the children. So that was kind of an important event. J.L. 's eleventh birthday -- I'm about to explain to you why that's relevant. Her eleventh birthday was DOB . April 1, 2016 is

when they move into the Beaver Dam Church Road house. May 16, 2017 is when she disclosed. Hopefully, this was the best way I could think to describe this to you guys.

We'll start with CSC with a minor first. I reads, "The Defendant, Michael Cliff Eubanks, did on or between DOB and DOB , in Laurens County, commit the crime of criminal sexual conduct in the first degree by engaging in a sexual battery with a minor." That's J.L. , date of birth DOB . "Who was less than 11 years of age." That's where 11 comes in. CSC with a minor first deals with all the sexual batteries he committed on her before she turns eleven. Is everybody clear? So, if you look at the time line, any time she discussed a sexual battery between the ages of six up to eleven, that is a CSC with a minor first. Do y'all remember that time on the couch at the Teague Road house? Do y'all remember that? That was one of the earliest times she talked about. She said he had used his fingers up to that point a lot. They had gone inside of her. She said that he put his mouth on her before. Remember we did the tissue box? I asked, "Well, did his mouth go - did his tongue go on the top or on the inside?" She said on the inside. Then she talked about he took his boy part out and was rubbing it on her. I said was it on the outside of your private or on the inside. She said inside.

I'll explain to you why that's important. But every time there was a sexual battery in that time period it's a CSC with a minor first. Y'all's recollection is going to trump mine, but my recollection is that the Teague Road house started when she was six and there had been multiple times when his mouth was on her private part. Multiple fingers touching her private part. But then she talked about this one morning when her mom had gone to work and he picked her up out of the bed and carried her to the couch and pulled her pants off, began using his hands on her, and then he put his mouth on her. Then he took his pants off and put his private in her private. I said well, tell me about that. She said that's kind of how it would work. He was lubricating her with his mouth. She said that was typically how that would work. He would use his fingers on me and his mouth and then he did the boy part on my girl part thing. So she talked about being eight. She talked about the number times happening at the Teague Road house. All those times are CSC with a minor first. Everybody clear on that?

CSC with a minor second. "The Defendant, Michael Cliff Eubanks, did on or about DOB to on or about May 16, 2017 in Laurens County commit the crime of criminal sexual conduct with a minor second by engaging in sexual battery with a minor, J.L. , who is at least fourteen

years old -- she's thirteen now -- or less, but who was at least eleven years of age at the time." I know this is confusing. But the CSC with a minor second, not CSC with a minor first, but second covers everything that happened after her eleventh birthday. Okay? And a good way of determining that, she moved into the Beaver Dam Church Road April 1, 2016. She talked about all of the events there. She talked about the barn. She talked about her bedroom. She talked about his bedroom at the Beaver Dam Church Road house. He still did the same things. It was the hand down the pants. Mouth on the vagina and in the vagina, and ultimately it was putting his penis inside of her. Every one of the times after she was eleven up until the time she disclosed is a CSC with a minor second.

CSC with a minor third, that can encapsulate everything that didn't involve the sexual battery. That's just touching her breasts, that's fondling her vagina. Sexual battery, which I'm about to explain, really if you think about penetration or the cunnilingus aspect, that's going to be a sexual battery. The judge is going to tell you all this by the way. I know this is a crash course. CSC with a minor first is the sexual battery when the victim is less than eleven. I think I already explained that. Criminal sexual conduct with a minor second degree is sexual battery, at least eleven but younger than fourteen. This is what I'm

trying to get to. What is sexual battery? Sexual battery is only important for the CSC with a minor first and second degrees. Third degree just means he's doing stuff to her to arouse his passions. That can be touching. His statement where he's having her grind on his lap until he ejaculates. There was no penetration in that specific instance, so that would be the CSC with a minor third. Sexual battery applies to CSC with a minor first and second. Sexual battery means sexual intercourse. He talked about that -- or she talked about him putting his penis on the inside of her girl part. Cunnilingus, that's oral sex with the female as the recipient. She talked about that. Talked about him putting his mouth on her girl part. Fellatio, I didn't hear any evidence of fellatio. That would be oral sex when the male is the recipient. Anal intercourse. She talked about him putting it in her butt. Do you remember that? When she talked about -- I'd ask her how did it feel when he put his boy part in your girl part. It hurt. And then talked about him doing it with her butt. I said well how did that feel afterwards. It hurt. Okay. That's important, because that is showing the penetration because sexual battery -- cunnilingus is cunnilingus. That's where he's putting his mouth on her, but for the intercourse aspect if there's any intrusion, however slight, of any part of a person's body or any object into the genital or anal openings of another

except for when it's done for medical purposes that's a sexual battery. I've thrown a lot at y'all. I'm sorry. That's what sexual battery is, but that's only going to apply to your CSC with a minor first and second charges. The key words are the anal sex he did with her, the vaginal sex he did with her, and the cunnilingus he did with her. Those are sexual batteries. Those establish the CSC with a minor first and CSC with a minor second. Everything else he was doing with her sexual in nature that appealed to his sexual desires and gratification, his lusts, those would be the CSC with a minor thirds.

That's just what that is. This is the third degree criminal sexual conduct. You're guilty of it if you engage with a minor in the third degree if the actor, that's Eubanks, is over fourteen years of age. He's in his mid-30's. And the actor willfully and lewdly commits or attempts to commit a lewd or lascivious act upon or with the body or its parts of a child under 16 with the intent of arousing or appealing to or gratifying the lusts, passions, or sexual desires of either he or the victim. So if you're doing this contact with a sexual -- a desire to be sexual in nature, then that's the lewd act aspect. But that's the CSC with a minor third. And that's the law you are to consider.

You know, the true father wants nothing more than to protect, to comfort the child, to do whatever it takes to

keep the child safe and without pain and suffering. So how do we explain the so called father, Cliff Eubanks? How do we explain somebody like him that does these things? Nature hard wires true parents to nurture, to care for a child. So why does Cliff Eubanks want to do the opposite? I don't really have the answer. I suspect if you're looking at that much pornography and you're making it that much a part of your life, because I think pornography is progressing. If you start off with Playboy it can begin and end there, or you can choose to up it a notch and get into more hardcore stuff. And then you can go into other rabbit holes. Into that genre or that genre. And you can look at all kinds of stuff until it's an unhealthy addiction. And you're looking on the internet and your sexual desires become such that you can't control them. I don't know what makes somebody become like a Cliff Eubanks.

I do know there is comfort in knowing that J.L. -- you don't have to pretend anymore. I want you to take comfort in that. You don't have to pretend anymore. You don't have to be afraid anymore. You should take comfort knowing that you're going to do everything from here going forward in your power to heal. I hope J.L. will leave this courtroom. I hope she finishes high school. I hope she goes on to make friends and lead a normal life, move into adulthood, establish friendships, relationships, and have as little

bitterness as humanly possible. That's what I hope for you, J.L. . I hope she'll be able to be vigilant against the evil that is out there. But I really do hope that she'll be able to trust. I don't want her past to steer every aspect of her future. I hope she's able to take these horrible things and transform them into a fabric that makes her a strong powerful woman. I hope that for her. You do have the power now, J.L. . He's never going to have any power over you again. You win. You told everybody what he did to you. Do you know that?

I'm now going to ask -- you'll hear from me again. He's going to get up here and say some things. I might have some responses to it. I'm going to ask you for verdicts of guilty on these charges. The question is after everything you've heard, after his excuses, after his victim blaming -- do you remember his last word yesterday? This is all J.L. 's fault. It's not your fault. You know that. In explaining his statement, this is all J.L. 's fault. Nevermind I'm a 210 pound 35-year-old man. She's an 81 pound girl. That girl was provocative. She was flirtatious. After everything J.L. has gone through, after them calling family members to talk about he's a good guy. I got the impression that a lot of them didn't know a lot of the allegations. Remember that little old lady who said she's a flirty little girl. I said did you ever flirt when you were

a kid. Yeah, I knew lots of boys. I liked to dance too. Then remember I asked well, you think that's bad. What do you think about a man who has a girl sit in his lap for sexual gratification. She said that's disgusting. I don't think she knew what he'd already admitted to. Do you remember the bully, the hired gun they brought on? Do y'all remember Mitchell twerking Eubanks? He's not here today. I looked for him after his examination yesterday. It was pathetic. I looked for him. I wanted to talk to him but he was out the door. The best he could do was come up with a picture of girls at a dance shop. I said where did you get that. I asked him where did you get that. Off a Facebook page. Who told you to do that? He keeps looking over at the Defense lawyer. Who told you to do that? He was a hired gun. He didn't know anything. He came in to do Cliff Eubank's dirty work, and he got exposed on the stand for it. But the best he could do was show a group of girls at a dance competition having fun. Let's make the innocent pay. Let's shift the blame from the guilty to the innocent, and that's what they tried to do. Let's look at it for what it was. We need to watch out for these little girls, because little girls can be provocative. They can give you flirtatious looks. They can overcome the willpower of a grown man. Y'all remember that, right? Let's see this for what it is. After everything J.L. has gone through.

That's why I've gone through all of these counseling sessions, all the interviews, physical examinations. Does that sound like something that you would go through if you just made something up off the bat? And what reason have we been given for her to make this whole thing up? There is none. See this for what it is. Do you believe grinning Cliff or do you believe that strong little girl? I'm asking you to believe that strong little girl and what the evidence showed you this week. I'm asking you to find Cliff smirking smiling Eubanks guilty of criminal sexual conduct first, but not just the first, the second and the third. Find him guilty for everything he's done. Let the truth speak. Thank you.

THE COURT: If it's okay with you, Mr. Wise, before we proceed with your closing we're going to take a brief break. By my watch y'all have been out here exactly one hour and three minutes. Most of us have been out here for an hour and twenty plus minutes, so we're going to take a brief comfort break for ourselves and proceed with further closing arguments. Of course, don't talk about the case yet. Adjourn to the back and make yourselves comfortable and we'll have you back out on the record in a few minutes.

(Whereupon, the jury exited the courtroom from 11:22 a.m. until 11:42 a.m.)

THE COURT: One housekeeping matter, the Court has made

a Court's Exhibit Court's number 1 the email string from last night about the proposed request to charge, so that's a Court's Exhibit as part of the record in this case. Another housekeeping matter, and I mentioned the time we did the *Jackson v Denno* hearing and forgot to ask about it last evening. I'm assuming, Mr. Wise, that you're not desiring the instruction -- I realize that you're still objecting to the nature of the second statement, but you're not requesting an instruction that the jury has to determine whether the statement is voluntary or not and consider whether --

MR. WISE: I hadn't thought about it one way or the other. It's probably appropriate.

THE COURT: All right. I'll add it.

MR. WISE: It's not that long.

THE COURT: I don't mind adding it. It's not that substantial. I'll add it in there and then submit it to you. Let's have the jury, please.

(Whereupon, the jury entered the courtroom at 11:43 a.m.)

THE COURT: The record will reflect that the jury is back and seated. At this time, Mr. Wise, you are recognized, sir, for your closing.

CLOSING ARGUMENT BY MR. WISE:

Mr. Foreman, ladies and gentlemen of the jury, when you

go into your jury room and you start talking among yourselves or even to yourselves and you say to yourself or among the group you know, Michael Cliff Eubanks is probably guilty. He probably did what the State said. What should your verdict be? Your verdict should be not guilty, because when we talk about proof beyond a reasonable doubt we're not talking about what probably happened, what might have happened, what could have happened, or what possibly happened. It is the highest standard known to man short of absolute certainty. So probabilities aren't sufficient to convict. A strong probability is not sufficient to convict.

Another way of looking at this is a football analogy that I like, and it's the instant review. When they have a play on the field and the official makes a call and then they will replay that play, and replay it, and replay it. And the announcer doing the replay will say that it has to be irrefutable evidence that the call on the field is wrong. In this courtroom, the call on the field is not guilty. The question is has the State produced irrefutable evidence that the call on the field is wrong, and they haven't. They haven't for many reasons. If you listen to the judge's charge and follow carefully what he says I think the analysis of this case becomes relatively easy.

First of all, I want to -- as the Solicitor mentioned, there are three separate and distinct charges in this case.

First, second, third degree. I understand in cases of sex abuse and as I said in my opening statement, unfortunately there is sex abuse of children in this country. And, unfortunately, there are false allegations of sex abuse in this country. And juries have to find the difference, unfortunately. I understand that when someone makes a report of sex abuse that the initial report is not going to be complete. And I understand maybe the second report isn't going to be complete. And I understand that an hour interview -- the forensic interview we talked about may not be complete. But you would think after 15 weeks, 15 sessions of therapy, it would be pretty complete. But one thing you can consider in this case is the story kept evolving. It kept changing. It kept moving. The truth doesn't.

I say that for this reason. You will have in your jury room the trauma narrative that was written. That is State's Exhibit 10. The trauma narrative was developed over those 15 weeks of therapy. If you remember, Samantha Black talked about the hardest part is to get out the worst thing that happened. That takes time. The first time is generally not that hard. What is the worst thing that happened to you. Tell me. I need to know. It takes time. And over 15 weeks the worst thing that happened came out. And you can carry it to your jury room and read it. But the worst thing that

happened to her at the end of those 15 weeks would only qualify for criminal sexual conduct third degree. There is nothing in the worst thing that happened to her in her trauma narrative that would lead you to convict for first or second degree.

That was not the testimony on the stand, so the testimony evolved. What happened after she completed 15 weeks of therapy and how the story kept evolving, we simply do not know. And that is something you can consider. Who said to her no you need to say more. Who said to her you need to talk about penetration. We don't know. Just as the Solicitor says, many acts of criminal sexual conduct are conducted in secrecy. So is nefarious planning done in secrecy. Those are done in secrecy. That is something you can consider. After 15 weeks that story should not evolve anymore. After meeting with a professional counselor who is trained to get this information from children, that story shouldn't evolve, but it did. And that should tell you something.

It should tell you there is a reason it evolved, and it's not because of things that quote she remembered 8 weeks later, 10 weeks later, six months later. It evolved because someone encouraged it to be evolved. That's the only rational explanation.

Now, they talk in this case and the judge will charge

you with circumstantial evidence. The Solicitor commented on some of that in his opening statement. The Judge will charge you in circumstantial evidence, if you are to consider it, must point with certainty to the guilt of the accused. No circumstantial evidence in this case points conclusively to the guilt of the accused. None. None. Here's why. Let's go first with the medical examination. It was normal. Granted, Dr. Pritchard stated yes, you can have sexual abuse, it can heal, and you not see anything. Fine. I understand that. Of course, she also said you could not have sexual abuse and the exam is going to be normal. So, how does a normal exam point conclusively to the guilt of the accused. It cannot and does not.

Then they talk about the PTSD. Oh, the child has trouble eating. The child has all these problems. Dr. Sharawy testified. So I asked her doctor, if a reasonably honest person lies could they have trouble sleeping? Oh, yes. And if a reasonably honest person lies, would they have trouble eating? Yes. We all know that. We don't need an expert to tell us that. If a reasonably honest person lies, would they have nightmares. All these things that are stressors. And the answer every time was yes. And common sense doesn't even require an expert. Lying creates stress in people. It makes them irritable and all these things. Of course it does. Common sense tells you it does. So, do

these factors then point conclusively to the guilt of Michael Cliff Eubanks? They do not. They do not point conclusively to the guilt of Michael Eubanks.

Then Dr. Galloway comes in. Fine, children delay reporting. Okay. Fine. Then she starts talking about also the factors and I say Dr. Galloway, do children who are -- and she said at first some children who are not abused could not have symptoms. Okay. And then she said children who are not abused have nightmares. Children who are not abused have trouble eating. Eating disorders. Children who are not abused have trouble sleeping. Children who are not abused have all these symptoms. Children who are abused have these symptoms. So, what does it prove. What does it remotely prove. It proves children who are abused or not abused have symptoms and some children who are abused or not abused do not have symptoms. That does not point conclusively to the guilt of Michael Cliff Eubanks. It doesn't do it. It doesn't add anything to this case.

So, also you can consider that J.L. went to counseling for some four or five months back in '14 and '15. Never once was there a disclosure in that counseling. Never once. She meets with another counselor one time and there is a disclosure. You can consider that. Those are things that I think show that this is a case of something that's created. The judge will also charge you -- let me tell you

something else too. There was an interesting comment, I thought, that J.L. made near the end of her testimony and it was this. She said I have attention. Talking about now. I have attention. I don't doubt that. I don't doubt that once she said she was sexually abused she got all the attention in the world. And for a child that's truly been sexually abused absolutely that should happen. But it was important to her because she said it on the stand. She now has attention.

Now, the judge is going to charge to you about reasonable doubt. He's going to tell you in his definition of reasonable doubt if there's a real possibility that the Defendant is not guilty then you are to find him not guilty. So let's look at the facts in this case and talk about whether there is a real possibility. Let's start out with an interesting one, the safe. Remember the testimony about the safe. Is there a real possibility that Michael Cliff Eubanks and Deanie Eubanks bought that safe, carried it home, and put $40,000 cash in it. Is that a real possibility? It sounds like most probable possibility. She denied she even knew a safe was there. But is there a real possibility she did know? Is there a real possibility that he carried it home and put it in there because she was spending too much money out of the bank. Is that a real possibility? Absolutely.

We talked about the negative exam. Is it a real possibility that a normal physical exam means no abuse happened? Yes. That's a real possibility, because a normal exam has to mean, at least a real possibility, that no abuse happened. You can't infer abuse from an exam that says there is nothing to show abuse. So, yes. That is a real possibility.

J.L. testified -- let's deal right now with just Beaver Dam Road. They moved in there approximately April 1, 2016. They were there until May -- Cliff Eubanks was there until May 16, 2017, roughly 400 days give or take a little. In that home were Mr. Wilson, up until he passed in January, the Grandmother, and Deanie Eubanks. They were there virtually 24/7. She was recovering from her injury. She didn't go anywhere except basically when she and Cliff went to dancing or something. We had three adults in that home virtually 24 hours a day. Is there a real possibility that had something been going on they would have noticed a lot of strange things over 400 days? Yes, but they didn't. So there is a real possibility that nothing happened.

They say it all happens behind closed doors. Yes, but if you observe an 11 or 12-year-old girl going behind closed doors with a step-father and being in there for 30 minutes you are going to be suspicious. And nobody saw that. Nobody saw anything that would indicate anything. So, is

there a real possibility that no abuse happened in that home over 400 days? Absolutely, yes.

Children today -- and it can be shocking -- know about cell phones more than I probably ever will. J.L. made an interesting statement -- and I said in my opening statement, "Pay attention to the small details, because that is what is important." J.L. made an interesting statement. She saw pornography on Cliff's cell phone on Teague Road. An iphone 5. And she saw it when she was 6 or 7 years old. Two things, is there a real possibility that a 6 or 7-year-old girl has no clue what an iphone 5 is -- and I don't think they were even out then, but use your judgement. Is that possible. I'm sure at 12 she knew what an iphone 5 was. Mr. Eubanks testified that the iphone 5 he didn't get it until they moved to the Beaver Dam Road and he started a new job making some money and he got iphone 5's for the kids and had their phones. So is there a real possibility that J.L. made that comment intentionally because she knew it couldn't have happened and is a way of saying something?

Also, she admitted in the forensic interview -- the forensic interviewer asked her what I call a throwaway question. The forensic interview was June 1, 2016. It would have been roughly two and a half, two weeks after this all came to the surface. Cliff had been out of her life for those two or three weeks, so she had been at home with her

mother. She had been interviewed by the police. She had been talked to by the first counselor that she saw, Ms. Gilchrist. After all this had come out she was seen there. The throwaway question was, "Have you seen Cliff lately?" Her answer was, "No, but I would like to." Is there a real possibility she meant that? Yes, there is. And is there a real possibility she meant that because she knew what she was saying had not happened? Yes, there is. If anything from the time this arose she had been reinforced with the idea that all this is horrible. Horrible.

Let's go back to Cliff's birthday in Month 2016. He gets a message on one of the programs -- I don't remember which one it was -- which she admits she sent. A happy birthday wish. A happy birthday wish in which she says, "I love you to the moon and back." Is there a real possibility she meant it? There's a real probability she meant it. A real probability she meant it. You'll have a chance to read that. The reason I say that is this. Now, let's go back and talk about those stress factors. You can only have these stress factors if you realize, understand, and comprehend in your own mind that what is happening to you is bad, horrible, and wrong. Otherwise, there's no stress. So you have to understand it's bad, horrible, and wrong in order to have drastic weight loss. In order to have the nightmares. In order to have the eating disorders. In

order to have the trouble sleeping, and a host of other things including not showering and all that. If you don't comprehend that what is happening to you is bad, awful, and wrong you won't have those stress factors.

When she sent this message there was no stress in her life, because if she knew those acts were bad, horrible, and wrong, that voluntary message on her part would not have been sent. Would not have been sent. Read it. You saw Mr. Eubanks when he read it.

Lastly, a lot of Cliff's relatives and friends testified. Of course, people who don't know him couldn't come testify, because they don't see him. You know, they don't know him. They don't see him with the children. Is there a real possibility that those that know him best in fact know him best. They are behind him. They took the stand in his defense. His attitude with his children, not showing favoritism, how he got along with the kids, and how he treated them. How they had never seen anything improper, or remotely improper.

Now, the Solicitor made the comment there was a drastic loss in weight. Quote the signs are there. What proof is there of a drastic loss in weight versus what proof could be there to show a drastic loss in weight. The judge will instruct you that in considering your verdict you consider the evidence and the lack of evidence. It is a simple

matter to show a drastic loss in weight on a 12-year-old child if you wanted to. Easy. She was weighed by Dr. Sharway. They were roughly within a month of each other. So to show a drastic loss in weight all you have to do is go back and get a medical check on this child over a period lf two to three years and show at her physical exams what she weighed, how the weight dropped, how low it got, and then how it started going back up. That is conclusive proof of a drastic loss in weight. Do we have it? No. The only source for virtually all these symptoms is the woman who said I never saw the safe with the $40,000 in it. The woman who said shortly before her settlement of some $89,000 when talking about Cliff, "I know how to get rid of him." That is the same source.

The Solicitor made a big argument about Mr. Eubanks saying in his initial statement, "I don't remember." Different people react differently to accusations. I will tell you this. If I saw someone accused of criminal sexual conduct with a minor and they pounded their fists and denied it vehemently, "That's the most stupid thing I've heard. I would never do anything like that." I would think that falls under the category of me think he doth protest too much. But when you get a nice guy in and say your step-daughter has accused you of touching her inappropriately. What have you got to say. It is easy to touch someone

inappropriately accidentally. You pick them up and carry them to bed while they're asleep. You could accidentally touch them inappropriately. So, when he says it's told you touched her inappropriately, he says I don't remember. Not saying it's impossible that it happened. Like I said, you can go to sleep next to them as everybody does with their kids. Your hand lands on them. They wake up. Oh, his hand is in the wrong place. Inappropriate touching. So I don't remember is as honest an answer as any human being can give. Nothing wrong with that.

Then he says the hip hop dancing can't be reconciled with his viewing pornography. Yes, it can. And it's easy. Hip hop dancing by a 12-year-old or provocative dancing by a 12-year-old done in public is totally inappropriate. Totally inappropriate. And if the Solicitor wants to say this is appropriate dancing for a 12-year-old, he may. I'm sorry. That's not my opinion. So, there is a difference. What you do in public is different from what you do in the privacy of your bedroom with your wife or spouse. This is totally inappropriate.

Then he makes a big deal about erectile dysfunction. Erectile dysfunction is not intimacy. They are two totally different things.

He says Deanie had no idea about the pornography. He said that box was put up there with duct tape. You saw the

box. There was residue of duct tape on it. And it had been in their house on Teague Road not in a box. He bought a box to put it in when they moved to put it in storage. Is there a real possibility that he's telling the truth about that and she knew about it and helped him move it? Yes. Yes. Then she's going to get up here and say I didn't know about it. I didn't know about it. Somebody opened it, and it wasn't Cliff Eubanks.

Then he made a comment about the witness, Mitchell Allen Eubanks. He wanted to speak to him and he skedaddled out of here or something like that. Well, if you observed Mitchell Allen Eubanks was here until the end of Cliff Eubanks' testimony yesterday.

Now, the burden is on the State in this case. Let me back up one second. There is a second statement by Cliff Eubanks and it relates, for all practical circumstances, to criminal sexual conduct third degree. The act, as I said in opening statement, does not make the crime. The intent does. Cliff Eubanks never denied making that statement. What he said in that statement is one hundred percent true, it is just that he never had the child touch him with his intent of arousing his passions or whatever. It was one of those things that just happened. In order for that to be a basis for conviction, you have to believe that he actually got her to sit in his lap for that purpose. For that

purpose. It's not there. It's not there. Something he's ashamed of, embarrassed of, having to deal with that in a public courtroom like this is, well, embarrassing. Embarrassing to him.

The State has argued in their closing about all the things this child went through after making this allegation. Implying why would someone do it. If you go out to a lake on a calm day and you pick up a rock and you throw it into the lake you create ripples and you can't stop them once you throw that rock. You can't stop those ripples no matter what you do. The same thing applies here. Once the allegations of child sexual abuse is made it starts a whole tsunami almost that can't be stopped. So once it's made you're stuck with it, so to speak, because you're going to be caught up in this through all this counseling, all this support, all this attention, forever.

So, it's not like there was a conscious decision to -- after the accusation is made, oh, I think I will go to forensic interviewer. She doesn't make a conscious decision to then go to counseling. It's all things that are just about mandated. The ripples go out, and they can't be stopped.

All of you had the opportunity to sit here and watch Cliff Eubanks and listen to him. Judge him as a human being. He was not required under the law to take that

stand. He wanted to take that stand to defend what has been so badly tarnished, his good name. He told you on that stand I have never been in trouble in my life. If that statement were not true, you would've heard it. Heard about it. It's true. Thirty something years old. He's led a good life. Great family support.

Is there real possibility that Cliff Eubanks was telling the truth? Yes. What else you have to understand as you discuss these real possibilities is the burden then is on the State to eliminate these real possibilities and to tell you and convince you that the real possibilities are not possible. Not that they're not probable. Not that they might not be, but they are not possible. Period. It is not possible that she meant this note. That's what the State has to convince you of. It is not possible that this was the worst thing that happened to her. That's what the State has to convince you of. It is not possible for all those. It's not possible that people who know him best know him best. That's what the State has to convince you of before you can come back with a verdict of not guilty.

I want to mention the pornography that's been discussed in this case. I don't know, y'all. I'm not passing judgement on anybody. I am just saying this. If any person has any pornography in their home and they happen to catch an allegation of child abuse, the State wants you to believe

that is compelling evidence of their guilt. And it simply is not. And it is not for one simple reason. There isn't a scintilla of evidence in this case that any pornography he had was child pornography. None. None. Also, it is indeed interesting from our perspective that they took all these cell phones and computers from Cliff's house. Finally, he turns one in a week or so ago they couldn't analyze because of a cracked screen they never asked him for. They never asked him for it. The cell phone he had in his possession at the time of his arrest, they never asked him for it. They never tried to get a search warrant for it. The one that is probably the most relevant to what his relationship with J.L. is, they never tried to look at it until the week of trial. They didn't try. Why is that significant. Because if he was obsessed with J.L. , as the State would have you to believe, you would've expected to have found suggestive pictures of her, provocative pictures of her, or even a bunch of pictures of her to the exclusion of the other children. They were able to get one cell phone he had that may have been less than a year old at the time of this incident. How many pictures that I just described did they find on that phone? I'll save you the trouble of trying to figure it out. None. None. And because they found no pictures, provocative or otherwise, of J.L. on that phone is there a real possibility that he was not

obsessed with her. Yes, it is. And has the State eliminated that real possibility. No, they haven't. No, they haven't. They haven't eliminated any of the real possibilities I talked about. As I said, not real probabilities, but an honest real possibility. Not somebody from Mars came down here and put these ideas in her head. That's a fanciful -- that's not even a possibility. That's just stupid thinking. We're talking about serious things that are real possibilities in this case, and the State has the burden of convincing you they are not even possible. Not even possible. She says in her forensic interview I would like to see him again. I can't do it until I'm eighteen. Is there a real possibility she mentioned that because she knew at what age she can see him again. When she's an adult. Not the comment of someone who has been sexually abused since the age of six. Not even remotely.

This story evolved from some touching initially to what they got in the trauma interview that you'll have a chance to read, to conduct filled with penetration and all the other sex acts, of which there is no physical evidence. This case should not have evolved once they got through serious 15 weeks of counseling. If and only if what was initially said was true, because if it's not true and it needs to be made stronger for court, it keeps getting added to by somebody somewhere. This is a 12-year-old, 13-year-

old girl. I hold her responsible for nothing. Nothing. And never will. But there are adults in her life that want to get rid of Cliff and want to keep the thirty-something thousand dollars. Is there a real possibility that Cliff bought a safe and put it in there? That Deanie Eubanks knew about it? Yes. Therefore, there's a real possibility that Michael Cliff Eubanks is not guilty, and that should be your verdict in this case. Thank you.

THE COURT: Mr. Scott, I assume you have a reply?

MR. SCOTT: Yes, sir.

THE COURT: Go right ahead, sir.

CLOSING ARGUMENT

BY MR. SCOTT: Well, there it is. I've been waiting for that. The theory -- the big theory of why she made it up. There it was. Remember how during the direct, what is this safe about. Why are we talking about the safe. Nobody has ever reported to police about a missing safe, because there is no missing safe. Deanie Eubanks was given $89,000 as part of a settlement. Her money. But what does she do with it? She lets him deposit it into a joint account. He alone makes the decision to withdraw $40,000. He says for down payment on a home. We never heard about this house he had planned on buying, because he alone made that decision. What is he doing while Deanie is in the hospital with her dying father? He's withdrawing more money and putting it

into money market accounts. Where is that money now? If anybody needs to be questioned about missing money, it's Mr. Eubanks. I mean, remember that text yesterday where she's talking to him. He acknowledged it. She's saying hey, maybe we should save some of this money you're out spending. He says I know, but I want to get some tools. Remember what else he did with the money while she was in ICU? He went and bought a car.

The money in the safe is what I call a red herring. Are y'all familiar with that term? It is an attempt by them to take your eyes off the relevant issue. What that lawyer and Cliff Eubanks are saying is hey, hey. Don't look at that statement. Don't pay attention to him on the stand yesterday and how crazy all his testimony was. Never mind that. Look way over here at this safe. Let's don't talk about the sex stuff, let's talk about this safe. It has nothing to do with anything. That's what I was waiting for and it makes no sense. Again, who cracked the case? It was Kim Little. It wasn't Deanie. Deanie sat in there while J.L. told the story and the counselor listened and she said J.L., why are you saying this. She said that in front of the counselor. She was genuinely shocked until J.L. starts talking about the progression. How he kissed her on her neck and her ears. Then he fondled her breasts. Then he moved down below the belt. She said that's his foreplay.

That's Cliff Eubank's foreplay 101. So, for them to blame it on Deanie it makes no sense, because it wasn't Deanie who ran down to the Sheriff's Department and said I've got something I've got to report. It was Kim Little, okay. Throw that away. That was mischaracterization number one.

Talks about he admits, he agrees, this type of stuff is done behind closed doors. We know this isn't done out in the open. He says nefarious planning is done behind closed doors too. He's wanting you to believe 12-year-old J.L. -- y'all had a chance to look at her. The Judge is going to tell you about credibility. That's one of the things that you are going to judge. Listen, y'all are going to be the judges. I want y'all to remember J.L. 's testimony and I want you to remember and compare that to Cliff's yesterday. I remember him reading that sweet note she wrote him and I remember those crocodile tears. I remember him trying his damndest to conjure up a tear. It wasn't working. It wasn't working. Now, here they are taking advantage of this note. They totally discount the expert. The expert on sexual dynamics. Sexual child abuse and dynamics. She said one of the things -- to me, this is just heartwrenching. I mean, it's something that the expert says in the hundreds of patients she sees it's a common thing that the child who has been abused for all these years has sympathy for their abuser. Are y'all familiar with Stockholm Syndrome? It's

the same kind of thing. You know, a kidnapper takes someone in, holds them against their will, and over time they start sympathizing with their kidnapper. That's what we have here. She is confusing abuse with love. She is confusing manipulation with caring. Because at the same time she's getting all this attention. That's the thing. Now, he's saying she did it all for the attention. That was never the issue for J.L. . Everybody said J.L. got all the attention. She was put on a pedestal. How has this helped her? That's what I'm trying to figure out. The ripples, he says. You can't stop the ripples. I guarantee you you can. Because after you tell Kim -- which I still don't know why J.L. would've done that spontaneously. He says it was nefarious planning. He says he doesn't blame J.L. , but he says there was nefarious planning, I think is what he is saying, between J.L. and her mom. And they got together and they concocted this plan. They said somehow we're going to convince Kim to call J.L. in. J.L. , when it's your cue you're going to suddenly spontaneously disclose this abuse. Then I'm going to play along with you, J.L. . You and me are going to be a team. All right. So when we go to the Sheriff's Department, I want you to tell that story to the investigator. Can you do that, 12-year-old J.L. ? Are we good? Okay, cool. And then after that, I hate to tell you J.L. , but they're going to have to do a physical exam. The

doctor is going to describe antidepressants. But keep playing along, J.L. . Keep playing along. And then, J.L. , you're going to have to miss dance and fun times with your family and friends, and we're going to do fifteen sessions in Greenwood. Can you do that, J.L. ? Are you still on board with this plan, this nefarious plan we've hatched together. Good. Okay. Then, somehow you're going to have to trick the expert into diagnosing you with PTSD. Can you do that, J.L. . Are we still on the same page? That's the Defense. Does that make any sense? I picked you all because I wanted a logical, reasonable -- I didn't want a gullible jury. I wanted a group of people who represent this county and the values of this county. I hope I got it, because if you believe that I've got some oceanfront property in Kansas I want to sell you. I really do if you believe his story.

He talks about -- it's mischaracterization after mischaracterization, what I just heard. What he talked to you about was there was nothing out of the ordinary from her physical exam. Now, I agree Dr. Pritchard said she found no signs of trauma. What she did note was pre-anorexia weight loss. He said there was no evidence of her being underweight, or he said drastic weight loss. That wasn't the testimony. The testimony was she was underweight. Listen to this. She testified to this, Dr. Pritchard. In

her report -- he said it was a completely normal exam. Difficulty sleeping, quiet and withdrawn, angry outbursts.

MR. WISE: Your Honor, I don't believe that was in evidence.

MR. SCOTT: Genital pain. That was testified to, Your Honor.

THE COURT: Ladies and gentlemen of the jury, remember the testimony of Dr. Pritchard as it was given. Obviously, again, you are the judges of the facts and if, at any time, the lawyers say something that differs from your recollection go with your recollection, in this case about what Dr. Pritchard testified to. You may continue, Solicitor.

MR. SCOTT: Dr. Pritchard testified to genital pain, her having two UTI's in the past year, change in appetite, frequent stomach aches, vaginal discharge. She had a weight of 81 pounds.

MR. WISE: Your Honor, I have an objection. He is reading from a report and saying that is what she testified to. That is improper.

THE COURT: Again, the jury will recall Dr. Pritchard's testimony as she gave it orally. If what she says differs from what the Solicitor says, go with your recollection of her testimony.

MR. SCOTT: I want you to hear these things. I don't

want anything to be hidden from you guys. She said the girl was underweight in her exam. He wants you to hear that it was completely normal. I want you to hear it.

That trauma narrative, that's an interesting thing. He's wanting this to be the end all be all of everything. He's wanting you to ignore all the testimony and just look at the trauma narrative. I do want you to look at this. I really do, but I want you to remember what Samantha Black testified to. This is not meant for law enforcement. It is not meant to be a piece of evidence in court. This is meant for therapy. This is a therapeutic exercise after they complete their sessions, 15 weeks. She is asked to let's put your thoughts on paper. It is a healing exercise. It's not meant to encapsulate -- she talked about that. Is this supposed to cover everything? No. We talk about first, worst, and last. It's an exercise because when she talks about it with the counselor the counselor asks well, how can you deal with this. What are things we can do moving forward to help you move on and heal from it. He says well, even the worst isn't that bad. Let me read it to you. "My mom, brother, grandma, and great-grandma went to L.L. 's band competition. I had to stay home because my mom thought it would be too late when it would be over. I was sad that I couldn't go to the band competition. My step-dad would watch me and B.E. . He would put B.E. in the bath and tell

her to turn off the water when it got to her belly button. I thought that was weird. I was wondering why he was putting her in the bath so late. I thought maybe he would touch me again. I felt awkward being with just him in the same room together because of things he had done in the past. He came back, turned off all the lights, and turned on the lamp. He turned the t.v. on low. It was probably 10:30. I looked at him. He was taking off all his clothes." That lawyer doesn't think that sounds too bad. "I was wondering when my mom would be home and I felt scared. I closed my eyes real quick and he started taking off all my clothes. He would get in the bed and cover us up." Sound familiar? "He would put his boy part in my girl part, kiss my neck and my ear. He would move back and forth, try to be inside of me, but it wouldn't. I felt scared the whole time. He had a rag with him. He would push me off and turn to the other side with the rag." Y'all know what that 12-year-old girl is talking about when he's moving back and forth trying to get inside of her. Y'all know what he's doing with the rag when he pushes her off of him. How does that 12-year-old girl know about these things? Her mother was taught sex ed by Song of Solomon. This is a naive girl who is talking about very grown up things. That lawyer says y'all don't worry about that trauma narrative and that worst thing. It's not that bad.

This is a nightmare. "I felt scared the whole time." Nevermind that, guys. Look over at the safe. Look at the safe. Don't pay attention to the facts. Look at the safe. "He had a rag, pushed me off, and turned to the other side with the rag. I didn't know why he did this." We know why he did that. He's ejaculating in the rag. "Then he would put his clothes back on and my clothes. I was glad it was over. Then he would go wash B.E. , come back, and go to sleep. I worried that he may do something to B.E. too, but I was too scared to say anything because I thought he might hurt me." That's not that bad to the middle-aged lawyer over there. I don't know what kind of long term effects it will have on a 12-year-old girl.

He believes this is a case of something created. This is victim shaming. That's all it is. I mean, we could go to any high school basketball, football game -- I think Deanie called this a straddle hold or something. Isn't it funny though that the same people who find hip hop dancing -- and the lawyer said it was his opinion too that hip hop dancing was offensive. For some reason, they are just unoffended by an enormous collection of pornography. Of all kinds of depraved acts. They are unoffended by internet searches. They're unoffended by a Defendant that admits he is attracted to very young appearing girls.

I'm sorry, y'all. I don't mean to -- I've got to cover

everything. I'm so scared that something he just said that makes absolutely no sense will gain traction. I hope it doesn't, and maybe I'm just arguing too hard. Some of the things I hear just blow my mind. I mean, we are shaming the victim here. We are talking about a man whose sexual interests and desires are just really out there, and we're blaming a victim. And we're talking about a guy who admits statement number two. He admits to that happening. Tip of the iceberg stuff, but he's admitting to it. At the same time we're saying blame it on the girl. Don't worry about the 35-year-old 210 pound man, blame it on the 81 pound 12-year-old. Because, my God, he cannot fight her off. This girl -- y'all don't understand how provocative she is. How flirtatious. I'm helpless. Kids these days. How many of his witnesses talked about kids these days. His mom did, his dad did, he did, his lawyer just did, who else did. Oh, the lady from the church. Kids these days. You think they all got together and talked about that when they were meeting and getting ready with their testimony. Their testimony sounded very similar to one another. They were even using the same terminology. You saw the concert. You saw how the lawyer was driving the train, because this picture -- remember how Mitchell twerk Eubanks produced that. He said the lawyer told me to go find something. He told me to dig up the dirt, and that's all he could come up

with. This is the provocative dancing we're talking about. This is why they want to blame J.L. . It's despicable.

Statement number one. Okay, he says the Solicitor makes a lot about statement number one. I stand by that. I stand by that is a weird statement when confronted with allegations of child abuse that as far as I know I haven't. And he thinks it would be odd -- I tell you what. What I would do if somebody said, "Mr. Scott, we have allegations that you've abused a small child." I would. I would slam my fist down and I would say absolutely not. Tell me who said it. I want to talk to them right now. Absolutely not. So, if he thinks that's methinks she doth protest too much, that's what I would do. I believe that's what the normal person would do. I believe that anybody who was innocent would do that. I believe somebody with something to hide would say something like well, you know, I don't know what I do when I'm asleep. Who says that? He thinks that's normal. I disagree.

Deanie -- they talk about the tub of porn. Deanie knew about the tub of porn. She says she didn't. He said she did. What I want to know is why does that really matter. The point is that J.L. knew about it. Why did J.L. know about it. He admitted because I showed her where it was. I told her about it, told her what was in it, and told her to move it. So Deanie said she didn't know about it, but

really that's not all that relevant. The relevant part is that he told J.L. about it.

The iphone. He asked well, why didn't the State try to get it. The State didn't know about it. I don't know what Cliff had done with it over all this time, but strangely he produced it late last week and it was busted to smithereens. He wants to know what was on that phone. I do too. I don't guess we'll ever find out, but he was able to do such a job on it that trained professionals couldn't get into it. He's right. I'd like to know what was on that phone. I mean, we could ask Cliff. I don't remember him talking about it. I guess we'll never know. I guess we'll never know what he's done with it over the past year. I guess we'll never know if he smashed it right before handing it to us.

You know, the lawyer says I don't hold the victim responsible for any of this. The Defendant does, though. You heard him yesterday. That was the last thing he said. That was J.L. 's fault. What he admitted to in the barn. That was all her fault.

Their defense, the act does not make the crime. It is the intent. By that logic, today I can get just completely drunk, drive home, wreck and kill five people, get out and say eh, that wasn't my intent. I really didn't mean to kill anybody. Nevermind all the dead people. I didn't mean to. It's preposterous, but that's the kind of things they are

arguing. If that tells you anything, that's their argument to you guys. I want logical, reasonable jurors. I think I've got them. I think I got twelve people who are going to see through that BS. I'm counting on it. J.L. is counting on it.

Beyond a reasonable doubt. Me and this lawyer have a very different understanding of what this means. He says we have to prove that it's impossible that he didn't do what we said he did. That's not it. What I'm going to show you, I want you to listen to what the judge tells you about reasonable doubt. It's going to be what I just told you. It will have nothing to do with what he just told you. Here's what this judge is going to tell you. Reasonable doubt, what does it mean. He's going to give you a little more detail. What I'm telling you will be included in his instructions. Does it mean beyond all doubt. Okay, when you go back there and you're trying to determine what your verdict is can you have some doubt. Can it be well, maybe on that occasion he used his mouth but not his penis. Maybe on this one, you know you can have some doubt about some things. It's one of these things -- who all remembers what all they ate for lunch Friday a week ago. None of us. Maybe one or two of us because it stands out. I certainly don't. So, when we come to court we have this sometimes unreasonable expectation that a victim will remember. You

have to remember, this is chronic, systematic abuse for six years, but we're asking her can you kind of give us a date when that happened. Can you give us a date when this happened? Typically, what we see is what we see in J.L. . That is, I know I was about eight when that time on the couch happened. I remember that was the time he did the tongue. So, you can have some doubt. Well, was it when you were eight or when you were seven. There can be some wiggle room, and reasonable doubt allows that. It doesn't mean you can't have any doubt as to any part of the testimony. It means that if you have a doubt that is reasonable and based on logic -- in other words, if you think his excuse is pretty reasonable that he couldn't push J.L. off of him --

MR. WISE: Your Honor, under the Beaty case, I object to his Powerpoint in closing. This should have been in his opening statement requiring him to open on the law and the facts, in which I could have responded.

MR. SCOTT: He argued reasonable doubt. I'm responding.

THE COURT: You did argue reasonable doubt. He is going to --

MR. WISE: I know I did. He should have too.

MR. SCOTT: I'm replying to his argument.

THE COURT: I will charge the jury on reasonable doubt. You can all talk about reasonable doubt. You argued it. He can argue it in both. Go ahead.

MR. SCOTT: Thank you, Judge. I want y'all to hear this. It means reasonable and based on logic. So if you guys use your reason and logic and y'all judge his credibility from the stand yesterday as it was and you truly believe J.L. was the aggressor and he was the victim, then you can discount that story. If that's what you think is reasonable and logical. If you have a doubt that is reasonable and based on logic, you should find the Defendant not guilty. But, if your doubt is not reasonable or your doubt is not really logical -- is his version logical to you guys? The 81 pound 12-year-old forcing herself on him. No. Again, do you have to be one hundred percent certain of his guilt? I would submit to you that the evidence proves that with all certainty he is guilty, but reasonable doubt does not even require that. The judge is going to tell you that there are few things that we know in this world with absolute certainty. In criminal cases, the law does not require proof that overcomes every possible doubt. He's going to tell you this okay. If, based on your consideration of the evidence you are firmly convinced -- firmly convinced is a term we can all understand. I'm giving you a bunch of legalese. We all understand what firmly convinced means. He's going to tell you that twice. He's going to use the term "firmly convinced" twice when he reads you his reasonable doubt instruction. He's going to

say if you are firmly convinced the Defendant is guilty of the crime you must find him guilty. Has not all the evidence, have not all the witnesses convinced you, firmly convinced you, of his guilt. I submit to you that is the only direction the evidence points in. I submit to you that he is guilty of all three charges. I ask you again, respectfully, find him guilty of all three charges. Thank you.

THE COURT: Thank you. Ladies and gentlemen, before I begin my remarks to you I know that you're probably getting a little bit hungry. I've already asked the Clerk to place an order for some pizza for you. It was the quickest way to get you food as opposed to breaking for 20 minutes and passing out menus, so pizza is sort of generic thing that most people like. That's what I told her to do. That will kill whatever bug is in your stomach right now, as far as the hunger bug.

Now, ladies and gentlemen, I'll let you know at this stage of the trial it is my obligation to instruct you on the law that applies. Please understand that at this point all the testimony and all the evidence has been admitted that you are going to have in order to judge this case. There is no mechanism whereby we can re-open the record and take additional testimony and give you additional factual information, so if you have any factual question about the

case and you send a note out asking me about that kind of factual question if it's not on the record odds are that I'm not going to be able to help you with any sort of factual question you have because, again, the record is closed. However, if you have any questions about these instructions, Mr. Foreman, any question about the law that applies I want you just to write me a note. I can help you on the law. I can't help you on the facts.

Ladies and gentlemen, when I first started practicing law 25/26 years ago I'll let you know that the way judges traditionally instructed a jury and the way that some judges still do it is they would sit up here and read from you basically 17 pages from the law taken from the law books behind me and the jury was supposed to absorb it and get it all on the first try and understand all of this stuff on the first hearing. I always found that a little unreasonable, and I think this tradition probably came from a time in our state when most people simply couldn't read. Most people were illiterate, and so the judge had to explain the law orally. Long story short, what I'm telling you, Mr. Foreman, I will give you a copy of these instructions in written form. During your deliberations, you may refer to the instructions to guide your decision-making. You must consider the instructions as a whole and not follow some and ignore others. Please return the instructions to the court

at the time your verdict is rendered.

Ladies and gentlemen, I instruct you that the Defendant in this case is charged with criminal sexual conduct with a minor in the first, second and third degree. I remind you that the fact that Mr. Eubanks was arrested, charged and indicted in this case is not evidence in this case and cannot be considered by you as evidence of guilt in this case, nor does it create any presumption or inference of guilt. These documents are merely the formal written instruments which contains the charges made against the defendant. These are the formal documents by which this case is brought into court.

Each indictment and each charge is a separate and distinct offense. You must decide each indictment separately on the evidence and the law applicable to it uninfluenced by your decision as to any other charge. The defendant may be convicted or acquitted on any or all of the offenses charged. You will be asked to write a separate verdict of guilty or not guilty for each of the charges in the indictments.

Ladies and gentlemen, the Defendant has pled not guilty to these indictments, and that plea puts the burden on the state to prove the defendant guilty. I instruct you that a person charged with committing a criminal offense in this state is never required to prove himself innocent. I

instruct you that it is an important rule of the law that the defendant in a criminal trial, no matter what the seriousness of the charge may be, will always be presumed to be innocent of the crimes for which the indictment was issued unless guilt has been proven by evidence satisfying you of his guilt beyond a reasonable doubt. Ladies and gentlemen, this presumption of innocence does not end when you begin your deliberations, rather it accompanies the defendant throughout the trial until you reach a verdict of guilt based on evidence satisfying you of his guilt beyond a reasonable doubt.

The presumption of innocence is often described as being like a robe of righteousness. It's placed about the shoulders of the defendant which remains with him until it has been stripped from him by evidence satisfying you of the defendant's guilt beyond a reasonable doubt. The presumption of innocence is not mere legal theory. It is not just a legal phrase. It is a substantial right to which everyone is entitled unless you, the jury, are satisfied from the evidence of his guilt beyond a reasonable doubt.

What is a reasonable doubt in the law? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. The state has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases where

you were told that it is only necessary to prove that a fact is more likely true than not true, such as by the greater weight or the preponderance of the evidence. In criminal cases, the state's proof must be more powerful than that. It must be proof beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crimes charged, you must find the defendant guilty. If on the other hand, you think there is a real possibility that the defendant is not guilty, you must give him the benefit of the doubt and find him not guilty.

I remind you that, during this trial, you and I have certain duties to perform. As the trial judge, it is my responsibility to preside over the trial of this case, and I also have the duty to rule on the admissibility of the evidence offered during this trial. You are to consider only the competent evidence before you. If there was any testimony ordered stricken from the record in this case during this trial, you must disregard that testimony. You are to consider only the testimony which has been presented

from this witness stand, any exhibits which have been made a part of the record in this case, and any stipulations of counsel.

I have the additional duty to charge you the law applicable to this case. As the presiding judge, I am the sole judge of the law of this case, and it is your duty as jurors to accept and apply the law as I now state it to you. If you already have any idea as to what the law is or what the law should be and this idea does not agree with what I now tell you the law is, you have to abandon this idea because you are sworn to accept the law and apply it as I state it to you.

Again, ladies and gentlemen, you are the sole and exclusive judge of the facts in this case. Understand that a trial judge cannot intimate, state, comment on, or make any statement to a trial jury about the facts in a case. Since you, the jury, are the sole judges of the facts in this case, you are not to infer from what I have said during the progress of this trial in ruling upon the admissibility of evidence, or otherwise, or anything that I say to you now during the course of this instructions, that I have any opinion about the facts in this case. Ladies and gentlemen, the law does not permit me to have an opinion about the facts in this case. This is a matter solely for you to determine. As jurors, it is your duty to determine the

effect, value, weight, and truth of the evidence presented during trial.

Now, in criminal cases, ladies and gentlemen, there are typically two types of evidence which are generally presented, direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction, such as testimony by an eye-witness. Circumstantial evidence is proof of a chain of facts and circumstances which indicate the existence of a fact.

I instruct you that crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or to circumstantial evidence, however, to the extent the state relies on circumstantial evidence, all of the circumstances must be consistent with each other and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed. I instruct you that the state has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the state regardless of whether the state relies on direct evidence, circumstantial evidence, or some combination of the two.

Ladies and gentlemen, in this case a statement alleged

to have been made by the Defendant has been admitted into evidence. While the Court has determined that the statement is admissible, I instruct you that you make the ultimate decision whether or not the Defendant, in fact, made the statement. If the Defendant did make the statement, you must determine whether the statement was made by the Defendant voluntarily and of his own free will. This means that the statement was not caused by pressure, force, fear, threats, coercion, or intimidation, or by hope of promise, leniency, or a reward of any kind. In determining whether the statement was voluntary, you should consider both the characteristics of the Defendant and the details of the questioning. Some of the factors that you must consider are the age of the Defendant, the Defendant's education or lack thereof, the Defendant's mental ability or capacity, the Defendant's IQ or intelligence, his background and environment, the place and length of the detention, the nature of the questioning, and the advice or lack thereof to the Defendant regarding his Constitutional rights including but not limited to his right to remain silent, that any statement could be used against him in court. His right to have an attorney present. If he couldn't afford one, one would be appointed to represent him at no cost to him, and that he could stop making the statement at any time. You have to carefully consider all the surrounding circumstances

before you give any weight to an alleged statement. The State has the burden of proving beyond a reasonable doubt that the alleged statement was voluntary. If you determine that it was, you may give the statement any further consideration you deem proper. You have to decide what weight, if any, should be given to the alleged statement. If you determine that the alleged statement was not the free and voluntary statement of the Defendant, you should not consider the statement at all.

Ladies and gentlemen, in finding the facts in this case, necessarily you have to determine the credibility of witnesses who have testified in this case. Again, credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth. In determining the believability of witnesses who have testified, you may believe one witness over several witnesses or several witnesses over one witness. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety or reject it in its entirety. You may consider whether any witness has exhibited to you any interest, bias, prejudice, or other motive in this case. You may also consider the appearance and manner of a witness while they are on the

witness stand.

Now, as I explained previously with regard to expert witnesses, ladies and gentlemen, the rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists for witnesses who are experts in some art, science, or profession. They may give an opinion as to the subject the witness claims to be an expert in, and they can also give the reasons for those opinions. You should consider any expert opinions given by a witness and, like any other evidence, give it the weight you think it deserves. If you decide that an expert witness' opinion is not based on sufficient education and experience, or if you decide that the reasons given in support of their opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion in its entirety. An expert witness' testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert, and you do not have to accept an expert's opinion, even though it is uncontradicted.

In this case, ladies and gentlemen, you have heard character evidence concerning the defendant. I instruct you that evidence of good character and good reputation may, in and of itself, create a doubt as to the guilt of the accused and should be considered by you, the jury, along with all

the other evidence, in determining the guilt or innocence of the defendant. The good reputation of the defendant, if proven, may be taken into consideration by you in determining whether or not the defendant committed the crimes charged.

Now, ladies and gentlemen, the defendant is charged with three counts of different degrees of criminal sexual conduct with a minor. I instruct you that when two or more acts of criminal sexual conduct occur at or about the same time, each is a separate crime rather than one continuing crime. We'll address first the charge of criminal sexual conduct with a minor in the first degree. The defendant is charged with first degree criminal sexual conduct with a minor. The State must prove beyond a reasonable doubt that the defendant engaged in a sexual battery with the victim. The state must then prove beyond a reasonable doubt that the victim was less than eleven years old at the time of the sexual battery.

Second degree criminal sexual conduct with a minor. In order to prove that, the State must prove beyond a reasonable doubt that the defendant engaged in a sexual battery with the victim. The State must also prove beyond a reasonable doubt that the victim was fourteen years of age or less but at least eleven years of age.

Under the law, ladies and gentlemen, as it relates to

criminal sexual conduct with a minor in the first and second degree, a sexual battery is defined as sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body.

Finally, ladies and gentlemen, the defendant is charged with committing criminal sexual conduct with a minor third degree. The State must first prove beyond a reasonable doubt that the defendant was over the age of fourteen years of age. Next, the State must prove that the defendant willfully and lewdly committed or attempted a lewd or lascivious act on, or with the body or its parts of, a child under the age of sixteen years of age, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the defendant or the child.

Willfully means voluntarily and intentionally with the specific intent to do something the law forbids. Lewd means obscene, lustful, indecent, or lecherous. Lascivious means tending to incite lust, lewd, indecent, obscene, or tending to deprave the morals in respect to sexual relations.

Ladies and gentlemen, with regard to all the above offenses, consent, willingness, indifference, or ignorance on the part of the minor, if any, as to what was taking place, does not in any way affect the charges of criminal

sexual conduct with a minor because a person under the age of sixteen cannot legally consent to sexual intercourse.

Ladies and gentlemen, in order to establish criminal liability, criminal intent is required. As I explained to you previously, criminal intent must be proven by the State beyond a reasonable doubt. Criminal intent is always a matter that must be determined by the jury from the circumstances surrounding the situation. Understand that here is no way to prove intent to a mathematical certainty. There is no way medical science can dissect a person's brain and determine what the person had in mind, so the law says that criminal intent may be inferred from the circumstances shown to have existed. This is how you make a determination of whether or not the element requiring intent was present. It is not necessary to establish intent by direct and positive evidence, but intent may be established by inference in the same way as any other fact by taking into consideration the acts of the parties and all the facts and circumstances of the case. Criminal intent is a mental state, a conscious wrongdoing. It is up to you to determine what the defendant intended to do based on the circumstances shown to have existed.

Now, ladies and gentlemen, in this case there are 6 possible verdicts. Mr. Foreman, I've prepared this verdict form that you can use to guide your deliberations and to

render your verdict when the jury does agree on the verdict in this case. It basically makes three statements. You're all smart people and you can figure this out, but the law still makes me go over it with you. The first statement is as follows: "We, the jury in the above captioned case, on the charge of first degree criminal sexual conduct with a minor unanimously find Michael Cliff Eubanks," and then there are two mutually exclusive options, either guilty or not guilty. Again, there is no significance in the order of which I state either of those verdicts. If you find that the State has met its burden of proving the Defendant's guilt beyond a reasonable doubt on the charge of criminal sexual conduct with a minor in the first degree, you would simply initial next to guilty and proceed on down. If you find the State has failed to meet its burden of proving the Defendant's guilt beyond a reasonable doubt to the charge of criminal sexual conduct first degree initial not guilty and move to the second question.

The second question relates to criminal sexual conduct with a minor second degree, and the final statement relates to criminal sexual conduct with a minor third degree. Exact same question, the only difference is the nature of the charge for each of those statements. If you've got any questions about this ask me, but I don't think you will.

As I mentioned a moment ago, ladies and gentlemen, all

twelve of you have to agree on the verdict as it relates to all three charges. The verdict must be a unanimous one. That means all twelve of you have to agree. Other states do not require unanimous verdicts. Some states permit a majority verdict. Those states are doing it wrong. In South Carolina there has to be all twelve people agreeing on each and every aspect of this verdict. You all have to be unanimous.

I remind you that you have been chosen as fair and impartial individuals. In other words, you have no friends to reward, you have no enemies to punish. Your job is to render a verdict based solely upon the evidence presented and the law as I have instructed. I ask that you now return to your jury room but do not begin deliberations until you are told by the clerk or the bailiff to do so. There are some matters which must be discussed with the attorneys before you begin your deliberations. Your cue to begin deliberations, Mr. Foreman, will be receipt of these instructions, receipt of the verdict form, and receipt of the evidence which was introduced in this case. The pizza has been delivered. Your cue to begin will be receipt of the evidence, instructions, and verdict form. Only if there is some correction I need to make will I bring you back out here and give you further instructions.

When you have reached a verdict, Mr. Foreman, just

complete the verdict form, knock on the door and let the Bailiff know and we'll get you back in here and assembled. Enjoy your lunch.

(Whereupon, the jury exited the courtroom at 1:12 p.m.)

THE COURT: With the exception of the Court's failure to instruct what was referenced in Court's 1, any additions or exceptions from the State?

MR. SCOTT: No, Your Honor.

THE COURT: Same to you, Mr. Wise?

MR. WISE: Well, actually I have a point I meant to mention earlier. I would request to charge the jury -- the Court charge the jury -- and I know the law so don't worry about arguing too long. The mandatory minimum on criminal sexual conduct first degree, because while sentencing generally is up to the judge, with a mandatory minimum the jury basically sets the sentence.

Secondly, in the criminal sexual conduct third degree, upon listening to it, I think there still needs to be a specific intent to arouse. The specific intent portion of the charge referred to the actual touching, and you can have a specific intent to touch, but I think the jury has to understand there also has to be a specific intent to arouse oneself. If that makes any sense.

THE COURT: I appreciate your position. I think that the instructions adequately convey the gravamen of the

defense. Of course, the Court is declining the instructions that you requested in Court's number 1 as well. Let us make sure that the evidence is correct as far as what's going back to the jury and we will send it back there.

(Whereupon, deliberations began at 1:17 p.m. and concluded when the jury indicated they had a verdict at 3:45 p.m.)

THE COURT: I'm informed the jury has, in fact, reached a verdict in this case. Anything prior to receiving the jury from the jury room from the State?

MR. SCOTT: No, Your Honor.

THE COURT: From the Defense?

MR. WISE: None from the Defense.

THE COURT: Just one quick word of caution before I bring the jury in. Understand that the lawyers and myself do this day in and day out, and so perhaps we've become somewhat desensitized to a lot of the stuff that this jury and you folks were exposed to this week. I know that there's a lot riding on this case. I want to compliment everyone in attendance for the way they've conducted themselves this week maintaining your composure, not causing any outbursts. Understand these twelve people have been exposed to something that most people thankfully don't have to hear about frequently. Whatever their verdict is, and I don't know what it is, whatever it is I cannot have their

decision insulted. I cannot have any outbursts. I can't have any cries of jubilation or sorrow, whatever. So, if you find yourself once the verdict is read, unable to control your emotions please feel free simply to quietly stand and leave through the back doors back there. There is not going to be any disruption once this verdict is read, please. That simply cannot happen. Let's have the jury, please.

(Whereupon, the jury entered the courtroom at 3:59 p.m.)

THE COURT: The record will reflect that all twelve jurors are present and seated. Mr. Foreman, I'm told that the jury has reached a verdict in this case.

JURY FOREMAN: Yes, sir.

THE COURT: If you would, hand the verdict form, please, to the Bailiff.

Madam Clerk, you can publish, please.

MADAM CLERK: Your Honor, in the State of South Carolina versus Michael Cliff Eubanks, case number 2017-GS-30-1499, -1294, and 2018-GS-30-1205. We, the jury in the above captioned case on the charge of first degree criminal sexual conduct with a minor, unanimously find Michael Cliff Eubanks guilty. We, the jury in the above captioned case, on the charge of second degree criminal sexual conduct with a minor, unanimously find Michael Cliff Eubanks guilty. We, the jury in the above captioned case, on the charge of third

degree criminal sexual conduct with a minor, unanimously find Michael Cliff Eubanks guilty. Signed by the foreperson, Tony E. Bailey, August 3, 2018 in Laurens, South Carolina. Ladies and gentlemen, if that be your verdict, please indicate by raising your right hand.

(Whereupon, all jury members raised their right hands.)

THE COURT: Let the record reflect that all twelve jurors did, in fact, raise their right hands. Anything further from the jury prior to their discharge from the State?

MR. SCOTT: No, Your Honor.

THE COURT: From the Defense?

MR. WISE: We would request that the jury be polled.

THE COURT: Ladies and gentlemen of the jury, in a moment the Clerk of Court is going to call your names individually. When your name is called, just raise your right hand. She'll then ask you a question whether this is your verdict and whether it is still your verdict. She will ask each of you that individually when your name is called. Ms. Lancaster, if you'll call the roll and poll the jury, please.

THE CLERK: Ladies and gentlemen, the verdict that I have just published was the verdict you reached in the jury room. I asked you was it your verdict then and is it your verdict now. As I call your name, please answer yes or no.

Tony E. Bailey?

JUROR: Yes.

THE CLERK: Michael W. Tucker?

JUROR: Yes.

THE CLERK: Kimberly B. Darnell?

JUROR: Yes.

THE CLERK: Edward A. Kennedy?

JUROR: Yes.

THE CLERK: Rodriguez Woodruff?

JUROR: Yes.

THE CLERK: Kevin T. King?

JUROR: Yes.

THE CLERK: Donna W. Sullivan?

JUROR: Yes.

THE CLERK: Bess E. Caldwell?

JUROR: Yes.

THE CLERK: Shawn J. Bush?

JUROR: Yes.

THE CLERK: Pamela Armstrong Martin?

JUROR: Yes.

THE CLERK: Teresa D. Kinards?

JUROR: Yes.

THE CLERK: Danielle J. Lowe?

JUROR: Yes.

THE COURT: The jury having been polled, Mr. Wise,

anything further, sir?

MR. WISE: Nothing further.

THE COURT: Ladies and gentlemen of the jury, I want to thank you for your jury service here this week. Just a few parting remarks. First of all, the Clerk of Court does have your checks ready for you. She'll pass those out to you in the hallway in just a few moments, okay? One of you had asked if you do, in fact, have to turn it over to your employer. Yes, if your employer reimburses you for jury service and pays you in any way you have to give it to them. You can't avoid that. Second thing I wanted to mention to you is that you will receive a letter in the mail from me which will be mailed shortly. You might get them tomorrow or Monday. The letter's purpose is to formally thank you for your work here this week. I realize that most of you aren't exposed to the kinds of things we were talking about on a regular basis. For those of us who do this day in and day out, judges, lawyers, and everyone, we appreciate that maybe how we've become desensitized to some of this information. Maybe what you've heard this week you've found shocking or unpleasant. I'm sorry to put you through that, and that's why I want to formally thank you with the letter that you'll get in the coming days. I have an ulterior motive in sending those letters out. It has my contact information. If there's anything that you liked about jury

service, I'm happy to hear from you. If there's anything you didn't like about it or thought we could do better, I definitely want to hear about it. The written copy of the jury instructions to the jury room, that idea came from a juror when I first started working in this job about eight or nine years ago. If there's anything that you didn't like or anything that you think could make your experience better or more helpful, I want you to let me know and don't be shy. I have a thick skin. I can take it, whatever the criticism may be. With that, I'm not going to keep you any longer. If you want to stay for sentencing, what will happen in the coming minutes the Solicitor will prepare some sentencing sheets and we'll take a brief break. I'll then hear from the victim and any members of her family, and certainly from Mr. Eubanks and any members of his family. If you wish to remain for sentencing that's perfectly fine. For security reasons, what I'll need you to do is there's a couple of benches on the back row. You see the deputy who is standing there? If you want to stay for sentencing we'll make a few of those rows available for you. For security reasons, we need you to be out there though as opposed to over here. So if you want to stick around that's fine. If you don't want to stick around that's fine too. Take your check and you're free to go. You're free to stay, whatever the case may be. Do remember that if you're summoned for jury duty in the

next three years you can tell the Clerk of Court that you served on the jury here in July and August and she'll automatically exempt you. You won't even have to show up on Monday. So, with that I'll bid you adieu. You have my thanks, my appreciation, and if there's anything you want to tell me you'll have my contact information either in the mailbox tomorrow or some time on Monday. Have a lovely weekend. You are excused, except for the Foreman who I need your signature on the actual indictments. The rest of you can step outside.

(Whereupon, the jury was excused from service.)

THE COURT: We'll be back on the record in about five minutes.

(Whereupon, there was a brief recess until 4:11 p.m.)

THE COURT: I believe the Defense, Mr. Wise, will be moving for a new trial and renewing all previous motions?

MR. WISE: I would like to reserve the ten days for that.

THE COURT: Certainly. Very good. You have ten days. Obviously, any appeal in this matter also has to be filed within ten days of the Court ruling on any motions and any action post-conviction relief needs to be filed either one year from now or one year from any exhaustion of any appellate action taken in this case.

Solicitor, in pre-trial you had informed me that Mr.

Eubanks does not have any prior criminal history. Is that correct?

MR. SCOTT: That is correct.

THE COURT: Before I turn to the Defense, I am more than happy to hear from the victim in this case if she wants to address me. J.L. is more than welcome to come up here and stand or wherever she is comfortable. If she wants to stay there that's fine too. And anyone on her behalf I am more than happy to hear from them as well.

J.L. : All I wanted was a dad. I figured that he would be that dad. Even though you -- even though he did do terrible things to me, I thought that he would actually care about me and my feelings. But, after I confessed, you told me that it was all my fault and I made -- and it made myself feel so bad in a way that I shouldn't feel. I realized that you never cared about me and all the things that you said was just a lie. The only thing that I have to say is that I do miss the good memories and the fun times, but I will never forget the pain that you left.

THE COURT: Thank you, J.L. .

DENISE EUBANKS: J.L. is a beautiful, talented child with a beautiful heart, but Cliff took away something that she could never get back and replaced it with fear and anger and hurt. No child should ever have to feel that. I just ask the Court to please take that into consideration, that

not one time during these last years that she had to go through this abuse did he take her feelings into consideration one time. It's hard. I'm sorry.

THE COURT: Take your time.

DENISE EUBANKS: Just please take that into consideration when sentencing.

THE COURT: Thank you. Solicitor, anything further from the State?

MR. SCOTT: As far as sentencing, Your Honor, first of all I want to thank the jury. I really want to thank you on behalf of the State, on behalf of J.L. and her family. Thank you very much for your attentiveness and thank you for your decision after listening to the evidence. We appreciate that. This is a big victory for the County of Laurens. I get too many of these cases, and I'm tired of them. This man is being held accountable. I'm going to ask you something, Judge. You hear a lot of cases from me, so I'm not saying this without thought behind it. You have seen me convict drug dealers who get 25 years for dealing drugs. This man has stolen a piece of that girl's soul. I mean that. I don't mean that lightly. I mean that. I've gotten to know J.L. , and I think she'll be able to move past this to some degree, but it will haunt her the rest of her life. I think there should be some consecutive sentence here. The jury has found him guilty on all three counts,

which span a time period of over six years of chronic, persistent abuse. I think this type of crime deserves some kind of consecutive sentence, Your Honor, and that's what the State would be asking.

THE COURT: Thank you, sir. I appreciate your position. Mr. Wise, I'm certainly happy to hear from you, Mr. Eubanks, and any member of his family who may want to speak on his behalf.

MR. WISE: Your Honor, the family understands that for all practical purposes your hands are kind of tied with a mandatory minimum sentence. You had a chance to see the caliber of his family when they testified. I don't know what they can add to that.

I would like to tell the Court that over the time I've been representing Mr. Eubanks since his arrest on the first charge I met with he and his family in my office. If we've met once, I know we've met a half a dozen times if not more. Probably the shortest visit we've ever had was two hours. I have talked to them at length. I have always liked Cliff Eubanks. I have always admired his family and how he was raised and the caliber of people they are frankly. I would like frankly to say for the record that I trust one day, I don't know when, but one day the truth of this matter will come out. I don't think it did in the courtroom today. I'm sorry to say that, but I don't think it did. I know His

Honor's hands are tied. I don't know more what I can say more about him than he said on the stand and what his family said on the stand.

THE COURT: I understand. Mr. Eubanks anything you want to say? Your father is standing. I'll be more than happy to hear from him first if he wishes to address me.

MR. EUBANKS: I'll go first. First of all, I just want to thank Rauch for all of his dedication and hard work he has done for me. I also, for the record, I love my kids. I will still plead not guilty til this day. I do love A.E. , J.L. , L.L. , P.E. , and B.E. . They are my kids. I would never harm them in any way. I think the decisions that were made here today were -- I'm not blaming the jury for their -- you know, what they've been through. They've been here all week and it's just -- I mean, it's just a hard decision to make. Also, I would like to tell my family that -- thank them for all their support and standing behind me and that I love them. They mean to the world to me, as much as my kids do. I am a family man. I've never been in trouble. I never would hurt anyone. I just got caught up in the wrong time.

THE COURT: I understand your position, Mr. Eubanks. Sir, happy to hear anything you want to say on behalf of your son.

MR. EUBANKS (Defendant's father): I'll try. First, let

me say I'm sorry. I just hate for everybody this week. The kind of man this is, he's a good man. I seen and I understand the State. They had to do their job. I didn't see a lot of the facts come out. But he's a good man. Again, I just want to say I'm sorry. We've been going through a lot. I'm trying to hold back. I haven't seen these kids in a long time. And I know it's hard on him. He done a lot a stuff around the house for me and I see in his eyes he misses these kids. It's just a mistake, Your Honor. It's just something that happened. I know he probably is ashamed. I know he is. It's just something that happened. We just -- the only person that's not the -- no disrespect to you or the jury, they did their jobs. But there is one man that's going to judge him in the end and that's the one above. I thank you for letting me speak.

THE COURT: Thank you, Mr. Eubanks. Ma'am, anything that you -- Mrs. Eubanks, anything that you want to tell me, ma'am?

MS. EUBANKS: I just want to say that listening all week how the Solicitor -- I understand too how he had to do his job, but we know in our heart. We know what was told here this week and we know some stuff didn't actually come out to prove that things on the other side weren't true. But I will say that we love our son and we still feel he's innocent. We love all of our grandchildren. There's a big

hole in our heart. (UNINTELLIGIBLE) family members because of (UNINTELLIGIBLE) and he's got the same thing. (UNINTELLIGIBLE).

THE COURT: Thank you, ma'am. Mr. Wise, anything further?

MR. WISE: Nothing further.

THE COURT: Mr. Eubanks, anything further, sir?

MR. EUBANKS: No.

THE COURT: Mr. Wise, what kind of time is he entitled to by way of credit for time served?

MR. WISE: About 45 days. He's been on an ankle monitor, but it hasn't been a formal house arrest.

THE COURT: The first thing that I do want to note, and I do want to note it for the record because I don't think it is reflected on the record except for perhaps a comment I made before we received the case in earnest. Obviously, there were plea discussions on this case as recently as Tuesday. They were what they were, and for whatever reason, Mr. Eubanks, you elected not to accept any responsibility for this as is your right. I would never ever ever, I will not and I do not punish anyone for taking a jury trial, especially in cases of this nature. So, I simply mentioned that first as a notation for any future post-conviction relief action and secondly as a lead in to what I'm about to say now.

Mr. Eubanks, I try a lot of cases, sir. I try a lot of cases. I have tried a lot of these cases. In my professional experience, Mr. Eubanks, we put twelve people in the box. They all had to agree. If you can get twelve people to agree on something -- if even one of them had said I don't agree with that, there could not have been a verdict. If you get twelve people to agree on something then that is a proper result. That is why unanimity in a jury in this state is required and that is why this result is an appropriate one. In other words, Mr. Eubanks, in my opinion, in my estimation, and in my experience, the jury got it right. I'm sorry that you find yourself now acknowledged as a pedophile. If the bitterness of that leaves a bad taste in your mouth, then so be it.

I'd like to say that I don't judge the person, I judge the crime. The sentence that I've imposed in this case is a sentence that judges the crime. I believe that you probably do possess many redeeming qualities, sir, but there is a reason in the eyes of the law that a crime like this carries the penalty that it does. It is eighty-five percent. It is a minimum 25 and maximum 30. There is a reason it carries this penalty, and that's because we have to protect the most innocent and the most vulnerable among us. Sir, you were J.L. 's last line of defense and you failed miserably in your obligation as a parent. That is the truth of this case.

That is the truth of what happened.

J.L. , I want to thank you for having the courage to come forward. You are a very very brave young lady. I will tell you, a lot of people think bravery is something like a cop confronting a robber or a thief, or a fireman running into a burning building. That is certainly one measure of bravery, one kind of bravery, but when it comes right down to it bravery is doing something and seeing it through even though you would rather not do it. That's what you have done. If more kids came forward who have suffered the kind of abuse you have suffered, perhaps this would not happen as frequently as unfortunately it does. I want to thank you for your courage. I'll tell you that yeah, this is going to follow you. Bad things happen to everyone in everyone's lives. You can either let it define you or you can grow stronger from it. I'm glad to see that you're growing stronger from it. You're going to meet a man one day who truly loves you and knows how to treat you right, so don't worry so much about the future. You're going to be fine. A great girl like you, you're going to be perfectly fine.

Mr. Eubanks, on the charge of criminal sexual conduct with a minor first degree, the sentence of the court is that you be committed to the Department of Corrections for twenty-five years. You will receive credit for 45 days that you have served in jail. By law you will be placed on the

Sex Offender Registry and the Child Abuse and Neglect Registry. On the charge of criminal sexual conduct with a minor third degree, the sentence on that charge is fifteen years in the Department of Corrections. It will be served concurrently with the offense of CSC with a minor first degree. You do get credit for 45 days in jail on that charge as well. On the criminal sexual conduct with a minor in the second degree, Solicitor, I appreciate your request for consecutive time. I am doing something similar, because quite honestly I want him to be supervised when he is released. If this kind of thing were to happen again I want the Court to have the option of putting him back in prison. I do feel like perhaps consecutive sentences would be appropriate for somebody who has a criminal history. He has none, and I have to take that into consideration. That's why I am doing it this way. On the CSC with a minor second, I've sentenced you to fifteen years. That will run consecutive to the twenty-five year sentence on the CSC with a minor first charge, however, the fifteen years on the CSC with a minor second degree will be suspended on the time that you have already served. Once you're done serving the twenty-five years you'll be on probation for five years with fifteen years hanging over your head on indictment -1205. Again, this charge is consecutive -- this sentence is consecutive to the twenty-five years on the CSC first, but

it is suspended. Sex Offender Registry, sex offender counseling upon your release will be an additional condition as well as the standard conditions of probation. Mr. Eubanks, you have twenty-five years to serve. You'll have to do eighty-five percent of that. Again, you have ten days to file any notice of intent to appeal and one year to file any action for post-conviction relief. I hate to meet all you people under these circumstances. I wish you all the best of luck. The record is closed on this.

(END OF REQUESTED TRANSCRIPT OF RECORD.)

Q Okay. Well, tell us about that because we just talked about, before the wreck, he could get an erection and you all would have sex regularly --

A Yes.

Q -- early on in the relationship --

A Yes.

Q -- and now, you're saying he couldn't get an erection. Why did you come to believe that?

A Because he started having high blood pressure issues.

Q Okay.

A One of his testicles had separated --

Q Okay.

A -- and whenever -- if anybody's been to Dr. Brownlee's office, whenever a patient goes back, only the patient can go back. She won't let the family go back with them. So whenever he would go to Dr. Brownlee's office to see her, he would say that he did blood work and that his testosterone level came back at zero and that he couldn't get an erection and I'd say, well, I don't care, I love you. You know, I'd say, it's really okay, you know, and I could live the rest of my life without sex as long as we're together, you know, as long as we love each other and this is what we both want. And then, he would say, well, we're going to work on that, but I've got to get my blood pressure down before I could have any medications given to me for my sex drive, which

MR. SCOTT: Right. And these are multiple cookies, Your Honor. They're all the same type. He can say, I don't know what you're talking about, I don't know how they got on my phone, just like your wife did. But the content matter, the multiple sites, the multiple days.

THE COURT: I understand. But if I'd gone in my wife's computer without that explanation, and then saw some of the stuff which was popping up, I would -- I would sincerely suspect --

MR. SCOTT: It might be --

THE COURT: -- that she was into -- that she was into some stuff that being married to me maybe she shouldn't have been into, if you understand what I'm saying. If you want to question him about searching online for porn, I feel like -- I think he's -- I think he's opened that door, but I don't know about specific instances.

MR. WISE: Your Honor, he hasn't open that door because he answered the question truthfully, I look at -- no -- at girls over 18 -- 18 and over. That has opened the door no more than the green box did. I mean, he really hasn't -- it gets too collateral and it's too prejudice. Under the 404(b) analysis, it clearly is more prejudicial than probative.

MR. SCOTT: If you look at *State v. Miller,* that's the Lexington case he keeps talking about, it cites a case out of Oregon and that is -- or *State v. Nelson* is the one out

R. 808

PAGE NO 1 OF 1 PAGES

VOLUNTARY STATEMENT

#17005015

STATE OF SOUTH CAROLINA
COUNTY OF Laurens

PERSONALLY appeared before me _____, who states:

"My name is Michael Cliff Eubanks My address is [redacted]

Date of Birth: [redacted] Social Security Number [redacted] Phone Number: [redacted]

I completed the 12th grade in school, and I can cannot read and write".

Before answering any questions or making any statements, J. Hunnicutt

a person who identified himself as Investigator w/ LCSO

duly warned and advised me, and I know and understand that I have the following rights: That I have the right to remain silent and I do not have to answer any questions or make any statements at all; that any statement I make can and will be used against me in a court or courts of law for the offense or offenses concerning which the following statement is hereinafter made; that I have the right to consult with a lawyer of my own choice before or at anytime during any questioning or statements I make; that if I cannot afford to hire a lawyer, I may request and have a lawyer appointed for me by the proper authority before or at anytime during any questioning or statements that I make, without cost or expense to me; that I can stop answering any questions or making any statements at any time that I choose, and call for the presence of a lawyer to advise me before continuing any more questioning or making any more statements, whether or not I have already answered some questions or make some statements.

I do not want to talk to a lawyer, and I hereby knowingly and purposely waive my right to remain silent, and my right to have a lawyer present while I make the following statement to the aforesaid person, knowing that I have the right and privilege to terminate any interview at any time hereafter and have a lawyer present with me before answering any more questions or making any more statements, if I choose to do so.

I declare that the following voluntary statement is made of my own free will without promise or hope of reward, without fear or threat of physical harm, without coercion, favor or offer of favor, without leniency or offer of leniency, by any person or persons whomsoever.

came in to speak with Hunnicutt about the alligations my daughter J.L. has said towards me. She says I have kissed her neck rub my arms across her chest touched her butt and put my hand down her pants. As far as I can remember I have not touched her ~~[illegible]~~ in any way that I can remember to make her feel this way. She has feel asleep at times with me and my daughter B.E. in the bed but I have also picked her up and took her to her bed and I have also fell asleep in my bed watching t.v. with me waking up with her next to me. I have no clue whom goes on when I sleep and Im not saying that I did are didn't while I was asleep.

End of Statement

I have read each page of this statement consisting of 1 page (s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 10:45 A.M. on the 17th day of May, 2017.

Michael C Eubanks
Signature of person giving voluntary statement

SWORN TO AND SUBSCRIBED TO BEFORE
ME THIS _____ DAY OF _____, 20____

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: _____

WITNESS: _____

WITNESS: _____

STATE'S EXHIBIT 818

PERIGAD 800-631-6989

PAGE NO 1 OF 1 PAGES

VOLUNTARY STATEMENT #17005015

STATE OF SOUTH CAROLINA

COUNTY OF Laurens

PERSONALLY appeared before me _____, who states:

"My name is Michael Clifford Eubanks My address is [redacted]

Date of Birth: [redacted] Social Security Number [redacted] Phone Number: [redacted]

I completed the 12th grade in school, and I ~~can~~ cannot read and write".

Before answering any questions or making any statements, J. H _____

a person who identified himself as Investigator WPLCSO

duly warned and advised me, and I know and understand that I have the following rights: That I have the right to remain silent and I do not have to answer any questions or make any statements at all; that any statement I make can and will be used against me in a court or courts of law for the offense or offenses concerning which the following statement is hereinafter made; that I have the right to consult with a lawyer of my own choice before or at anytime during any questioning or statements I make; that if I cannot afford to hire a lawyer, I may request and have a lawyer appointed for me by the proper authority before or at anytime during any questioning or statements that I make, without cost or expense to me; that I can stop answering any questions or making any statements at any time that I choose, and call for the presence of a lawyer to advise me before continuing any more questioning or making any more statements, whether or not I have already answered some questions or make some statements.

I do not want to talk to a lawyer, and I hereby knowingly and purposely waive my right to remain silent, and my right to have a lawyer present while I make the following statement to the aforesaid person, knowing that I have the right and privilege to terminate any interview at any time hereafter and have a lawyer present with me before answering any more questions or making any more statements, if I choose to do so.

I declare that the following voluntary statement is made of my own free will without promise or hope of reward, without fear or threat of physical harm, without coercion, favor or offer of favor, without leniency or offer of leniency, by any person or persons whomsoever.

talked with honeycutt and As far as what went on in the barn was that myself and J.L. was working tearing apart pallets and cleaning up I went to sit down and Jade came to me and set in my lap and started to wiggle on my leg and move around, I knew it wasn't right but I tried to push her away but she still did it to arouse me and I ended up ejaculating in my pants.

End of Statement

I have read each page of this statement consisting of 1 page (s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 5:52 P.M. on the 17 day of May, 20 17.

Michael C. Eubanks

Signature of person giving voluntary statement

SWORN TO AND SUBSCRIBED TO BEFORE

ME THIS _____ DAY OF _____, 20____

WITNESS: M. Benjamin

NOTARY PUBLIC FOR SOUTH CA

My Commission Expires: _____

WITNESS: _____

STATE'S EXHIBIT 2

ENGAD 800-631-6989

A. 819

Chapter 1: All About Me

My name is J.L. and I am 12 years old. I like to dance and play volleyball. I like to color. I live with my mom, grandma, great grandma, my brother, and sister. I get along with my brother and sister mostly but they annoy me sometimes. My great grandma likes to cook and watch TV shows and her and my grandma like to garden. I will be starting a new school at Laurens Middle. I like that I will have a new start. My dad doesn't come around anymore starting about a month ago. Mom said he turned himself in to some house for drugs. I think that's good. I am kind of mad that he never came around or call on my birthdays until after I told about the abuse then he wanted to be in my life.

Chapter 2: Before the Abuse vs. Now

Before the abuse I was happy. I never really worried about anything. I felt free. He and I always did stuff together. He always bought me candy and we would do stuff outside together. He showed me more attention than the other kids and my brother would get mad at me for that and we would fight about it. I liked the attention at first but then I thought it was unfair to my brother and sister. After the abuse I was angry at everyone. I felt like I had to compete with my sister for attention. I was confused about everything and didn't know if the abuse was good or bad or what I should do. I wasn't allowed to show any attention to my mom and that upset me.

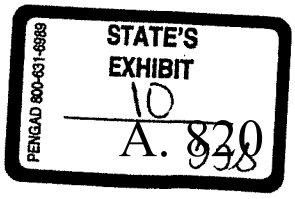
Chapter 3: The Abuse

The First Time

I was 6 or 7 and I was at my old house in the living room on the couch. It was early in the morning and he picked me up from my bed while I was half way asleep and brought me to the couch. I thought "what is he doing?" "What time is it?" I was scared or worried that something bad happened. He pulled my pants down to my knees and took my underwear off. I was thinking "What is he about to do?" I was shocked. He would take his boy part and put it on my girl part. I felt scared. I was wondering what was going on and why he was doing this. I don't know why he was doing this. I wanted to know where my mom was. He tried to put it in me but he couldn't. I would try to move away and act like I was still asleep. He would breathe really loudly. I was too scared to say anything. About 3 minutes later he would push me away from him and go to the bathroom. I was wondering what I should do next. I would pull my pants back up. Then he would come back and take me back to my room. I felt scared because I didn't know if he would do it again in my bedroom.

The Worst Time

My mom, brother, grandma, and great grandma went to L.L.'s band competition. I had to stay home because my mom thought it would be too late when it would be over. I was sad that I couldn't go to the band competition. My step dad would watch me and bella. He would put B.E. in the bath and told her to turn off the water when it got to her belly button. I thought that was weird. I was wondering why he was putting her in the bath so late. I thought maybe he would touch me again. I felt awkward being with just him in the same room together because of things he had done in the past. He came back, turn off



all the lights, and turn on a lamp by the light. He turned the TV on low. It was probably 10:30. I looked at him and he was taking off all his clothes. I was wondering when my mom would be home and felt scared. I closed my eyes real quick and he started taking off all my clothes. He would get in the bed and cover us up. He would put his boy part on my girl part and kiss my neck and my ear. He would move back and forth and try to be inside of me but he wouldn't. I felt scared the whole time. He had a rag with him and he would push me off and turn to the other side with the rag. I didn't know why he did this. Then he would put his clothes back on and my clothes. I was glad it was over. Then he would go washB.E. and come back to go to sleep. I worried that he may do something toB.E. too but I was too scared to say anything because I thought he might hurt me.

The Last Time

I remember it was sunny out because me andB.E. were in the middle of finding worms outside. He called me andB.E. down to the barn. I didn't know what he wanted. He toldB.E. to go to the house. B.E. asked why and he said he needed her to stay up there until I came back up to get her. I wondered why she needed to go up to the house and thought he may try to touch me again. Then I would sit down in the chair. I tried to tell him no, that I didn't want to sit down. He would tell me "I thought you liked it." I would feel bad that I'm not showing him any attention and would sit down. My mind was telling me not to sit down but my heart felt bad and told me to sit down to make him happy. He would put up the big piece of wood behind Bella's doll house that he hid behind so no one could see what he was doing. He would rub my back until I fell asleep. Then when I woke up he was pulling up my pants. I was wondering what just happened. I was worried that he did something to me. I was wondering if he put his boy part on my girl part. He told me to go to the house to getB.E. and I would avoid him the rest of the day. The next day he would be mad and not talk to me. I felt sad that he didn't talk to me. I thought maybe I did something wrong. Maybe he thought I told on him. He would stay in the room and be mad at everybody. Mom would send me into his room to get him but he would tell me not to worry about it and that it was mom's problem if she needed him. I would ask him what was wrong and he just told me not to worry about it.

A.E.

I was maybe 8 or 9 years old. We would mainly be in a closet or a closed area. She would ask me if I wanted to play the "girlfriend and boyfriend game." I didn't know it was bad so I would play along. She told me not to tell anyone about it. She explained that one of us would be a girl and the other would be a boy. I remember wondering if this actually happened in real life relationships. She would make me be the girl. I felt weird. We would pretend to get each other stuff. The girl would go in the living room and she would be picking out stuff and giving it to me as a gift. I didn't like that she was going through my stuff. It usually happened at night. She would call me in the closet, telling me she wanted to show me something in the closet or telling me my present was in the closet. I felt weird about going in the closet and wondered why she wanted me to go into the closet. I don't know why she would want to do this. We would go in the closet and keep the light off with the door shut. She would try to kiss me and put her girl part on my butt. I felt awkward because we were both girls and she was my sister. She would do things kinda like what Cliff would do to me. I wondered if I should go tell someone or leave and not go

in the closet. I was scared not to listen to her. I was scared she would tell an adult and blame it on me. Now she blames a lot of stuff on my because she does things in my room so I get in trouble for it.

Now I am more cautious around her and the things that she does. Cliff had already started touching me when A.E. started doing this. I wondered if it was all a game. I wondered if Michael did similar things to his daughter. I wondered if it was something all fathers and daughters and sisters did. I thought it was weird if it was something they all did, but if it was normal then I wouldn't have felt like such an odd ball. At the same time, I didn't want to ask other people because then I really would be an odd ball if I was the only one experiencing it.

1. Why did this happen to me?
   I don't know why it happened to me. Maybe since I didn't tell anyone the first time he thought he could keep doing it and get away with it. Now I think I should have stepped up to him, but I didn't because I was worried. I was worried that he would be rough with me and hurt me. I also didn't want to make him mad. If he was mad at me that would mean I was a bad person because it was my job to provide for everyone. I was the only one that was happy on the outside. Now, I know it's not my job to make other people happy because it's just the way they feel and I have no control over it.

2. Who is responsible for this happening?
   Cliff is responsible because he made the choices to do it. My mom thinks it is her fault because she knew something was going on and he was acting weird but she never addressed it. She said he treated me more like a wife than her and she didn't like that. I didn't see that he was doing that, but now I can see that he did come to me for things when he should have gone to mom. He would ask me to give him things while he was in the shower and not tell my mom. I don't think it was my mom's fault because she was probably scared to say anything to him because he may have hurt her. I think she knew something was going on because of the way she acted, but I don't think she knew what was going on. She pulled me aside a lot and asked if I was okay. She told the old therapist that she knew something was going on but didn't know what. It wasn't her choice that he would do it. I know she stayed with him because Luke and I really wanted a dad. There were times when he was nice to everyone.

3. How will this affect my future?
   I think it will help me out and make me stronger. I think it makes me a leader to people this has happened to. It makes me a better person because I am not able to stop bad things from happening instead of letting them go on. Now that I am in a relationship I am more cautious and making sure nothing bad happens.

4. How has this affected my family?
   We are happier and I feel more loved. My brothers and sisters used to be mad at me because I got more attention from him, but that's not happening anymore. I feel free now. I'm not scared

to do what I want. I used to second guess what I would wear, say, act, or do but I don't have to do that anymore. I don't have to do that anymore because he is gone.

5. My view of the world has changed in these ways:
   I learned not to judge a book by it's cover. If someone is mean than there is probably something else going on and I shouldn't jump to conclusions. There is always a bigger story or more meaning behind what people are trying to say. I learned this because there were times when I was mean to others and when my sisters were mean to me, but really there were other things going on. I learned that if something like this happens again I should tell somebody.

6. How has this affected the way I view myself?
   I used to feel ashamed, but now I feel like I should be respected and be respectful. I feel like a nicer person.

R. 814

C. Joanne Brownlee, MD

DEA: BB7335133 NPI: 1528099942

209 Lucus Avenue Laurens, SC 29360

Phone: (864) 984-7561 Fax: (864) 984-1195

Patient Name	MICHAEL CLIFF EUBANKS	Address/Phone	[redacted]
Date of Birth	[redacted]		MOUNTVILLE , LAURENS
Gender	Male		SC 29370
Patient Id	[redacted]		[redacted]

Notes

[redacted]

History CC:
Follow-up after hospital discharge. Went to ER last week with chest pains, headache & elevated blood pressure. Denies chest pains or headache today.

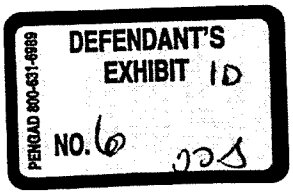
Duration:
The patient has had the problem for 1 - 3 weeks

History ROS:
Constitutional symptoms:
The patient denies fever, chills, weight loss or lack of appetite.
Ears, Nose, Mouth, Throat:
The patient denies sore throat, hearing loss or nose bleed.
Cardiovascular:
The patient denies chest pain, palpitations, shortness of breath on exertion, orthopnea or syncope.
Respiratory:
The patient denies wheezing, shortness of breath, sputum production or blood in sputum.
Gastrointestinal:
The patient denies nausea, vomiting, constipation, diarrhea or blood in stools.
Genitourinary:
The patient denies hematuria, polyuria, dysuria. No incontinence. No urinary retention.
Integumentary:
The patient has no complaints.
Endocrine:
The patient denies weight loss, weight gain or cold sensitivity.
Neurological:
Nonfocal

Examination :
BP-Rt Arm : 140/80, BP-Lt Arm : 130/80, HR : 94, RR : -, Temp : -, Pulse Ox : 98, Wt : 225, Ht : 69, BMI : 33.7, Pain : -
HEENT:
pupils are equal, round, reactive to light
HEENT: oro clear; nares patent; TM's clear

NECK:
No deformities, No JVD, No Carotid Bruits
NECK: supple

HEART:
Regular rhythm, no murmurs
LUNGS:
Clear bilaterally
ABDOMEN:
Soft, non-tender, no rebound signs, no masses
EXTREMITIES:
No Cyanosis, no clubbing, no edema. No deformities noted.
NEUROLOGIC / PAIN EXAMINATION:
- affect good
- alert and ox3
- gait normal



Medical Decision Making :
Medications:
hydrochlorothiazide 25 mg tablet qd with 2 oz OJ,atorvastatin 40 mg tablet qd

ASSESSMENT :
Presents with:
Hypertension; med change in hospital back to what I had initially given him in 2015 (hydrochlorothiazide).
Leg cramps

PLAN :
Dietary Measures discussed, Discussed the care and plan with the patient and they are in full agreement., Follow-up visit depending on test results.,

A. 824

R. 815

C. Joanne Brownlee, MD

DEA: BB7335133 NPI: 1528099942

209 Lucus Avenue Laurens, SC 29360

Phone: (864) 984-7561 Fax: (864) 984-1195

Patient Name	MICHAEL CLIFF EUBANKS	Address/Phone	[redacted]
Date of Birth	[redacted]		MOUNTVILLE , LAURENS
Gender	Male		SC 29370
Patient Id	[redacted]		[redacted]

Other:
Lab to recheck potassium and magnesium.
Will schedule arterial studies lower extremities to check for blockages.
Monitor blood pressure and goal is

[redacted]

History CC:
Check up - patient presents with complaints of BP elevation with headaches, dizziness & chest pains. Checked bp at home and elevated. Chest pain twice and only lasted a few seconds.
Previously took hctz; had leg cramps.
Has some erectile dysfx.
Testosterone low x 2.

Duration:
The patient has had the problem for 1 - 3 weeks

History ROS:
Constitutional symptoms:
The patient denies fever, chills, weight loss or lack of appetite.
Ears, Nose, Mouth, Throat:
The patient denies sore throat, hearing loss or nose bleed.
Cardiovascular:
chest pain
Respiratory:
The patient denies wheezing, shortness of breath, sputum production or blood in sputum.
Gastrointestinal:
The patient denies nausea, vomiting, constipation, diarrhea or blood in stools.
Genitourinary:
ED; maintaining
Integumentary:
The patient has no complaints.
Endocrine:
The patient denies weight loss, weight gain or cold sensitivity.
Neurological:
Headaches, Vertigo

Examination :
BP-Rt Arm : -/-, BP-Lt Arm : 165/100, HR : 91, RR : -, Temp : -, Pulse Ox : 98, Wt : 229, Ht : 69, BMI : 33.8, Pain : -
HEENT:
pupils are equal, round, reactive to light
HEENT: oro clear; nares patent; Tm's clear

NECK:
No deformities, No JVD, No Carotid Bruits
NECK: supple

HEART:
Regular rhythm, no murmurs
LUNGS:
Clear bilaterally
ABDOMEN:
Soft, non-tender, no rebound signs, no masses
EXTREMITIES:
No Cyanosis, no clubbing, no edema. No deformities noted.
NEUROLOGIC / PAIN EXAMINATION:
- affect ok
- alert and ox3
- gait normal

ASSESSMENT :
Presents with:
- hypertension; uncontrolled

PLAN :
Dietary Measures discussed, Educational Materials Provided; DASH DIET., Exercise Encouraged, Discussed the care and plan with the patient and they are in full agreement., Follow-up visit for fasting labs; check blood pressure daily at home and bring values; goal is < 140/90., Other:
- amlodipine 5 mg daily for blood pressure control

A. 825

R. 816

C. Joanne Brownlee, MD

DEA: BB7335133 NPI: 1528099942

209 Lucus Avenue Laurens, SC 29360

Phone: (864) 984-7561 Fax: (864) 984-1195

Patient Name	MICHAEL CLIFF EUBANKS	Address/Phone	[redacted]
Date of Birth	[redacted]		MOUNTVILLE , LAURENS
Gender	Male		SC 29370
Patient Id	[redacted]		[redacted]

A. 826

MAIL.CO.LAURENS.SC.US - LYNN LANCASTER <LLANCASTER@CO.LAURENS.SC.US>

FW: DELETED LANGUAGE FROM THE STOCK INTENT INSTRUCTION

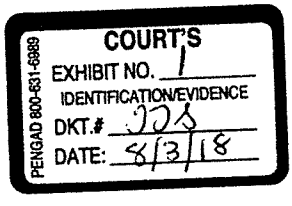
Addy, Frank R.
Lancaster, Lynn W. ...
8/3/2018 10:37 AM

From Addy, Frank R.
faddyj@sccourts.org
To Lancaster, Lynn W.; Lancaster, Lynn W.

~WRD000.jpg (1 KB)

Lynn,
This is the email string where we were discussing the instructions last night. Please print this off during a break, and I'll have Tara make it a court's exhibit since it was discussed this morning.
Thanks.

Frank R. Addy, Jr.
Resident Judge, 8th Judicial Circuit
Greenwood County Courthouse
528 Monument Street, Ste. 210
Greenwood, South Carolina 29646
Office: (864) 943-8020
Fax: (864) 942-8581
Email: faddyj@sccourts.org
Secretary: Freda Sartin (faddysc@sccourts.org)
Law Clerk: Daenayia Hudson (faddylc@sccourts.org)



From: Dale Scott [mailto:dscott@greenwoodsc.gov]
Sent: Friday, August 3, 2018 8:52 AM
To: Addy, Frank R. <faddyj@sccourts.org>
Cc: Rauch Wise <rauchwise@gmail.com>; Wise, C R. <rauch@simplepc.net>; Julie Keeney <jkeeney@greenwoodsc.gov>; Addy, Frank R. Law Clerk (Daenayia Hudson) <faddylc@sccourts.org>
Subject: Re: Deleted Language from the Stock Intent Instruction

"No witness's testimony must be corroborated in order to be believed." In the alternative: "No witness's testimony must be corroborated in order to be believed. At the same time, a witness's testimony can be disbelieved even when corroborated." Either of those proposed instructions conveys the exact same sentiment as the instruction on believing one over many or many over one, they do not improperly single out the testimony of the victim since they are directed at all witnesses equally, and, since they're just a general statement of law that is neutral to both sides, they cannot reasonably be characterized as comment on the facts. I would ask to give this instruction it right after the "one over many" language,.

A. 827

This instruction would not run afoul of Stukes and it would also be fully consistent with the beliefs of the dissent in Rayfield, which effectively became the majority in Stukes. See State v. Rayfield, 369 S.C. 106, 120, 631 S.E.2d 244, 251 (2006) (Pleicones, J., dissenting) ("No witness's testimony need be corroborated."), overruled by State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016).

On Thu, Aug 2, 2018 at 9:59 PM, Addy, Frank R. <faddyj@sccourts.org> wrote:

> Thought about this on the way home, and I still am.
> Here's my problem. Assuming there is an unlawful touching, or an assault, the Defendant's case is that it was he who was assaulted. His case is that he engaged in no touching which would constitute a lewd act. If he's not the one doing the touching, how can he be guilty of CSC 3rd. In other words, he's just sitting there, minding his own business, when …..
> We can discuss more in the morning, but will likely be up for another 30 min or so in case anyone wants to chime in.
>
> Frank R. Addy, Jr.
> Resident Judge, 8th Judicial Circuit
> Greenwood County Courthouse
> 528 Monument Street, Ste. 210
> Greenwood. South Carolina 29646
> Office: (864) 943-8020
> Fax: (864) 942-8581
> Email: faddyj@sccourts.org
> Secretary: Freda Sartin (faddysc@sccourts.org)
> Law Clerk: Daenayia Hudson (faddylc@sccourts.org)
>
> ---
>
> **From:** Dale Scott [mailto:dscott@greenwoodsc.gov]
> **Sent:** Thursday, August 2, 2018 9:54 PM
> **To:** Rauch Wise <rauchwise@gmail.com>
> **Cc:** Addy, Frank R. <faddyj@sccourts.org>; Wise, C R. <rauch@simplepc.net>; Julie Keeney <jkeeney@greenwoodsc.gov>; Addy, Frank R. Law Clerk (Daenayia Hudson) <faddylc@sccourts.org>
> **Subject:** Re: Deleted Language from the Stock Intent Instruction
>
> I've never heard of the rule of linity but does it pass The elements test? Does csc w/minor 3rd have all the elements of A&B 2nd? No it doesn't...gotta have an injury (or attempted) for A&B 2nd but not for CSC with minor 3rd. I'm pretty sure there is law out there on this. I'll get it to you tomorrow. Good night
>
> Sent from my iPhone
>
> On Aug 2, 2018, at 9:36 PM, Rauch Wise <rauchwise@gmail.com> wrote:

I take the position that CSC 3rd degree is a specific intent crime. The suggested charge is a general intent charge. I say specific because that is what the statute says and the indictment.

I belive A&B 2nd is a lesser included of CSC 3rd. This is based upon the fact that A&B 2nd provides "involves non-consensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent." very similar to CSC 3rd but slightly different. To the extent that the court perceives no difference between the two, then the rule of linity would require the court to charge only A&B 2nd. My personal opinion is that CSC3rd requires specific intent and A&B 2nd only requires a general intent and therefore woould be a lesser included.

Rauch

On 8/2/2018 5:39 PM, Addy, Frank R. wrote:

> Attached are the portions of the Intent charge which I think are not necessary or are confusing.
> ~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

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In The Court of Appeals

RECEIVED
JAN 08 2020
SC Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2018-001684

The State,..... Respondent,

v.

Michael Cliff Eubanks, ... Appellant.

Rule 210, SCRCP Certification

The Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully Submitted,

By _____

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December 30, 2019
Greenwood, South Carolina

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Final Brief of Appellant

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STATEMENT OF THE CASE

On May 16, 2017, J.L. alleged her stepfather, Michael Cliff Eubanks,[1] sexually assaulted her. The next day, the Laurens County Sheriff's Office arrested Mr. Eubanks and obtained an arrest warrant for third-degree criminal sexual conduct with a minor, alleging "[t]hat on May 1, 2017," Mr. Eubanks "did engage in sexual battery[2] by having the victim sit in his lap rubbing his penis with her buttocks for sexual gratification causing him to ejaculate while still clothed." R. 7 (footnote added).

On June 16, 2017, the Laurens County Sheriff's Office obtained an arrest warrant for first-degree criminal sexual conduct with a minor, alleging "[b]etween January 1, 2010 and January 1, 2016" Mr. Eubanks "did engage in sexual battery by having sexual intercourse with the minor victim J.L." R. 8 (footnoted added).

---

[1] Mr. Eubank's family and friends call him "Cliff," which is how he will be referred to in this brief.

[2] The warrant incorrectly invokes the term "sexual battery." *State v. Elliott*, 346 S.C. 603, 552 S.E.2d 727 (2001) *overruled on other ground by State v. Gentry*, 610 S.E.2d 494, 501, 363 S.C. 93, 106 (2005) ("'Sexual battery' does not mean any battery of a sexual nature. Rather, it is statutorily defined to include only certain specific acts, which can be loosely described as involving penetration of some sort.").

On July 21, 2017, the Laurens County Grand Jury indicted Mr. Eubanks, alleging he committed third-degree criminal sexual conduct with a minor, "on or about May 1, 2016 to on or about May 17, 2017," by lewdly and lasciviously touching the body parts of J.L. R. 9-10.

On August 18, 2017, the Laurens County Grand Jury indicted Mr. Eubanks, alleging he committed first-degree criminal sexual conduct with a minor, "on or between August 15, 2010 and August 15, 2015," by engaging in an unspecified sexual battery with J.L. R. 11-12.

On July 27, 2018, the Laurens County Grand Jury indicted Mr. Eubanks, alleging he committed second-degree criminal sexual conduct with a minor, J.L., "on or about August 15, 2015 to on or about May 16, 2017," by engaging in an unspecified sexual battery with a minor.[3] R. 13-14.

From July 31, 2018 to August 3, 2018, the State tried Mr. Eubanks before the Honorable Frank R. Addy, Jr. and a jury. Deputy Solicitor C. Dale Scott and Assistant Solicitor Julie Kate Keeney, both of the Eighth Circuit Solicitor's Office, prosecuted the case. C. Rauch Wise represented Mr. Eubanks. The jurors convicted Mr. Eubanks as charged. R. 789-91, R. 15. Judge Addy sentenced Mr. Eubanks twenty-five years imprisonment for first-degree criminal sexual conduct with a minor, a concurrent term of fifteen years imprisonment for third-degree criminal sexual conduct with a minor, and a consecutive term of fifteen years imprisonment, suspended with probation for five years, for second-degree criminal sexual conduct with a minor. R. 803-05, R. 1-3.

---

[3] During the jury trial, the Deputy Solicitor talked about Mr. Eubanks' case being on the trial docket for months. *E.g.* R. 661, 699. The prosecution never explained adding the charge of second-degree criminal sexual conduct with a minor just four days before trial.

On August 13, 2018, Mr. Eubanks moved for a new trial. R. 16-21. By written order dated September 11, 2018, Judge Addy denied the new trial motion. R. 4-6. This appeal follows.

STATEMENT OF FACTS

A. Introduction.

Cliff Eubanks grew up in Clinton, South Carolina. He and his first wife, Jennifer Newsome, had two children, A.E and P.E. After his divorce from Ms. Newsome was final, Mr. Eubanks contacted Deanie Lyons. Ms. Lyons had two children from a prior relationship, L.L. and J.L. Cliff and Deanie got married in 2010. They moved into Cliff's house. At the time, Cliff worked for International Paper and later the Department of Transportation. Deanie Eubanks worked for Beltram and later at the Laurens County Detention Center. Cliff and Deanie had a child together, B.E. Cliff and Deanie lived paycheck to paycheck. R. 580-86.

Cliff took care of L.L. and J.L. as if they were his own children. L.L. was "more focused on his past and what went on in his past verses what he could have had in his future." L.L. wanted a dad, and Cliff "tried everything possible" to support him. They had talks. Cliff built "a tree house for him." Cliff had raced cars at the Laurens racetrack. Cliff took L.L. to the racetrack, but L.L. wasn't interested in racing. L.L. was a "video gamer," who liked to stay in the house playing video games." J.L. liked to be outside more than L.L. Cliff

> always told the kids, look, I'm not your father, but I'll be whatever you want me to be. I'll be there for you. I'll be your friend, you know. I'm just here for you if you need me. And it was that way with [L.L.] and [J.L.].

R. 589-92.

At his jury trial, Cliff Eubanks' family and friends testified about his relationship with his natural children and stepchildren:

- Elizabeth Eubanks is Cliff Eubanks' mother. She and her husband, Michael Eubanks, had family gatherings almost every weekend. Cliff would attend with his children and stepchildren. Deannie Eubanks attended less after her automobile wreck. She testified Cliff "is a good father." He "played with the children," "never showed special" favoritism, was "fair to all the children," and disciplined them appropriately. She never noticed Cliff engaging in any inappropriate conduct or suspicious touching. Cliff and J.L. had a father-daughter relationship. R. 566-69.

- Michael Eubanks is Cliff Eubanks' father. He and Elizabeth Eubanks had family gatherings and almost every weekend. He observed Cliff with his children and stepchildren. He testified Cliff is "a great father" who played with the children. He never observed Cliff do "anything out of the ordinary" or show favoritism towards one of the children. R. 572-574.

- Jessica Eubanks is Cliff Eubanks sister. She observed Cliff with J.L., L.L., and B.E. almost every weekend at Eubanks family get togethers. A.E. and P.E. were at the get togethers every other weekend when Cliff had visitation. Cliff treated all the children the same – "[v]ery playful with them all." When necessary, Cliff disciplined the children the same as "any other parent should do." She never noticed Cliff showing any favoritism towards J.L. Her daughter, who was fourteen years old at the time of trial, spent time around Cliff, including spending the night at his house. R. 533-36.

- Cristi Cline[4] is Cliff Eubanks' sister. She observed Cliff with his children and stepchildren at his home and family gatherings. Cliff was "good" with the children. She testified, "He never directed any attention towards one particular child. He was always playful with them, doing things with them." She never saw Cliff engage in any inappropriate behavior. She does not have any concerns about Cliff being around her eleven year old daughter. R. 550-53.

- Kathleen Eubanks Schumpert, Cliff Eubanks' aunt, lived across the road from Cliff. She observed Cliff around his children and stepchildren. Cliff played with them in the yard and helped them with homework. He treated

[4] Ms. Cline's first name is spelled "Christy" in the transcript, but the correct spelling is "Christi." This brief also uses the correct spellings of the names of Kathleen Eubanks Schumpert and Alexus Eubanks.

the children equally. She never observed Cliff engage in any inappropriate conduct around the children. R. 562-65.

- Alexus Eubanks is Cliff Eubanks' niece. She observed Cliff with J.L., L.L. A.E., P.E., and B.E. at Eubanks family gatherings. She testified Cliff treated all of children, including the step children, equally. She never observed Cliff engage in any inappropriate conduct with the children. R. 527-31.

- Amy Philson lives with Alexus Eubanks. "The Eubanks took [her] in because [she] didn't have a good childhood." She was twelve when she first started spending time around Cliff Eubanks. She has observed Cliff around his children and stepchildren. She testified Cliff is "just a good loving parent is what I think anyways. He never showed more attention to one child than he did the other." She attended the Eubanks' family gatherings. She never noticed any concerning behavior by Cliff. R. 545-49.

- LouAnn Price knows Cliff Eubanks through church. Cliff also did work for her at her house. She had opportunities to observe Cliff which his children and stepchildren. Cliff treated all the children equally. She testified J.L. is "a very talented girl. She loves to dance and she's a wonderful actor." She described J.L. as "flirty with the guys and everybody." R. 553, 558-60.

In November 2013, Deanie brought Cliff breakfast at work. On the way home, she got into a rear-end automobile wreck in front of the Post Office in Laurens. She ultimately required back surgery. Deanie did not work from November 2013 to May 2016. Initially, Deanie received disability though the State of South Carolina, but the State eventually cancelled this support because the injury was not work related, meaning only Cliff was receiving a paycheck to support the family. They lost their house. Cliff, Deanie, L.L., J.L., and B.E. moved in with Deanie's extended family – her mother, father, and grandmother. A.E. and P.E. joined them every other weekend. R. 586-88.

Deanie's father, Johnny Wilson, had a close relationship with Cliff's daughter, A.E. By the time Cliff and Deanie moved, Mr. Wilson was not in good health and stayed at home all day. Deanie's mother also stayed home all day. She helped by picking up the

children at the end of the school day. Deanie's grandmother "rarely" left the house unless "she had a doctor visit." She "loved" to cook "southern home food." R. 591-94.

After the automobile wreck, Cliff and Deanie's marriage "started going downhill a little." Deanie seemed depressed and "felt worthless" because she could not do all of her normal activities. They stated sleeping in separate beds in the same bedroom. Sometimes, Deanie would sleep in a rollaway bed. Sometimes, Cliff would sleep in the rollaway bed. R. 634-35.

Elizabeth Eubanks testified about a conversation in November or December 2016 involving her, Michael Eubanks, and Deanie Eubanks. They were on the porch. Deanie said, "I know how to get rid of somebody." Ms. Eubanks was "shocked." R. 569-71. Michael Eubanks recalled Deanie saying she knew how to get rid of Cliff. R. 574-75.

Cliff and Deanie eventually settled the automobile wreck claim with the insurance company for $89,821.55 after medical expenses, attorney fees, and costs. On December 28, 2016, they deposited the proceeds in a joint checking account at the SunTrust Bank in Laurens. In January 2017, they transferred $25,000.00 to a money market account and withdrew $40,000.00 in cash. They placed the $40,000.00 in a safe in a storage shed on Deanie's mother's property. Cliff had the combination to the safe. Deanie did not. Financially, Cliff and Deanie should have been in good shape, but their bank account balance kept decreasing and they began "bickering" about finances. In May 2016, they took several thousand dollars out of the safe for a family vacation. Cliff, Deanie, J.L., and B.E. were all present when they opened the safe.[5] R. 594-606.

[5] J.L. confirmed she knew about the safe with money in the storage building and that she knew the combination to the safe. R. 261-62.

After returning from the May 2017 vacation, Deanie Eubanks took J.L. and L.L. to see Kimberly Little, a counselor, because of L.L.'s depression and grief secondary to several family deaths. That visit is when J.L. first alleged Cliff Eubanks had sexually assaulted her. Ms. Little notified DSS and law enforcement. R. 166-71. J.L. allegations of sexual abuse will be discussed in more detail in Subsection B below.

The day after law enforcement arrested Cliff Eubanks, Michael Eubanks went to Cliff's house to get his medication and some clothing. He went to the storage building to get Cliff's winter clothing. He noticed the safe, which he understood contained $40,000.00 cash, was no longer there.[6] R. 575-77.

B. Allegations of Child Sexual Abuse.

L.L. is J.L's older brother. He was one week from his sixteenth birthday when he testified. On May 16, 2017, L.L. attended counseling with Kimberly Little. He started counseling because of "a lot of deaths," including his great grandpa, grandpa, cousin, and other friends. During the session, L.L. talked about "past depression," "past anxiety," the absence of his biological father, and his relationship with Cliff Eubanks. Although L.L. saw Mr. Eubanks more often than his biological father, Mr. Eubanks "didn't feel like he was my step-dad" because he put J.L "on a pedestal" and did not treat L.L. "like a son." L.L. "always wanted a dad." L.L. testified Mr. Eubanks treated J.L differently than his

[6] During opening statements, counsel for Mr. Eubanks addressed Deanie Eubanks' motive for persuading J.L. to make these allegations. Cliff and Deanie "got married on the rebound." They had a child together, but their "marriage started having problems." Deanie was involved in an automobile accident that resulted in an insurance settlement. Cliff "took the money out of the bank because she was spending it too fast" and put it in a safe "in a barn near that house." Cliff had the combination. Deanie did not. The children "knew about this cash in the safe." After the allegations were made, Cliff's father "went back to the house to get the safe, it was gone and hadn't been seen since." R. 130-31.

two biological daughters that visited every other weekend. Ms. Little wanted to talk to J.L. R. 136-43, 147-48.

The prosecution had L.L. testify about various topics to suggest that Mr. Eubanks treated J.L. more favorably than L.L. and the other children. He claimed the relationship between Cliff and J.L. "became stronger" after Deanie's automobile accident and he began noticing "grabs on the butt." R. 143-44, 146. He testified Cliff and J.L. hung out the barn, which is used for a storage and was Cliff's "getaway place." R. 144-45. He claimed to witness Cliff go inside the bathroom with J.L. while she was not clothed. He claimed Cliff would wrestle with J.L. more than the other children. He claimed Cliff and J.L. would "cuddle under blankets on the couch or in [J.L.'s] room." He claimed Cliff gave J.L. more money for school. He was upset Cliff took J.L. to school, while his grandmother took him to school, even though J.L.'s school was on the way to Cliff's workplace. R. 143-50. On re-direct examination, L.L. claimed Mr. Eubanks "bullied" him at home. R. 156-58.

On cross-examination, L.L. acknowledged Cliff paid for his braces. He also acknowledged he never discussed with his mother his observations of the shower or cuddling under the blanket. L.L admitted Cliff took him fishing, to the Laurens racetrack, and to the Crying Baby Bridge. L.L also acknowledged telling a counselor about the financial impact his stepsisters (Cliff's biological children) had the family finances. L.L. also did not like J.L. being homeschooled for a period of time because he "felt like a lot of attention was going to her," and she would spend more time with their mother. R. 150-56.

Kimberly Little, a licensed professional counselor, testified about her counseling sessions with L.L. for depression, recent deaths in the family, and bullying at school. During the sessions, Ms. Little learned about the family dynamics. L.L. "did not have a relationship with his father and there was a step-father in the home that he wanted a relationship with, but did not have a good relationship with." L.L. "said his parents weren't really getting along," and J.L "was the peacekeeper." Ms. Little "wanted to speak with [J.L.] as well to make sure she was okay." Ms. Little was able to speak with J.L. on May 16, 2017. J.L. was anxious. J.L. made allegations of sexual abuse. As a mandated reporter, Ms. Little "contacted law enforcement and DSS," both of which responded. Mr. Eubanks and his mother, Elizabeth Eubanks, also arrived. T. 166-71.

J.L. testified. She was thirteen, about to turn fourteen, when she testified. She claimed she and her step-sisters argued over her getting more attention from Mr. Eubanks. She testified Mr. Eubanks took her places, bought her things, gave her money for lunch and snacks at school, and would tell her about his arguments with her mother. Mr. Eubanks and Ms. Eubanks argued about money. The attention made her feel special. R. 172-79.

J.L. testified "bad things" started to happen when she was six. She claimed it started with Mr. Eubanks touching her breast, bottom, and genitals underneath her clothing. She testified alleged Mr. Eubanks rubbed his "boy part" against her "girl part." She claimed Mr. Eubanks "boy part" sometimes went insider her "girl part." She claimed Mr. Eubanks would use a "rag" to clean up "white stuff that would come out." She claimed Mr. Eubanks touched her "girl part" with his mouth. She also alleged Mr. Eubanks inserted the tip his "boy part" inside her "butt part." She claimed that Mr.

Eubanks, grabbed her "butt" when she walked around the house, wrestled with her, and "cuddled" a lot with her under blankets, none of which he did with the other children. She claimed the sexual abuse started at the first house and continued at the second house. She also alleged it occurred at the storage shed. She alleged Mr. Eubanks touched her "butt" or rubbed her chest almost every day. R. 179-201, 206-20.

J.L. testified about talking to Ms. Little and Investigator Hunnicutt. R. 228. On June 1, 2017, Heather Bennett interviewed J.L. at Beyond Abuse, which is a Children's Advocacy Center. J.L. was twelve years old at the time of the interviewed. In the interview, J.L. claimed "something happened" to her "from when she was six years old until she was" twelve and at two separate addresses. R. 297-99. J.L. acknowledged that she told Ms. Bennett that she would like to see Cliff Eubanks again despite the allegations. R. 270.

On June 8, 2017, Dr. Lyle Pritchard, M.D. performed a sexual assault medical examination on J.L., including her genitals, using "forensic imaging" that provides extra lighting and magnification to look "for any evidence of any sort of injuries of scars." She did not find any signs of trauma. The hymen was intact. J.L. did not have any sexually transmitted diseases. The medical exam was normal, meaning the exam was "not definitive that there was abuse or not abuse." R. 372-83.

C. Cliff Eubanks' Statements.

On May 16, 2017, Laurens County Sheriff's Deputy Ronald Richey responded to Kimberly Little's office. He interviewed J.L. and contacted the Department of Social Services. While Deputy Richey was at Gilchrist Consultation Group, Cliff Eubanks and

his mother, Elizabeth Eubanks, arrived. Investigator Jared Hunnicutt took over the investigation. R. 158-64, 331-32.

Investigator Hunnicutt contacted Cliff Eubanks on May 17, 2017, and Cliff came to the Laurens County Sheriff's Office. Investigator Hunnicutt advised Mr. Eubanks about J.L.'s allegations that Mr. Eubanks had "touched her on her chest and kissed her on the neck." Mr. Eubanks denied the allegations, stating that if any such touch occurred, then it happened while both were sleeping. He also told Investigator Hunnicutt that he had caught J.L. masturbating and "receiving explicit pictures from some unknown boys on her phone." Mr. Eubanks provided a written statement. R. 333-40; State's Exhibit No. 1.

Investigator Hunnicutt learned from Deanie Eubanks that she had lied to her husband about there being a hidden nanny cam in the barn area. At Investigator Hunnicutt's request, Cliff Eubanks returned to the Sheriff's Office later in the day on May 17, 2017. Investigator Hunnicutt slid a blank "DVD across the table to [Mr. Eubanks] and insinuated that [law enforcement] had footage of the act." Mr. Eubanks told Investigator Hunnicutt about an incident that happened at the barn, which was reduced to the following written statement:

> [A]s far as what went on in the barn was that myself and J.L. was working tearing apart pallets and cleaning up. I went to sit down and J.L. came up to me and sat in my lap and started wiggling on my leg and moving around. I knew it wasn't right, but I tried to push her away but she still did it to arouse me and I ended up ejaculating in my pants.

Investigator Hunnicutt then arrested Mr. Eubanks. R. 341-49; State's Exhibit No. 2.

During opening statements, counsel for Mr. Eubanks asserted Mr. Eubanks' innocence and addressed his statement to law enforcement "in which he admits to an act

that he is not proud of. That he is frankly embarrassed about." Counsel noted the act was not a crime because it was "not done with the intent to satisfy that lust of a person." Counsel explained:

> [Mr. Eubanks] comes in the barn and he sits down. And [J.L] comes and sits in his lap and starts wiggling around and jumping up and down. And he puts in his statement, and I have to put it in the statement. Have to tell you because it's there, that frankly her jumping up and down on him caused him to ejaculate. That is an act. But you will find there was no intent on his part to have her sit on his lap to the point that he was satisfying his lustful desires. There was no intent. And if the intent is not there, the act is not illegal. It is, call it what you want to, but you can't call it illegal because of the lack of intent.

R. 131-33.

D. State's Trauma Expert Witnesses.

The State's case against Cliff Eubanks heavily relied on the expert testimony of Samantha Black, Dr. Eman Sharawy,[7] and Shauna Galloway-Williams.

Samantha Black, a therapist employed by the Beckman Mental Health Center, provided counseling services to J.L. at Beyond Abuse, which is a Children's Advocacy Center, providing "assessments and therapy with children that have been abused."[8] She has a Master's Degree "in marriage and family therapy," is a licensed professional counselor, and is "certified and registered in trauma focused cognitive behavioral therapy." On June 14, 2017, Ms. Black met J.L. and "got her background, history, family, abuse allegations, symptoms and [] did assessment measures" to determine what type of treatment to provide. R. 300-02.

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[7] This witness' name is sometimes spelled "Sharway" in the transcript. *E.g.* R. 27, 729. This brief uses the spelling "Sharawy" because that is how the South Carolina Department of Labor, Licensing, and Regulations lists her name for her medical license.

[8] Ms. Black is married to Eighth Circuit Assistant Solicitor Micah Black.

Ms. Black testified she provided J.L. trauma focused cognitive behavior therapy, Mr. Eubanks objected because testimony by Ms. Black about the treatment "for the psychological ramifications of the abuse" constitutes vouching for the credibility of J.L. prohibited by *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). The trial judge convened a hearing outside the presence of the jurors. Counsel for Mr. Eubanks explained this evidence does not have any probative value to Ms. Black's testimony if she planned to opine she "determined there to be a problem because [J.L.] was, in fact, abused." The prosecution indicated another witness would testify about a diagnosis of Post-Traumatic Stress Disorder ("PTSD"). Mr. Eubanks then objected to any testimony about PTSD. R. 302-04.

Mr. Eubanks pointed out that PTSD does not appear in any of Ms. Black's therapy notes. The prosecution, however, intended for Ms. Black "to testify about the trauma-based cognitive therapy that she offered the minor" and Dr. Eman Sharawy would testify about "the actual diagnosis of PTSD." Dr. Sharawy saw J.L. for "one counseling session," reviewed Ms. Black's notes," and "diagnosed her with PTSD." The prosecution relied on *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993), *overruled on other grounds by State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016), *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997), *overruled on other grounds by State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), and *State v. Barrett*, 416 S.C. 124, 785 S.E.2d 387 (Ct. App. 2016). R. 304-08.

The trial judge reviewed *Barrett*, noting that case cited to *Schumpert* and *State v. White*, 361 S.C. 407, 414-15, 605 S.E.2d 540, 544 (2004), and concluded testimony about PTSD to be admissible. The trial judge, however, acknowledged the court still "has to

engage in a probative value prejudicial effect 403 type analysis." Mr. Eubanks argued that an expert testifying J.L. suffers from PTSD "is doing nothing but vouching for the credibility" of her testimony and "is terribly more prejudicial than probative." The trial judge reasoned this testimony would not be precluded by *Kromah* as long as the prosecution does not elicit testimony that the PTSD was caused by the child sexual abuse.[9] R. 308-312.

Over objection, Samantha Black testified the goals of trauma-focused cognitive behavioral therapy are to "learn coping skills," "change any thought distortions," and "complete a trauma narrative"[10] about the first, last, and worst incident of sexual abuse, which "takes care of the symptoms the way that the therapy is researched." The trauma narrative focuses on a child's thoughts about the trauma "to get rid of any distortions they have," such as thinking the abuse was their fault. The following exchange occurred between the prosecutor and Ms. Black:

Q. Okay. And so, the purpose really isn't for Court?

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[9] The trial judge considered testimony about PTSD in a child sexual abuse case to be similar to a medical doctor testifying about the life threatening nature of a gunshot wound, without opining whether the injury was unlawfully inflicted or the result of self-defense. R. 320-21.

[10] J.L. testified about her trauma narrative. R. 237, 239, 256-58, 262, 269, 273, 275-76, 288-90; State's Exhibit 10. On cross-examination, defense counsel asked J.L.:

> But when you did your trauma narrative, you didn't say that you felt different later. I mean, in your trauma narrative you said, "I was worried that he did something to me. I was wondering if he but his boy part on my girl part." I mean, you never said then that you thought something happened.

J.L. responded it was something that she "remembered" when she talked to the Deputy Solicitor. R. 259-60.

A. No. It's not investigative at all. It's purely therapeutic and it's just to help them move on with their life to get past the trauma.

Q. Just to talk about it?

A. Uh-huh.

Q. And be open and talk about it?

A. Yes.

R. 312-315.

Dr. Eman Sharawy, a medical doctor, is the Medical Director at the Beckman Mental Health Center. Dr. Sharawy's completed a medical degree at the Medical College of Georgia, competed a psychiatric residence at the Medical University of South Carolina, and is board certified in adolescent psychiatry and adult psychiatry. Over objection, the trial judge qualified Dr. Sharawy as an expert in child and adolescent psychiatry. Dr. Sharawy explained:

> PTSD stands for posttraumatic stress disorder and it's a disorder that people experience after having come in contact with significant trauma in their lives. It – there are four categories of symptoms. So the first category would be re-experiencing symptoms where people re-experience the trauma in different ways. They have recurrent thoughts, memories, nightmares, flashbacks, intrusive thoughts that just pop into your mind during the day during normal routine activity. Secondly, they can have avoiding behavior where people avoid things that remind them of the trauma that might trigger some of the symptoms and responses. Next is hypervigilance where a person is very on the edge all the time, very anxious, jumpy. Anxiety is a big component of that. And lastly people have mood problems and cognitive distortions. Mood problems consisting of depression, sleep and appetite disturbance, anxiety, poor concentration, irritability.

R. 318-23.

Dr. Sharawy interviewed J.L. on August 31, 2017 for one hour, reviewed Samantha Black's notes, and diagnosed PTSD. Dr. Sharawy prescribed Remeron (an

antidepressant which helps with sleep) and ordered continued trauma focused cognitive behavioral therapy. The prosecutor inquired "some of the symptoms" J.L displayed that are indictive of PTSD, and Dr. Sharawy testified:

> A. [J.L.] came in and she was very anxious, very avoidant, even the discussion related to, you know, *the history she was providing.* I remember that she was really guarded and withdrawn, looking down. She reported nightmares, bad dreams. *She reported intrusive thoughts and recollections of the traumatic event.* She was having depressive symptoms, low mood, anxiety, avoidant type behaviors, erratic – erratic appetite, poor sleep, poor concentration.
>
> Q. And so, all those taken together in her interview, your professional observations, Samantha Black's notes, you were able to come up with a diagnosis of PTSD?
>
> A. Yes.

R. 323-27 (emphasis added).[11]

Shauna Galloway-Williams, a licensed professional counselor, is the executive director of the Julie Valentine Center, a Children's Advocacy Center, which she described as "a trauma abuse and sexual assault recovery center that serves Greenville and Pickens County [sic]." She has "a Bachelor's degree in psychology from Winthrop University and a Master's degree in counseling from Clemson." The trial judge qualified her as a "blind expert in the field of child abuse dynamics." R. 383-88.

Ms. Galloway-Williams initially testified, "[W]e would expect that a child or an adult is going to tell every single detail or every single event that they've experienced related to child abuse at one time." R. 388. Later she testified disclosure can be tentative, "which is where most children's disclosures fall, where they share some pieces

[11] On cross-examination, Dr. Sharawy acknowledged that a "basically honest" person stating "something that's not true," could have a "stressful reaction" that "affects their life," but she opined it would not be PTSD. R. 327-28.

of information but not all of it." She does not "expect a child to report every single detail of his or her abuse in one interview." Age, frequency of abuse, comfort level with the interviewer, knowledge of anatomy, and sexual knowledge could be factors. Children might delay disclosure of sexual abuse because of fear or relationship with the alleged perpetrator. R. 389-93

Ms. Galloway-Williams testified "90 percent of the time children are abused by someone that's known to them." She testified:

> Grooming is a term that we use to refer to developing a trusting relationship with a child in order to gain access to them in order to essentially abuse them. So it's developing a relationship with them and developing trust. And there are certain ways that that happens. One of those ways might be by giving a child special attention or special favors, giving them extra time on their video games, allowing them to stay up later at night, watch movies, do things that like. It may involve giving a child actual tangible items. Buying them a cell phone, giving them money, things like that. Grooming might be just giving them special attention. And it could include introducing children to sexual behavior. Normalizing sexual behavior with them. So that can involve introducing them to sexual jokes, sexual pictures, you know, perhaps showing them nude pictures and talking to them about that. Making it as if it's something that's normal and okay because it's introduced by a trusting adult, and then gradually using those things to gain access to the child.

R. 393-94.

Ms. Galloway-Williams testified the emotional or behavior characteristics of a child that has been sexually abused could range from "no mood changes and they internalize the trauma" to symptoms of depression and anxiety child might include changes in grades, insolation, bed wetting, nightmares, self-harm, obesity, or weight loss. R. 394-98.

During closing arguments, the prosecution emphasized the testimony of Ms. Galloway-Williams. R. 710-12, 715-17, 760. The Deputy Solicitor next referenced J.L.'s "[f]ifteen therapy sessions" with Samantha Black and then argued:

> Dr. [Sharawy] – do y'all remember her? That was the doctor who she met with. She's Samantha Black's supervisor, and she met with [J.L.] once or twice. I can't remember what the exact testimony was, but she met with her, reviewed Samantha's assessment of the girl. Spoke with [J.L.] and diagnosed her with PTSD. That's Post Traumatic Stress Disorder. That's stuff we see in combat vets. She talked about how it is the after effects of somebody experiencing something traumatic, and she had seen this in this twelve-year-old girl. She's a doctor and her opinion was this girl was exhibiting symptoms of PTSD.

R. 729; *see also* R. 762 (arguing, "Then, somehow you're going to have to trick the expert into diagnosing you with PTSD.") and 754 (arguing, "I want you to remember what Samantha Black testified to. This is not meant for law enforcement. It is not meant to be a piece of evidence in court. This is meant for therapy.")

E. Adult Pornography.

During cross-examination, counsel for Mr. Eubanks asked J.L. about her interview with Heather Bennett where she alleged, when she was six or seven years old, seeing Cliff Eubanks make YouTube searches on his iPhone for provocative videos, including ones called "Birthday Sex"[12] and "step-dad having fun with daughter." J.L told Ms. Bennett that she told her mother about the YouTube searches.[13] Her mother never investigated these allegations. R. 248-53.

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[12] On direct examination, Mr. Eubanks testified "Birthday Sex" is a video on YouTube with someone "singing about birthday sex," which does not contain any pornography. R. 635-36.

[13] On re-direct, J.L. claimed the YouTube searches were on the iPhone with a broken screen. R. 286. As seen in Question VII, this testimony is directly related to Mr. Eubanks motion to continue so that his iPhone 5 could be examined.

On-redirect, the prosecutor asked J.L. if she knew about Mr. Eubanks keeping a lot of pornographic videos in the storage shed. Counsel for Mr. Eubanks objected, and the trial judge convened a hearing outside the presence of the jurors. The prosecutor argued defense counsel asking questions about "cell phone searches . . . . opens the door to other pornographic imagery he's showing or being shown in front of her." The prosecutor anticipated J.L. "knowing where this enormous tub of pornography was" kept. Mr. Eubanks argued, "Asking the witness about a statement she made about seeing a video on the cell phone hardly opens the door to what he considers a box of pornographic material." The purpose of asking about the internet searches was "showing that she could talk to her mother about one thing and did." Mr. Eubanks argued the evidence is "more prejudicial than probative, because there's no way of proving that" is what she saw. The trial judge ruled, "Porn, is porn, is porn" and allowed the testimony. R. 276-82.

After the jury returned to the courtroom, J.L. testified about showing law enforcement where to find a container containing pornography in a storage building, which she claimed to have observed Mr. Eubanks looking at when they lived at the first house. R. 282-86. Investigator Hunnicutt, however, testified on direct examination that Deanie Eubanks showed him where to find the container of pornography. R. 358-60.[14]

During direct examination, defense counsel asked Cliff Eubanks about the "big, green box" of pornography. He testified it has been accumulated over years since when he lived with Jennifer Newsome. He testified the box was kept "in the top of my closet where nobody could get to it." He shared that closet with Deanie Eubanks, and "[s]he

[14] Mr. Eubanks renewed his prior objection, and the trial judge allowed Investigator Hunnicutt to "generally state the contents of the box without going into specifics as far as titles, publications, etcetera." R. 358-59.

knew it was up there."[15] When they moved from the first house to the second house, Mr. Eubanks placed the pornography into the "green bin," "put a lid on it," "taped it with grey duct tape," and "wrote a note on top of it, Cliff's stuff, do not open." After the move, the green bin was kept in the storage shed. J.L. did not know what was inside the green bin, and Mr. Eubanks never opened it in front of her. R. 631-34.

The prosecutor cross-examined Cliff Eubanks extensively about the container of pornography. The prosecutor asked Mr. Eubanks, "Tell me your favorite storylines" from the videotapes. The trial judge overruled defense counsel's objection. The prosecutor accused Mr. Eubanks:

> Instead of being with your wife, you looked at porn in hopes that would boost your testosterone. And tell me some of your favorite storylines. What does Cliff Eubanks – I keep asking all your family. You know, what are your sexual interests and desires? What are you attracted to?

R. 651-54.[16] The trial judge overruled defense counsel's objection and instructed, "Mr. Scott, please continue, sir." The Deputy Solicitor continued:

> Q. All right. I'm going to ask the million dollar question. Are you attracted to young girls?
>
> A. If they're over 18. Yes, sir.
>
> Q. Okay. Over 18. Are you attracted to teens?
>
> A. If they're over 18.
>
> Q. Are you attracted to younger looking females?
>
> A. If they're over 18.

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[15] During direct examination, Deanie Eubanks denied knowing about the container of pornography.

[16] Indeed, the Deputy Solicitor asked Alexus Eubanks (R. 532), Mitchell Eubanks (R. 536), LouAnn Price (R. 553), and Michael Eubanks (R. 579) if they knew about Cliff Eubank's sexual interests.

Q. I'm not asking you if you're attracted to women over 18. Are you attracted to younger appearing females?

A. No, sir. I mean, you need to describe how –

Q. All right.

A. – what you mean by young.

Q. All right. I will. Let me ask you about a couple.

MR. WISE: Your Honor –

THE COURT: This [is] now fair game.

Q. Let me ask you if you've heard of any of these –

MR. WISE: Your Honor, I'd like to be heard.

R. 654-55.

The trial judge convened a hearing outside the presence of the jurors. The prosecutor referred to Mr. Eubanks direct testimony about intent and argued, "That's what I was waiting for and they went for it and [it] was the intent." Defense counsel argued the evidence is not relevant because the prosecution had "not even come close to establishing that any of these sites are illegal. Counsel further argued the prosecution was trying to introduce propensity evidence, referring to *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998), prohibiting the introduction of propensity evidence. Finally, counsel argued the evidence "is more prejudicial than probative."[17] The trial judge allowed the

[17] The transcript reflects defense counsel cited to Rule 404.3. R. 658, line 21. Please see the concerns raised by Question XII, *infra*. More than likely, counsel cited Rule 404(b), SCRE as *Nelson* is a notable case applying that rule. As Justice Kittridge observed, dissenting, albeit in an unpublished opinion with no precedential value pursuant to Rule 268(d), SCACR, "It would be regrettable" if the outcome of an appeal is "due to sloppy transcription." *Hughey v. State*, No. 2010-170387, 2015 WL 2231252, at

prosecution to introduce the evidence because Mr. Eubanks had denied the intent to commit third-degree criminal sexual conduct with a minor when he accidentally ejaculated while J.L. was sitting on his lap. Defense counsel questioned "how searching a porn site of adults establishes . . . a specific intent on that" crime. The trial judge, however, limited the prosecution to one question about whether Mr. Eubanks accesses pornography online.[18] R. 656-62.

When the jurors returned to the courtroom, the following exchange occurred:

Q. Had you done internet searches where you looked for young looking girls?

A. I have done searches.

Q. Have you done searches where you looked for younger looking girls?

A. Yes, sir.

R. 663. The prosecution questioned Mr. Eubanks about pornography again. R. 654. The prosecutor again asked Mr. Eubanks, "And you're attracted to younger looking

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*3 (S.C. May 13, 2015). Contemporaneously, with serving his Initial Brief of Appellant, Mr. Eubanks is submitting a second challenge to the trial transcript.

[18] When the prosecutor protested the trial judge's ruling because the case had "been on the docket for six months," defense counsel's frustration with the Deputy Solicitor's handling of the entire case became apparent:

> Your Honor, I am tired of that, and I'm going to tell you why. They didn't know about those websites until this week. I asked him specifically, when I started to spend several hours looking at that download, is there anything – any obscene pictures on there. No, there isn't. Thank you very much. I closed the file and I quit looking. And then they're coming in here today, or yesterday, and they tell me, oh, there are these cookies on there that we found the day before. So, to say I'm to blame is simply not correct.

The Deputy Solicitor responded, "In discovery, don't take a Solicitor's word for what you may find." R. 661.

girls?" Mr. Eubanks responded, "I'm attracted to young girls, but over the age of 18." R. 654.

During closing arguments, the prosecution emphasized the container of pornography and the internet searches. The prosecutor argued Deanie Eubanks "didn't know about the enormous collection of pornography" or what her husband "was up to on the internet." R. 713. The prosecutor referred to the container as "that giant green tub of some of the most obscene pornography you've ever seen."[19] And, the prosecutor argued:

> I asked him about the porn. This was a classic response. Well, Mr. Scott, I just like the articles. I'm kind of a collector. Really, that's why I have them. I said well, what about all those DVDs in there. There's a bunch of them. Listen, I'm not some puritan, okay? I'm not saying there's anything wrong with pornography, but if on one hand you're saying I think hip-hop dancing is vulgar. I think this little girl is provocative. I think these dances are disgusting. How do you reconcile that with his interests? How do you do it? You can't. It makes no sense. Mr. Scott, I like the story lines in those movies. I said tell me about your favorite story lines. Oh, well that's personal.

R. 724-25.

And:

> I suspect if you're looking at that much pornography and you're making it that much a part of your life, because I think pornography is progressing. If you start off with Playboy it can begin and end there, or you can choose to up it a notch and get into more hardcore stuff. And then you can go into other rabbit holes. Into that genre or that genre. And you can look at all kinds of stuff until it's an unhealthy addiction. And you're looking on the internet and your sexual desires become such that you can't control them. *I don't know what makes somebody become like a Cliff Eubanks.*

R. 736 (emphasis added).

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[19] The jurors, of course, had not "seen" the pornography because the trial judge did not allow the container and its contents to be introduced into evidence because of the trial court's concerns about unfair prejudice under Rule 403, SCRE. R. 354-57.

After defense counsel responded to the prosecutor's argument about pornography (R. 748, 752-53, 755-56), the prosecutor replied:

> Isn't it funny though that the same people who find hip hop dancing – and the lawyer said it was his opinion too that hip hop dancing was offensive. For some reason, they are just unoffended by an enormous collection of pornography. Of all kinds of depraved acts. They are unoffended by internet searches. They're unoffended by a Defendant that admits he is attracted to very young appearing girls.
>
> I'm sorry, y'all. I don't mean to – I've got to cover everything. I'm so scared that something he just said that makes absolutely no sense will gain traction. I hope it doesn't, and maybe I'm just arguing too hard. Some of the things I hear just blow my mind.

R. 767-68.

STANDARD OF REVIEW

> In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown. An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law.

State v. Blackwell, 420 S.C. 127, 136, 801 S.E.2d 713, 718 (2017) (internal citations and quotations omitted).

ARGUMENTS

Question I

***State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993), and similar cases, should be overruled (or the holdings in *Schumpert* and similar cases limited) to the extent that those holdings allow a prosecution expert witness to offer an opinion about whether a complaining witness suffers from trauma, when that expert's opinion is largely based on the hearsay statements of the complaining witness, because that type of opinion testimony is inconsistent with *State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566 (2018) and the *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) line of cases.[20]**

[20] As will be seen, Mr. Eubanks does not advocate for a rule excluding testimony about the presence or absence of trauma symptoms. Nor does he seek the reinstatement of *Hudnall*. Rather, he seeks a limitation *Schumpert* that excludes opinion testimony, based on hearsay, bolstering the credibility of a complaining witness.

Relying on *Schumpert*,[21] the prosecution made J.L.'s PTSD a central part of its presentation through the testimony of Samantha Black, Dr. Eman Sharawy, and Shauna Galloway-Williams. Mr. Eubanks objected based on the *Kromah* line of cases and Rule 403, SCRE. The prosecution emphasized the testimony of Ms. Black, Dr. Sharawy, and Ms. Galloway-Williams during closing arguments. Mr. Eubanks moved for a new trial because the trial judge erred in admitting evidence of J.L.'s PTSD when "the evidence was more prejudicial than probative," the prosecution "used the evidence in its closing argument to bolster the testimony of the complaining witness," and the "admission of this testimony deprived Mr. Eubanks of due process of law in violation of the 14th Amendment to the Constitution of the United States of America and Article I, § 3 of the Constitution of the State of South Carolina." R. 17. The trial judge erred by relying on *Schumpert* to admit opinion testimony when the diagnosis was largely based on the statements of J.L. that bolstered her credibility as the complaining witness.

Any discussion about overruling *Schumpert* should begin with *State v. Hudnall*, a case overruled by *Schumpert*. In *Hudnall*, "a pediatrician[] testified over appellant's objection regarding common characteristics exhibited by child victims of sexual abuse." 293 S.C. 97, 99, 359 S.E.2d 59, 61 (1987), *overruled by State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993). The *Hudnall* Court reasoned "the evidence was admitted to bolster the child's testimony that the crime had in fact occurred and was not offered to explain any seemingly inconsistent response to the trauma" and held "this irrelevant and prejudicial expert testimony was error which could not have been harmless in view of the

[21] The prosecution also relied on *Morgan* and *Barrett*. These cases will be discussed later in this section of the brief.

paucity of evidence against appellant." *Id.* 293 S.C. at 100-01, 359 S.E.2d at 62. The Court also noted, "A doctor's testimony regarding a patient's history is admissible only insofar as it relates facts given by the patient upon which the doctor relied in reaching his medical conclusions." *Id.* (finding reversible error in allowing the pediatrician to testify "regarding appellant's identity as the perpetrator") (citing *State v. Brown,* 286 S.C. 445, 334 S.E.2d 816 (1985).

In *Schumpert*, the South Carolina Supreme Court overruled *Hudnall* and "held trauma testimony of a rape victim is relevant to prove the elements of criminal sexual conduct since such evidence makes it more or less probable that the offense occurred." 312 S.C. at 506, 435 S.E.2d at 861-62. The Supreme Court further held the admission of such evidence is subject to a prejudice analysis now codified in Rule 403, SCRE. *Id.* The Court of Appeals struggled with the implication of *Schumpert* in *Morgan.* Morgan challenged the admissibility of two behavioral science experts because "there was no scientific basis that the facts or data was of a type reasonably relied upon by experts in the particular field forming opinions or inferences upon the subject." 326 S.C. at 508, 485 S.E.2d at 115. Bound by *Schumpert*, the Court of Appeals held "that the admissibility of the two behavioral science expert opinions at issue was not subject to admissibility challenges based upon reliability." *Id.* The *Morgan* Court reasoned:

> The *Schumpert* court never expressly addressed the two other central concerns of *Hudnall,* however. Although *Schumpert* briefly mentioned *Hudnall*'s limitation to rebuttal purposes, the *Schumpert* court never truly confronted the bolstering issue, but apparently equated character evidence with substantive evidence of sexual abuse. Moreover, *Schumpert* was silent as to another crucial aspect of *Hudnall*: whether behavioral science could reliably ascertain whether a victim was telling the truth or whether some event did in fact occur in the past. While we are reluctant to read *Schumpert*'s silence on these two linchpins of *Hudnall* too broadly, it is difficult to avoid the conclusion that the court implicitly overruled these

> two aspects of *Hudnall* as well as the relevancy aspect. Accordingly, Morgan's arguments that the opinions were admitted as improper bolstering evidence and were not sufficiently reliable cannot stand in light of *Schumpert.*

326 S.C. at 511-12, 485 S.E.2d at 117. The Supreme Court overruled *Morgan* in *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009) (holding the trial court's gatekeeping function in assuring reliability of expert testimony applies to nonscientific evidence).

Despite *Schumpert* not addressing "the bolstering issue" and "whether behavioral science could reliably ascertain whether a victim was telling the truth or whether some event did in fact occur in the past," our appellate courts steadfastly maintained the prohibition of a witness improperly bolstering the credibility of a child witness in a child abuse case. *E.g. State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (error in admitting portions of forensic interviewer's written reports that contained improper vouching was not harmless); *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989) (psychiatrist's testimony that alleged victim's "symptoms are genuine" improperly vouched for credibility); *State v. McKerley,* 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012) (testimony of forensic interviewer who conducted interviews with complainant indicated belief in complainant's truthfulness and was thus inadmissible); *South Carolina Dept. of Social Services v. Lisa C.,* 380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2008) (testimony of therapist indicating "Child gave a consistent disclosure and that as a result of that conclusion she recommended therapy" improperly bolstered Child's credibility); *State v. Dempsey,* 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000) (testimony from a child abuse counselor that child tells the truth 95% to 99% percent of time abuse is alleged improperly vouches for child's credibility). In *Kromah*, the Supreme Court held testimony by forensic interviewer of victim that victim had given a "compelling finding"

of child abuse was inadmissible and identified categories of admissible and inadmissible testimony. 401 S.C. at 359-60, 737 S.E.2d at 538.

In *State v. Anderson,* the Supreme Court held, "The trial judge's refusal to determine [the State's witness'] qualification as a 'child abuse assessment' expert was patent error." 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015). In doing so, the Court acknowledged it is proper to allow and expert to "testify to the behavioral characteristics of sex abuse victims." *Id.* (citing *Schumpert,* 312 S.C. 502, 435 S.E.2d 859 (1993); *State v. Weaverling,* 337 S.C. 460, 523 S.E.2d 787 (Ct.App.1999); and *State v. White,* 361 S.C. 407, 605 S.E.2d 540 (2004)). The Court explained:

> The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility. *Compare State v. Brown,* 411 S.C. 332, 768 S.E.2d 246 (Ct.App.2015) (distinguishing improper bolstering cases because in *Brown* the behavioral expert did not examine the victim). Here, [the State's witness] vouched for the minor when she testified only to those characteristics which she observed in the minor.

Anderson, 413 S.C. at 218-19, 776 S.E.2d at 79. The *Anderson-Brown* procedure allowing an independent "blind expert" to testify about the characteristics of child abuse victims is now the common practice in criminal sexual conduct with a minor trials in our state.[22]

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[22] As seen, the prosecution cited and the trial judge reviewed *State v. Barrett. Barrett* merely held, "Under the specific facts of this case, we affirm as we find no error in [the Children's Advocacy Center interviewer's] qualification as an expert mental health professional, the testimony she offered regarding general behavioral characteristics was admissible, and she did not improperly vouch for Victim's credibility." 416 S.C. at 130, 785 S.E.2d at 390. The Court acknowledged the preferable *Anderson-Brown* procedure. *Barrett* is distinguishable; however, to the extent that it supports the admission of the PTSD testimony in this case, *Barrett* should be overruled.

In *State v. Simmons*, the Supreme Court held the "hearsay testimony [of a medical doctor] ventured far beyond the parameters of Rule 803(4), SCRE,[23] for much of the testimony was unrelated to medical diagnosis or treatment." 423 S.C. 552, 567, 816 S.E.2d 566, 574 (2018) (footnote added). The Supreme Court expressly declined to "sanction the State's use of Dr. Simmons as a conduit for this glaringly inadmissible hearsay to be brought before the jury." 423 S.C. at 565, 816 S.E.2d at 573. The Court noted, "If this tactic were permitted, the legitimate use of the Rule 803(4), SCRE, medical diagnosis and treatment exception would be undermined and the general approach of Rule 801(d)(1)(D), SCRE,[24] would be thwarted." *Id.* (footnote added). Stated another way, an expert witness "recounting" of a complaining witness' "statements amounted to nothing more than 'hearsay shrouded in a doctor's white coat.'" *Id.*

In this case, the testimony of Shauna Galloway-Williams complied with the constraints of the *Anderson-Brown* procedure. Indeed, similar testimony by Ms. Galloway-Williams has been approved by our appellate courts. *E.g. State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018); *Brown, supra.* If the prosecution had limited its

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[23] Rule 803(4), SCRE, providing an exception to the hearsay rule, provides, "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion."

[24] 801(d)(1)(D), SCRE provides, "A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident."

presentation of trauma evidence to the testimony of Ms. Galloway-Williams, then this question would not be before this Court now. The testimony of Samantha Black and Dr. Eman Sharawy, however, crossed the line into impermissible bolstering and vouching for the credibility of J.L. Although employed by the Beckman Center for Mental Health, Ms. Black provided J.L. counseling services though Beyond Abuse, the statutorily mandated Children's Advocacy Center in the Eighth Judicial Circuit.[25] According to the testimony of J.L. and Ms. Black, the counseling was directly related to J.L.'s allegations that Cliff Eubanks sexually abused her. J.L. shared with Ms. Black the first, last, and worst incidents of the alleged sexual abuse. J.L. prepared a trauma narrative, a redacted version of which was admitted into evidence. Ms. Black testified she made notes about J.L.'s statements about her allegations of abuse and claimed trauma symptoms. Dr. Sharawy reviewed Ms. Black's notes, met with J.L. only once, and opined J.L. suffers from PTSD. The jurors were very aware that Dr. Sharawy's opinion was based on the hearsay statements of J.L. Dr. Sharawy's opinion "amounted to nothing more than 'hearsay shrouded in a doctor's white coat.'" *Simmons*, 423 S.C. at 565, 816 S.E.2d at 573.

The prosecution and trial judge relied on *Schumpert* when admitting the testimony of Ms. Black and Dr. Sharawy. Because this testimony crossed the line into the bolstering and vouching for the credibility of J.L. that is prohibited by *Simmons* and the *Kromah* line of cases, *Schumpert* should be overruled (or the holding in *Schumpert* limited) to the extent that the holding is *Schumpert* allows a prosecution expert witness to offer an opinion about whether a complaining witness suffers from trauma, when that

[25] S.C. Code Ann. § 63-11-310.

expert's opinion is largely based on the statements of the complaining witness. This Court should order a new trial.

Question II

The trial judge erred by admitting evidence of J.L.'s Post-Traumatic Stress Disorder when the "probative value [of this evidence was] substantially outweighed by the danger of unfair prejudice," pursuant to Rule 403, SCRE, and the prosecution used this evidence in its closing argument to bolster the credibility J.L.'s testimony, thereby denying Cliff Eubanks due process of law in contravention of the Fourteenth Amendment to the United States Constitution and Article I, § 3 of the South Carolina Constitution.

Mr. Eubanks objected to the testimony of Samantha Black and Dr. Eman Sharawy based on the *Kromah* line of cases and Rule 403, SCRE. Mr. Eubanks moved for a new trial because the trial judge erred in admitting evidence of J.L.'s PTSD when "the evidence was more prejudicial than probative," the prosecution "used the evidence in its closing argument to bolster the testimony of the complaining witness," and the "admission of this testimony deprived Mr. Eubanks of due process of law in violation of the 14th Amendment to the Constitution of the United States of America and Article I, § 3 of the Constitution of the State of South Carolina." R. 17. If this Court declines to overrule or limit *Schumpert*, then this Court should order a new trial because, even under *Schumpert*, the trial judge should have excluded the testimony of Ms. Black and Dr. Sharawy because the prejudicial effect of this testimony substantially outweighed and probative value.

Schumpert held, "[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect." 312 S.C. at 506, 435 S.E.2d at 862. Rule 403, SCRE provides, "Although relevant, evidence may be excluded if its probative value

is substantially outweighed by the danger of unfair prejudice." "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). The South Carolina Supreme Court has defined "unfair prejudice" as an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991). Although *Alexander* pre-dated the adoption of the South Carolina Rules of Evidence, our appellate courts continue to cite it for the definition of "unfair prejudice." *E.g. State v. Gray*, 408 S.C. 601, 616, 759 S.E.2d 160, 168-69 (Ct. App. 2014). *Alexander*, in fact, is a companion case to *Schumpert* in holding evidence of "mental trauma is relevant to prove the elements of criminal sexual conduct." 303 S.C. at 381, 401 S.E.2d at 149. *Alexander* ultimately held, "Applying the test to the unique facts of this case, we hold that the emotional trauma evidence is unduly prejudicial and should have been excluded." 303 S.C. at 382, 401 S.E.2d at 149.

Here, an emotional appeal to the jurors was the cornerstone of the prosecutor's case. In opening statements, the prosecution explained the case was about "disloyalty," "deception," and "betrayal." R. 121. The prosecutor attacked the character of Mr. Eubanks and his witnesses. During closing arguments, the prosecution compared J.L. to "combat vets" when recalling Dr. Sharawy's testimony about J.L.'s PTSD. Under the facts of this case, the danger of unfair prejudice substantially outweighed any prejudicial value and should have been excluded. This Court should order a new trial.

Question III

The trial judge erred by allowing the prosecution to question J.L. on re-direct examination about her knowledge of an "enormous tub of pornography" in response to defense counsel asking J.L. limited questions about the titles of two iPhone internet searches when this testimony was not relevant, pursuant to Rule 401, SCRE, improper character evidence pursuant to Rule 404(b), SCRE, and the prejudicial effect of the testimony substantially outweighed its probative value, pursuant to Rule 403, SCRE?

During her interview at Beyond Abuse, J.L. talked about two very specific internet searches, which counsel for Cliff Eubanks argued could be refuted or placed into context if the trial judge would have continued the trial for Mr. Eubanks' iPhone 5 to be examined.[26] In response, the prosecution brought an "enormous tub of pornography" into the courtroom to question J.L. and Cliff Eubanks.[27] The Deputy Solicitor argued testimony about this pornography was admissible for the limited purpose of responding to defense counsel's questioning J.L. about these two internet searches. The Deputy Solicitor's questioning of Mr. Eubanks and his closing argument revealed the true purpose of introducing this evidence, which was to attack Cliff Eubanks' character and accuse him of having a propensity to sexually assault young children. During cross-examination, the Deputy Solicitor questioned Mr. Eubanks about collecting adult pornography, the "story lines" that appealed to him, and his attraction to younger appearing women over the age of eighteen. During closing arguments, the prosecutor mocked Mr. Eubanks for reading the stories in the magazine and not sharing with the jurors his fantasies about "story lines." The prosecutor referred to the container as "that giant green tub of some of the most obscene pornography you've ever seen," questioned

[26] *See* Question VII, *infra*.

[27] The Deputy Solicitor also asked Michael Eubanks if he and Cliff "used to collect old Playboys and stuff." R. 579.

why the defense was "just unoffended by an enormous collection of pornography," and argued, "I don't know what makes somebody become like a Cliff Eubanks." The trial judge should have excluded this evidence for three reasons.

Frist, the evidence was not relevant to prove any element of the crimes charged and should have been excluded by Rule 401, SCRE. None of this evidence made it more or less probable that Cliff Eubanks committed the offenses of criminal sexual conduct with a minor in the first, second, or third degree. S.C. Code Ann. § 16-3-655.

Second, this evidence was improper character evidence. *Nelson* reminded:

> In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue. In a similar vein, evidence of other crimes or bad acts is generally inadmissible to prove the crime charged unless the evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity. Both rules are grounded on the policy that character evidence is not admissible for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged.

331 S.C. at 6, 501 S.E.2d at 718-19; *and see* Rule 404(b). Our appellate courts consistently exclude character evidence about a propensity to commit a crime. *E.g. State v. Peake*, 302 S.C. 378, 396 S.E.2d 362 (1990); *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999); *Nelson.*

Third, the evidence was not admissible because the prejudicial effect substantially outweighed its probative value pursuant to Rule 403, SCRE. As seen in Question II above, Rule 403, SCRE protects an accused from "unfair prejudice" which is an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Alexander*, 303 S.C. at 382, 401 S.E.2d at 149. Although arguing the evidence was admissible for a limited purpose, the prosecution used it to launch an

emotional and merciless attack on Cliff Eubanks' character. The evidence should have been excluded, and this Court should order a new trial.

Question IV

The trial judge erred by allowing the prosecution to cross-examine Cliff Eubanks about his internet searches of legal adult pornography when such evidence did not "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," pursuant to Rule 401, SCRE, was inadmissible character and propensity evidence pursuant to Rule 404(b), SCRCP, and the "probative value [of this evidence was] substantially outweighed by the danger of unfair prejudice," pursuant to Rule 403, SCRE.

As seen, the Deputy Solicitor argued in favor of the admissibility of the container of pornography to respond to defense counsel's limited questions about two iPhone 5 internet searches. The Deputy Solicitor, however, made no pretenses about why he wanted to question Cliff Eubanks about his internet searches for adult pornography of younger appearing women over the age of eighteen. He began this line of questioning by asking, "All right. I'm going to ask the million dollar question. Are you attracted to young girls?" R. 654-55. The trial judge ultimately allowed the prosecutor to ask Mr. Eubanks, "Have you done searches where you looked for younger looking girls?" R. 663. This question left the jurors with the impression that Mr. Eubanks searched for underaged girls on the internet when, in fact, there is not a scintilla of evidence that he ever searched for, viewed, or possessed child pornography.

The Deputy Solicitor's character attack and propensity insinuation became more obvious during closing arguments when he mocked Mr. Eubanks about "lik[ing] the articles, his "favorite story lines," and sexual "interests." R. 724-25. Later, the Deputy Solicitor accused Mr. Eubanks of having an "unhealthy addiction" and argued, "I don't know what makes somebody become a Cliff Eubanks." R. 736. In his reply argument,

the Deputy Solicitor urged the jurors to be offended by the "enormous collection of pornography," "internet searches," and Mr. Eubanks "admit[ting] his is attracted to very young appearing females." R. 767-68.

For the same reasons discussed in Question III above, evidence of Mr. Eubanks' internet searches was not relevant and inadmissibly character evidence. *Peake, King,* and *Nelson, supra*; Rules 401 and 404(b), SCRE. Alternatively, this evidence should have been excluded because the prejudicial effect of this evidence substantially outweighed the probative pursuant to Rule 403, SCRE. *Alexander, supra.*

Question V

The trial judge erred by allowing the prosecutor to call Cliff Eubanks down from the witness stand to demonstrate to the jurors how J.L. was "wiggling" when she sat on his lap, when the only purpose for the demonstration was to humiliate Mr. Eubanks and to obtain fodder for the prosecution's closing argument that repeatedly mocked Mr. Eubanks.

During cross-examination, the Deputy Solicitor instructed Cliff Eubanks to "step[] off the stand" and demonstrate how J.L. was "wiggling" when she sat on his lap. The Deputy Solicitor instructed, "Yeah, move your seat out. If they can see it, because I want you to show them the dance and the wiggle and the –." Defense counsel objected, and the trial judge overruled the objection by stating, "If he's able to pull it off, then he's able to pull it off. Let's see if he can do it. Go ahead." The Deputy Solicitor then instructed:

> Q. You play [J.L.] Okay?
>
> A. I play [J.L.]?
>
> Q. I want to see how she was wiggling in your lap. Do you want me to sit in the chair and you wiggle on me?
>
> A. No. You're a man. I'm not –

Q. All right. Stand up. Pretend there's somebody sitting in the chair. Now wiggle like she was doing.

R. 671-72.[28]

The South Carolina Supreme Court has held some courtroom demonstrations so inflammatory and prejudicial so as to require a new trial. *E.g. Northcutt*, 372 S.C. at 222, 641 S.E.2d at 881 (During closing argument, Solicitor "enacting a funeral procession complete with a black shroud covering the baby's crib" required new trial). The demonstration ordered by the Deputy Solicitor was not proper, and this Court should order a new trial.

Question VI

This Court should grant Cliff Eubanks a new trial based on the Deputy Solicitor's highly inflammatory closing arguments that were a direct and dehumanizing attack on the character of Cliff Eubanks and his cousin Mitchell Eubanks.

Mitchell Eubanks is Cliff Eubanks cousin. He had opportunities to observe Cliff with his children and stepchildren. On one occasion, he was at Cliff's house when J.L. had some friends over and they were "twerking," meaning moving "their butt up and down," which he considers "very vulgar." He also observed J.L. dancing on the laps of her mother and grandfather. He considered the clothing and make up J.L. wore at dance recitals to be age inappropriate. The Deputy Solicitor asked Mitchell Eubanks to "stand

[28] The Deputy Solicitor also asked Mitchell Eubanks, Cliff Eubanks' cousin, who testified he finds "twerking vulgar," to "stand up" and "[s]how us what twerking is." Mitchell Eubanks declined because its "vulgar." R. 536-64. The Deputy Solicitor's conduct regarding Mitchell Eubanks will be discussed in Question VI, *infra.* If there was any legitimate reason for the Deputy Solicitor to insist on these "twerking" demonstrations, then the State should explain that reasons in its Brief of Respondent.

up" and "[s]how us what twerking is." Mitchell Eubanks declined because its "vulgar." R. 536-64. During closing argument, the Deputy Solicitor argued:

> Do y'all remember Mitchell twerking Eubanks? He's not here today. I looked for him after his examination yesterday. It was pathetic. I looked for him. I wanted to talk to him but he was out the door.

R. 536-64, 738; *see also* R. 767 (referring to the witness as "Mitchell twerk Eubanks").

As already seen, during closing arguments, the Deputy Solicitor mocked Mr. Eubanks about "lik[ing] the articles, his "favorite story lines," and sexual "interests." R. 724-25. Later, he accused Mr. Eubanks of having an "unhealthy addiction" and argued, "I don't know what makes somebody become a Cliff Eubanks." T. 736. The Deputy Solicitor concluded his closing argument by arguing:

> See this for what it is. Do you believe *grinning Cliff* or do you believe that strong little girl? I'm asking you to believe that strong little girl and what the evidence showed you this week. I'm asking you to *find Cliff smirking smiling Eubanks* guilty of criminal sexual conduct first, but not just the first, the second and the third. Find him guilty for everything he's done. Let the truth speak. Thank you.

T. 739 (emphasis added).

Counsel for Mr. Eubanks did not object; however, a narrow exception to our state's error preservation rules allows this Court to consider this misconduct. "[E]ven in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) (citing *South Carolina Highway Dept. v. Nasim,* 255 S.C. 406, 179 S.E.2d 211 (1977)); *cf. Major v. Alverson*, 183 S.C. 123, 190 S.E. 449, 450 (1937) ("referring to defendant as a 'bare faced liar'" during closing argument required new trial). This narrow exception "excuses the failure to make a contemporaneous objection only where the challenged argument

constitutes abuse of a party or witness," as it did in this case. *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 259, 509 S.E.2d 269, 272 (1998). *And see Bennett v. Stirling*, 842 F.3d 319 (4th Cir. 2016) (held that state courts unreasonably determined that prosecutor's references to defendant during closing arguments were not appeals to racial prejudice and that his right to due process was not violated); *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (Solicitor's closing argument "dehumanizing Appellant" required remand for new trial).

The Deputy Solicitor's closing argument and reply argument were highly inflammatory and constituted a humiliating, degrading, and dehumanizing attack on the character of Cliff Eubanks and Mitchell Eubanks. This argument was improper, and this Court should order a new trial.

Question VII

The trial judge erred by not continuing the trial to allow time for examination of Cliff Eubanks' iPhone 5, thereby denying Mr. Eubanks his due process right to a fair trial and his Sixth Amendment rights to present a complete defense and confront and cross-examine J.L. about observing sexually explicit movies on this phone.

Prior to the trial court swearing the jurors, Cliff Eubanks provided several cell phones to the State and moved to continue the case to have his iPhone 5 analyzed. Mr. Eubanks provided his PIN numbers for the phones. The State accessed all of the phones, except the iPhone 5 with the broken screen. The prosecutor acknowledged J.L. described this iPhone in "her forensic interview," alleging she saw "some porn on that phone." The Solicitor conceded the State might have been able to access the phone if it had received it sooner or if the screen was not broken. Counsel for Mr. Eubanks informed the trial judge that the damaged iPhone

> is important because apparently that's the cell phone that the complaining witness is going to be saying she saw some pornography on it, and she makes reference to some pretty crude stuff in her forensic interview. I need that analyzed.

R. 97-99, 102-05.

Defense counsel informed the trial judge that J.L. "named two specific movies:" "Stepdaddy Does Daughter" and "Birthday Sex." Counsel informed the Court that Lars Daniel, a digital forensics expert, in North Carolina, could examine the iPhone 5 despite the broken screen. The prosecution acknowledged the relevance of the iPhone. The trial judge denied the motion to continue, considering it "a collateral issue" that was not "central to the ultimate issue in this particular case." R. 99-111.

The trial judge erred in considering the examination of the iPhone 5 to be a "collateral issue" and merely "an impeachment type of an issue." Defense counsel cross-examined J.L. about the same two internet searches identified during J.L.'s interview by Heather Bennett and motion to continue. This cross-examination led to the introduction of the container of pornography. The failure to examine the iPhone was an issue during the closing arguments. The Deputy Solicitor stated he "wants to know what was on that phone" and insinuated the results would be damaging to Mr. Eubanks. R. 748, 756, 769.

The Solicitor's Office, not the trial judge, called Mr. Eubanks' case to trial. R. 31. The trial courts have a due process obligation "to control the order of its business to safeguard the rights of litigants." *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012). When a defendant feels that his rights are prejudiced by reason of the calling of his case at any particular time, he may apply to the judge for a continuance." *State v. Mikell*, 257 S.C. 315, 322, 185 S.E.2d 814, 817 (1971); *and see* Rule 7, SCRCrimP.

Here, the trial judge denying the motion to continue denied Mr. Eubanks his due process right to a fair trial and his Sixth Amendment rights to present a complete defense and confront and cross-examine J.L. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"); *Pennsylvania v. Ritchie*, 480 U.S. 39, 51(1987) ("The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."); *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985) ("although some cross-examination of a prosecution witness was allowed, the trial court did not permit defense counsel to 'expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.'"). Thus, it was error for the trial judge to consider the examination of the iPhone 5 as "collateral issue" and merely "an impeachment type of an issue." This Court should order a new trial.

Question VIII

The trial judge erred by not continuing the remainder of the trial until the following Monday so that Cliff Eubanks could call Dr. Joanne Brownlee as a witness to reply to Deanie Eubanks' testimony and corroborate Mr. Eubanks' medical condition.

During direct examination, Deanie Eubanks testified she "didn't think that [Cliff Eubanks] could get an erection" after she was involved in the automobile wreck. Mr. Eubanks had high blood pressure and "[o]ne of his testicles had separated." After Mr.

Eubanks would see Dr. Bradley,[29] he would say that his "testosterone level came back a zero and that he couldn't get an erection." Ms. Eubanks claimed Mr. Eubanks never "brought home any paperwork" about his medical condition. Ms. Eubanks claimed the last time she and her husband had sex was January 1, 2013, not long after her automobile wreck. R. 444-47.

During direct examination, Cliff Eubanks testified he had low testosterone and erectile dysfunction. Over objection by the prosecutor, the trial judge admitted into evidence a written report from Dr. Joanne Brownlee. When defense counsel asked Mr. Eubanks about the medical history of low testosterone and erectile dysfunction, the prosecution objected again, and the trial judge convened a hearing outside the presence of the jurors. The trial judge expressed concern about the date of creation of Dr. Brownlee's report. Defense counsel informed the report "was not going to be relevant in this case until" Deanie Eubanks testimony about Mr. Eubanks "lying to her about low testosterone." Defense counsel indicated Dr. Brownlee could testify about her report. The trial judge stated, "[I]t may be necessary to do that," so Dr. Brownlee could provide more information about Mr. Eubanks medical history, testing, and treatment. The trial judge removed Dr. Brownlee's report from evidence. After the jurors returned to the court room, Mr. Eubanks testified he has low testosterone and erectile dysfunction that have been reported to his doctor. R. 626-31; Defense Exhibit 6.

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[29] "Dr. Bradley" likely refers to Dr. Joanne Brownlee. As Justice Kittridge observed, dissenting, albeit in an unpublished opinion with no precedential value pursuant to Rule 268(d), SCACR, "It would be regrettable" if the outcome of an appeal is "due to sloppy transcription." *Hughey* at *3. Contemporaneously, with serving his Initial Brief of Appellant, Mr. Eubanks is submitting a second challenge to the trial transcript.

The trial judge delayed the start of trial the next day (a Friday) so that defense counsel could contact Dr. Brownlee. R. 690. When court began, defense counsel explained Dr. Brownlee's office is closed and Mr. Eubanks had not been able to contact her. Mr. Eubanks "request[ed] the Court continue this case to Monday so that [the defense] can have Dr. Brownlee available." The prosecution objected, acknowledging Mr. Eubanks "has every right to call the witnesses he thinks are necessary to defense the case," but arguing he should not be allowed to call Dr. Brownlee because she was not on the witness list. Defense counsel explained he received the report in February but did not intend to call Dr. Brownlee until Deanie Eubanks' testimony. Reversing the court's earlier position, the trial judge ruled Dr. Brownlee's testimony would not "add anything substantial or germane" and was not "absolutely necessary." R. 608-700.

As seen in Questions VII above, the Constitution guarantees Cliff Eubanks "a meaningful opportunity to present a complete defense." *Holmes*, 547 U.S. at 324. Dr. Brownlee's testimony corroborated Mr. Eubank's testimony and was necessary to prevent a complete defense. By not continuing the trial to the following Monday, the trial judge failed to protect Mr. Eubank's rights as a litigant. *Langford.* This Court should order a new trial.

Question IX

The trial judge erred by not excluding juror Tony Bailey from the jury panel after Mr. Bailey, a real estate agent, revealed he had sold a house to a relative of J.L, who was present in the courtroom for the trial, when this information was not available to Cliff Eubanks prior to jury selection and would have been the basis of a peremptory strike had this information been disclosed timely.

The trial court selected twelve jurors and one alternate. Mr. Eubanks used eight of his ten preemptory challenges. R. 68-75. The trial judge appointed Tony Bailey, the

first juror selected, to be the foreperson of the jury. T. 112. Immediately after opening statements, the trial judge excused all of the jurors except for Mr. Bailey. Mr. Bailey had informed the bailiff that his "ex-wife was related to certain members of the Lyons family." They had "been divorced eleven years and have two children together." Mr. Bailey, a real estate agent, had sold a house to "Jenna," an aunt of J.L., in the last two-three years. Mr. Bailey denied talking to the Lyons family on a regular basis and represented he could be fair and impartial. The trial judge retained Mr. Bailey as a juror. R. 134-36.

Mr. Eubanks moved for a new trial because the trial judge

> erred in failing to exclude juror Tony Bailey from the panel after Mr. Bailey revealed he had sold a house to a relative of the minor child testifying. The relative was present in the courtroom during the trial. This information was not available before jury selection and would have been a basis for the defense to use a peremptory strike had this information been known.

R. 17-18.

By written order dated September 11, 2018, the trial judge denied this motion, explaining the court had "inquired of whether the juror could remain fair and impartial despite his limited contact with the victim's family." At the time Mr. Bailey revealed the real estate transaction, the trial judge was under the impression Mr. Bailey had "limited contact with the victim's family" involving a "prior one-time business transaction with a member of the victim's family [that] was extremely limited in scope." In denying the motion for a new trial, the trial judge further relied on the subsequent removal of juror number sixteen who recognized a defense witness,[30] theorizing "the number of jurors

[30] At the very beginning of the direct examination of Lou Ann Price, the trial judge excused the other jurors to have a private conversation with Juror Number 16,

would have dropped to eleven (11) has the Court previously removed Juror Bailey, thereby likely necessitating a mistrial." R. 5-6.

Pursuant to the Sixth Amendment of the United States Constitution, Article I, Section 14 of the South Carolina Constitution, and S.C. Code Ann. § 14-7-1020, the tiral court has an obligation to place potential jurors on their oath and asked questions to determine whether any potential juror "has any interest in the cause, has expressed or formed any opinion, or is sensible to any bias or prejudice." Courts have long recognized the tricky nature of analyzing jurors' bias. *See Smith v. Phillips*, 455 U.S. 209, 221-2 (1982) (O'Connor, J., concurring) (recognizing that jurors may be incapable of acknowledging their own bias); *Crawford v. United States*, 212 U.S. 183, 196 (1909) ("Bias or prejudice is . . . an elusive condition of the mind . . . and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence"); *United States v. Burr*, 25 F. Cas. 49, 50 (D.Va.1807) (a person under the influence of personal prejudice "is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony" for such person may declare that "notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him').

Carolyn Blackstock, where Ms. Blackstock disclosed she works the prior witness, Cristy Cline "in the lunch room in Hickory Tavern." The trial judge was under the impression that counsel for Mr. Eubanks had not provided a defense witness list. Counsel had provided the defense witness list to the trial judge's law clerk and assumed the trial judge intentionally did not read it during *voir dire*. Ms. Blackstock assured the trial judge she "still could be fair to both the State and the Defendant and judge this case based on the law and the evidence even though" knowing this witness. R. 553-58. The trial judge subsequently removed Ms. Blackstock from the jury, at her request, following an off-the-record hearing convened in chambers. R. 692-93.

The possibility that a juror might not recognize his own bias is one of the reasons our General Assembly allows an accused ten preemptory challenges in a criminal sexual conduct with a minor case. S.C. Code Ann. § 14-7-1110. Even the unintentional withholding of this type of information warrants remove of the juror once it is discovered. *E.g. State v. Coaxum*, 410 S.C. 320, 764 S.E.2d 242 (2014) (juror's unintentional concealment of information regarding possible familial relationship with defendant warranted mid-trial removal). This Court should order a new trial.

Question X

The trial judge erred by denying Cliff Eubank's motion for a new trial, without convening a hearing and taking testimony, after Cliff Eubanks learned that juror Tony Bailey is friends on Facebook with Darlene Newsome and Jared Hunnicutt when Mr. Bailey did not disclose this information in response to the voir dire questions by the trial court.

As seen in Question IX above, when Juror Tony Bailey disclosed he was the real estate agent in a transaction with one of J.L.'s aunts, the trial judge was under the impression Mr. Bailey had "limited contact with the victim's family" involving a "prior one-time business transaction with a member of the victim's family [that] was extremely limited in scope."

After the trial, counsel for Cliff Eubanks "learned Mr. Bailey is friends on Facebook with Darlene Newsome, the grandmother of one of the witnesses for the State" and "Jared Hunnicutt, the chief investigator in this case." In his motion for a new trial, Mr. Eubanks specifically requested the trial judge "conduct a hearing with Juror Bailey to determine why his friendship with these two people was not disclosed in *voir dire* questions asked by the Court." Mr. Eubanks attached "[c]opies of the Facebook pages establishing these facts" and an exhibit to this motion for a new trial. R.19-24.

Rather than convening a hearing on this motion, the trial judge committed multiple errors of law when denying the motion. First, footnote one of the order denying Mr. Eubanks' motion for a new trial states, "The Court subsequently received affirmative confirmation via email from the Deputy Solicitor that Juror Bailey and Investigator Hunnicutt only became Facebook friends after the trial had concluded." Reliance on an email from the Deputy Solicitor was error because "[a]court cannot consider facts appearing only in argument of counsel." *Shinn v. Kreul*, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) (citing *Gilmore v. Ivey,* 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct.App.1986). *Cf. McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.").

Second, the trial judge's finding of fact that Mr. Bailey being a Facebook friends with Ms. Newsome and Investigator Hunnicutt "is not synonymous with a 'close business or social relationship' or being related by blood or marriage," is not supported by the record because the trial judge declined to convene a hearing on Mr. Eubanks' motion. *Blackwell, supra; McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013)

Third, the trial judge opined that it is not possible to seat independent jurors "in smaller, more rural counties," such as Laurens County,[31] and "the empaneling of an impartial jury was accomplished in this case." These finding of fact and conclusions of law are error. The Sixth Amendment obligation for the trial judge to seat "an impartial jury of the state and district wherein the crime shall have been committed" is no less

[31] The United States Census Bureau estimated the population of Laurens County, on January 1, 2018, to be 66,994. Quick Facts, Laurens County, South Carolina (found at https://www.census.gov/quickfacts/laurenscountysouthcarolina (last viewed June 22, 2019).

applicable in rural communities. As stated above, the finding of fact that "the empaneling of an impartial jury was accomplished in this case" is not supported by the record without the trial judge convening a hearing to determine the Mr. Bailey's connection to Ms. Newsome and Investigator Hunnicutt.

Fourth, the trial judge acknowledged the court disregarded existing case law requiring the court to convene the hearing requested by Mr. Eubanks, citing *McCoy v. State*, 401 S.C. 363, 371, 737 S.E.2d 623, 628 (2013) ("evaluating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing"). R. 6. *And see, e.g., Remmer v. U.S.*, 350 U.S. 377 (1956); *Remmer v. U.S.*, 347 U.S. 227 (1954); *State v. Bryant*, 354 S.C. 390, 581 S.E.2d 157 (2003). Additionally, the trial judge's suggestion counsel for Mr. Eubanks might have "sandbagged" the pre-trial investigations into the backgrounds of potential jurors is not supported by the record. *Blackwell, supra.*

Fifth, the order denying Mr. Eubanks' motion for a new trial states, "[B]ased on the colloquy with Juror Bailey, the Court was fully satisfied with his ability to remain impartial in these proceedings." R. 6. This finding of fact, however, overlooks the fact that the trial judge's colloquy with Mr. Bailey occurred immediately after opening statements, when the trial judge was under the impression Mr. Bailey had "limited contact with the victim's family" involving a "prior one-time business transaction with a member of the victim's family [that] was extremely limited in scope," and before counsel for Mr. Eubanks discovered Mr. Bailey's connection to Ms. Newsome and Investigator Hunnicutt. Convening a hearing was still necessary. *McCoy.*

Finally, the trial judge erred by not applying the proper standard for a juror misconduct claim, which is

> Provided a claim is timely raised, a new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges.

McCoy, 401 S.C. at 371, 737 S.E.2d ar 627. Although citing *McCoy*, the order denying Mr. Eubanks motion for a new trial ignored this standard.

In his motion for a new trial, Mr. Eubanks made a timely request for the trial court to convene a hearing regarding Mr. Bailey's connections to Ms. Newsome and Investigator Hunnicutt. As the trial judge acknowledged, *McCoy* and similar cases required the trial court to convene that hearing. This Court, therefore, should remand this case to the Circuit Court to convene a hearing to determine whether Mr. Bailey intentionally concealed his connections to Ms. Newsome and Investigator Hunnicutt. Either one of these connections supports Mr. Eubanks exercising one of his peremptory challenges and, depending on the facts developed at the hearng, might support excluding Mr. Bailey for cause.

Question XI

The trial judge erred by declining to charge second degree-assault and battery as a lesser-included offense of third-degree criminal sexual conduct with a minor.

> The law to be charged is determined by the evidence presented at trial. A trial judge must charge a lesser included offense if there is any evidence from which the jury could infer the defendant committed the lesser rather than the greater offense.

State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004) (internal citations omitted) (holding appellant was entitled to lesser included jury instruction in criminal sexual

conduct case). "The test for determining if a crime is a lesser included offense is whether the greater of the two offenses includes all the elements of the lesser offense." *State v. McFadden*, 342 S.C. 629, 632, 539 S.E.2d 387, 389 (2000), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

Counsel for Cliff Eubanks requested the trial judge instruct the jurors second-degree assault and battery as a lesser included offense of third-degree criminal sexual conduct with a minor. The trial judge initially pointed to "an unpublished opinion in the advance sheets this week that addressed that very question and said that on a charge of this nature A&B second would not constitute a lesser included offense." Defense counsel countered, "The criminal sexual conduct third degree just requires touching with intent to satisfy lust. Assault and battery second degree requires the touching with no [element of] intent to satisfy lust." R. 688-90; *see also* Court's Exhibit No. 1 (emails between Court and counsel regarding requests to charge), R. 817-20.

The trial judge ultimately denied the request for three reasons. First, the court below saw the jurors' decision, regarding Mr. Eubanks' statement in State's Exhibit No. 2, as a binary choice between conduct initiated by Mr. Eubanks that would be third-degree criminal sexual conduct with a minor or conduct initiated by J.L. that would not be an assault and battery or "an unlawful touching." Second, the trial judge noted our General Assembly did not expressly make second-degree a lesser included offense of third-degree criminal sexual conduct with a minor as a way "to offer additional protections to minors." Third, second-degree criminal sexual conduct with a minor has "different elements" than second-degree assault and battery. R. 692-93, 696-98.

Although not identifying the case, the trial judge apparently relied on *State v. Hernandez*, decided during Mr. Eubank's trial, which found "that had the Legislature intended for assault and battery in the first and second degrees to be lesser-included offenses of CSCM, it could have so provided." No. 2016-000612, 2018 WL 4690997, at *3 (S.C. Ct. App. Aug. 1, 2018).[32] Both *Hernandez* and the trial judge overlooked the evolution of the statutory second-degree assault and battery offense. Initially, S.C. Code § 16-3-600(D)(1)(b) (2010) required the nonconsensual touching of the private parts involve an adult, by providing:

> A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and the act involves the nonconsensual touching of the private parts of an *adult*, either under or above clothing.

(emphasis added). The next year, our General Assembly amended S.C. Code § 16-3-600(D)(1)(b) (2010),[33] removing the requirement that the nonconsensual touching of the private parts involve an *adult* by providing:

> A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and the act involves the nonconsensual touching of the private parts of a *person*, either under or above clothing.

(emphasis added). The General Assembly, thus, intended for second degree-assault and battery to apply to nonconsensual touching of the private parts of a child, contrary to the trial judge's belief.

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[32] As an unpublished opinion, *Hernandez* is not precedent and was not binding on the trial court. Rule 268(d), SCACR.

[33] The 2015 amendment to S.C. Code § 16-3-600 changed the definition of "moderate bodily injury" but did not otherwise alter the elements of second-degree assault and battery.

Third-degree criminal sexual conduct with a minor requires proof of (1) the age of the accused, (2) the age of the child, (3) a lewd or lascivious touching (or attempt of the body parts of the child, and (3) "the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child." S.C. Code Ann. § 16-3-655. Second-degree assault and battery deletes the elements of age of the accused, age of the child, and "the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child." Thus, second-degree assault and battery satisfies the elements test. *McFadden.*

Because reasonable jurors could have concluded that Mr. Eubanks unlawfully touched J.L. without "the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child," the trial judge erred by not instructing second-degree assault and battery. *White, supra.* This Court should order a new trial.

Question XII

This Court should reverse Cliff Eubanks' convictions and sentences and order a new trial based on the cumulative error doctrine.

The cumulative error doctrine "provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial." *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). *And see State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000), *reversed on other grounds by State v. Blurton,* 352 S.C. 203, 573 S.E.2d 802 (2002) (cumulative error of solicitor's improper argument and improperly excluded evidence warranted reversal). In *Blurton*:

> The prosecutor accused Blurton of a recent fabrication, an accusation which could not have been seriously made if the trial court had properly admitted the taped telephone conversations between Blurton and

> Mayfield. In that regard, the closing arguments served to exacerbate the error in excluding evidence critical to Blurton's defense.

342 S.C. at 512-13, 537 S.E.2d at 298. In *Blurton,* the Solicitor's improper closing argument was directly linked to the erroneously excluded evidence.

Here, several of the questions presented in this appeal are directly linked to each other. First, testimony about the container of pornography, questioning about legal internet searches, requiring Mr. Eubanks to demonstrate "twerking," and the Deputy Solicitor's inflammatory closing argument, all of which were improper character attacks, combined to deny Cliff Eubanks a fair trial. Second, the cumulative effect of Tony Bailey's multiple non-disclosures of information relevant to his selection as a juror require a new trial. Third, the cumulative effect of the trial judge's failure to provide Mr. Eubanks sufficient time to have the iPhone 5 examined and to delay the conclusion of the trial for a few days denied Mr. Eubanks his Constitutional right to present a complete defense. This Court should order a new trial.

Question XIII

This Court should clarify the procedure to be followed when the court reporter assigned to record a trial accepts employment with one of the parties that participated in that trial prior to completing the trial transcript.

South Carolina Court Administration assigned Tara Scott to be the court reporter for Judge Addy during the term of General Sessions Court for Laurens County during which the Eighth Circuit Solicitor's Office prosecuted Cliff Eubanks (week of July 30, 2019 – August 3, 2018).[34] On August 13, 2018, Mr. Eubanks moved for a new trial. On

[34] Found at https://www.sccourts.org/calendar/dspTermsCRCir.cfm (last viewed June 22, 2019).

August 17, 2018, while the new trial motion was still pending, Mr. Eubank's trial counsel requested the court reporter produce the trial transcript.

On September 4, 2018, a representative of the Eighth Circuit Solicitor's Office approached Ms. Scott, inquiring whether she would be interested in a position in that office as a victims' advocate. On September 21, 2018, Ms. Scott met with Solicitor Stumbo, who formally offered her the position as a victims' advocate, which she immediately accepted. Also on September 21, 2018, Ms. Scott submitted her resignation to Court Administration. October 26, 2018 was Ms. Scott's last date of employment with Court Administration. October 29, 2019 was Ms. Scott's first date of employment as a victims' advocate for the Eighth Circuit Solicitor's Office.

On October 27, 2018, Ms. Scott requested an extension to November 17, 2018 to complete the transcript. The extension request represented that 400 of 900 pages of the transcript had been completed at that point. Based on information provided by Court Administration in response to a Freedom of Information Act request, "The extension was not granted at the time it was submitted due to the extension request procedure not being followed." Ms. Scott delivered the transcript on November 26, 2018.

Mr. Eubanks challenged the transcript. Court Administration conducted an independent review of the transcript, reporting to this Court, on February 7, 2019, the correction of unspecified "proofreading errors that included word misspellings and grammar, punctuation, and typographical errors." Ms. Scott delivered the corrected transcript on February 18, 2019.

Published policy requires court reporters to return records to Court Administration upon separation:

> When a court reporter's employment with the Department ends, all primary and back-up recordings, trial notes, and log sheets must be properly labeled, dated, and transmitted in person to Court Administration in Columbia, South Carolina, no later than the last day of employment.

Section X (Return of Records and Equipment), Court Reporter Manual, at p. 13, as approved August 16, 2011, amended March 1, 2017, and updated May 1, 2018.[35] October 26, 2018 was Ms. Scott's last date of employment with Court Administration. When Ms. Scott requested an extension on October 27, 2018, she reported approximately one-half of Mr. Eubanks' transcript had been completed. If Court Administration had followed its published policy, then Ms. Scott would have returned her records and tapes to Court Administration before the transcript was complete, meaning production of the transcript could have been turned over to a disinterested court reporter.

Once Ms. Scott acquired an interest in employment with the Eighth Circuit Solicitor's Office, she should have disclosed that conflict of interest and recused herself from working on any cases involving her future employer.[36] Guidance from this court is necessary to avoid similar situations from occurring in the future.[37] As seen in footnotes

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[35] Found at https://www.sccourts.org/courtreporter/CourtReporterManual.pdf (last viewed December 18, 2018).

[36] Very arguably, Ms. Scott should have recused herself from proceedings involving the Eighth Circuit Solicitor's Office beginning as early as September 4, 2018 when that office began recruiting her for the Victims' Advocate position. That the Solicitor's Office did not advertise the position strongly suggests Ms. Scott was the only candidate for the position at that time. Certainly, by September 18, 2018, Ms. Scott was actively pursuing the Victims' Advocate position. According to the Judicial Department website, Ms. Scott was the court reporter for General Sessions Court in the Eighth Judicial Circuit on September 4-7, 12-14, 17-21, 2018 and October 1-5, 8-12, 2018.

[37] Mr. Eubanks acknowledges this issue likely will be moot in this case, depending on the outcome of his second challenge to the transcript. "If, however, an issue raised is capable of repetition but generally will evade review, the Court can address the issue." *Nelson v. Ozmint*, 390 S.C. 432, 434, 702 S.E.2d 369, 370 (2010).

17 and 29, *supra*, even after Court Administration reviewed this transcript, errors remain that are directly relevant to the questions presented in this appeal.

CONCLUSION

For the foregoing reasons, this Court should reverse Cliff Eubanks' convictions and sentences and remand this case for a new trial. In the alternative, this Court should remand this case for a hearing to determine whether juror Tony Bailey had undisclosed relationships with Investigator Jared Hunnicutt and Darlene Newsome.

Additionally, this Court should provide guidance about the procedure to be followed when the court reporter assigned to record a trial accepts employment with one of the parties that participated in that trial prior to completing the trial transcript.

Respectfully Submitted,

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Issues arising from a court reporter leaving the employment of Court Administration has the potential of generating multiple issues in the future. The failure of this court reporter to return her records to Court Administration became a consideration in at least one other case. In *State v. Charles Tillman,* Appellate Case No. 2018-000495, as evidence by a petition dated March 26, 2019, the Attorney General's Office had difficulty obtaining a transcript from this same court reporter, which could have been avoided if the procedures set forth in the Court Reporter Manual had been followed.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2018-001684

RECEIVED
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SC Court of Appeals

The State,..... Respondent,

v.

Michael Cliff Eubanks, ... Appellant.

Rule 211, SCACR Certification

This Final Brief of Appellant complies with Rule 211(b), SCACR.

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STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal From Laurens County
Frank R. Addy, Jr., Circuit Court Judge
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THE STATE, Respondent,

vs.

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FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court properly admitted the testimony of the State's expert witnesses regarding the victim's diagnosis of PTSD because the testimony was substantive evidence and its probative value significantly outweighed any possible prejudice. (Appellant's Issues I and II).

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X. The trial court properly refused to charge second degree assault and battery as a lesser included offense of third degree criminal sexual conduct because it is not a lesser included offense and even if it were, there is no evidence indicating Appellant was solely guilty of second degree assault and battery instead of third degree criminal sexual conduct.

XI. Appellant's argument regarding cumulative error is not preserved for review on appeal and he has failed to establish entitlement to a new trial.

XII. This Court should decline the opportunity to issue what is at most an advisory opinion requested by Appellant. Further, the issue was addressed by this Court in ruling on Appellant's motions prior to briefing.

STATEMENT OF THE CASE

On July 21, 2017, the Laurens County Grand Jury indicted Appellant on one count of third-degree criminal sexual conduct with a minor. On August 18, 2017, the Laurens County Grand Jury indicted Appellant on one count of first-degree criminal sexual conduct with a minor. Thereafter, on July 27, 2018, the Laurens County Grand Jury indicted Appellant on one count of second-degree criminal sexual conduct with a minor. (Indictments; R. 15, 17, 19).

The case was called for a jury trial on July 31, 2018, before the Honorable Frank R. Addy Jr., and a jury. (T.7; R.31). Appellant was subsequently found guilty as indicted by the jury. (T.780-782; R.790-792). Judge Addy sentenced Appellant to twenty-five years imprisonment for first-degree criminal sexual assault with a minor, a concurrent term of fifteen years imprisonment for third-degree criminal sexual assault with a minor, and fifteen years imprisonment, suspended with probation for five year, for second-degree criminal sexual assault with a minor to run consecutive to the twenty-five year sentence on the first-degree criminal sexual assault with a minor. (T.793-795; R.803-805).

On August 13, 2018, Appellant moved for a new trial. (Motion for New Trial; R.16) On September 11, 2018, by written order, Judge Addy denied the new trial motion. (Denial of Motion; R.4). This appeal follows.

STATEMENT OF FACTS

Appellant married Denise "Deanie" Lyons in 2010. (T. 111, R. 121). Appellant had two children from a former marriage, and Deanie also had two children from a previous marriage, including the victim. (T.111-112; R.121-122). Appellant and Deanie had one child during their marriage. (T.112; R.122). Initially, Appellant and Deanie's children lived in a house on Teague Road. (T.423; R.433). Appellant's biological children from his first marriage lived with their mother and visited every other weekend. (T.164; R.174).

In November of 2013, Deanie was involved in an automobile accident that left her with a broken neck. (T.576–578; R.586-588). Due to the accident, Deanie had to undergo back surgery and was unable to work. (T.428; R.438). Initially, Deanie did receive disability provided by the State, but that was ultimately cancelled because the accident was not work related. (T.578; R. 588). During this time, Appellant quit his job and did not work for about 6 months which lead to the family losing their home on Teague Road and having to move in with Deanie's parents on Beaver Dam Road. (T. 428; R.438).

In May of 2017, one of the children attended a counseling session with Kimberly Little at Gilchrist Consultation and Counseling. (T.127; R.137). The child suffered from depression due to a series of family losses and bullying that had occurred at school. (T.157; R.167). During his session, he explained to Little he did not have a relationship with his father nor his stepfather, Appellant, but he wanted a relationship with Appellant. (T.158; R.168). According to the child, Appellant and Deanie were not getting along in the home, and the Victim was the "peacekeeper" with whom Appellant spent a lot of his time. (T.158; R.168). After his session with Little, Little decided to ask Deanie if she could meet with Victim "to make sure she was ok." (T.158; R.168).

On May 16, 2017, the Victim met with Little. Victim was fidgety, anxious and crying. (T.158; R.168). After Little's session with Victim, Little contacted DSS and law enforcement. (T.159; R.169). Agents from both agencies arrived and took statements from the Victim and Little. (T.159-160; R. 169-170). Appellant also showed up at Little's office with his mother, but was intercepted by Deputy Ronald Richey (Richey). (T.160; R.170). Appellant wanted to go inside, but Richey asked Appellant to wait in the parking lot. (T.152-153; R.162-163). The case was turned over to DSS and Investigator Jared Hunnicutt (Hunnicutt).

On May 17, 2017, Deanie and Victim met with Hunnicutt at the Sheriff's station where statements were provided. (T.57; R.81). Hunnicutt also met with Appellant on May 17, 2017, to receive his statement of events. (T.58; R.82). Hunnicutt informed Appellant the Victim made allegations of abuse and the scope of those allegations. (T. 58, R. 82). Appellant willfully gave a statement. (State's Exhibit 1; R.808). In the statement Appellant explained:

> As far as I can remember, I have not touched her in any way that I can remember to make her feel this way. She has fell asleep at times with me and my daughter, . . . in the bed, but I have also picked her up and took her to her bed. And I have also fell asleep in my bed watching TV with me waking up with her next to me. I have no clue what goes on when I sleep. And I'm not saying that I did or didn't while I was asleep.

(T.330; R.340; State's Exhibit 1; R.808). Hunnicutt further explained that Appellant mentioned catching the Victim masturbating, the Victim was very flirtatious with Appellant and would do things other kids her age would not typically do, but Appellant did not know what to do about the Victim's behavior. (T.62-63; R.86-87). Appellant freely left the Sheriff's office after writing that statement. (T. 64; R.88).

Later on, that same day, May 17, 2017, Hunnicutt asked Appellant if he would be willing to come back to the Sheriff's office to discuss in further detail his first statement and the

allegations against him. (T. 65; R. 89). Appellant arrived at the Sheriff's office with his parents and gave another statement, freely, detailing an encounter with the Victim at the barn that was not provided in the first statement. (See State's Exhibit #2.) In Appellant's second statement, Appellant averred he was tearing down some pallets with the Victim at their barn and, at some point, the Victim crawled into Appellant's lap and began "wiggling on his leg." (T.69; R.93). Appellant stated he tried to push the Victim away, but she would not stop. Appellant ejaculated and did not know what to do. (T. 69; R.93). Appellant indicated he knew it was wrong, that he tried to push the Victim away, but it still aroused him, and he ejaculated in his pants. (T.70; R.94). After providing this statement, Appellant was arrested. (T.71; R.95).

The Victim testified Appellant began sexually abusing her when she was "young" at around the age of six at the Teague Road home. (T.169; R.179). Initially, Appellant would touch Victim on her breasts, butt, and vagina with his hands. (T.171; R.181). Appellant would digitally penetrate Victim's vagina. (T.172; R.182). Appellant would also perform oral sex on Victim. (T.173; R.183). Then Appellant would "use his boy part against [her] girl part" and would insert the "tip" into Victim's vagina. (T.174-175; R.184-185). The Victim testified when she was about eight years old, Appellant would pick her up early in the morning while she was still asleep and take her to the couch in the living room. (T.169; R.179). Then, Appellant would pull Victim's pants down and pull his pants down and start rubbing his penis against Victim's vagina. (T.170; R.180). The Victim also testified "[Appellant would] put his boy part on the rag and white stuff would come out." (T.179; R.189).

The Victim further testified to instances that occurred at the barn where Appellant would put boards up to block the view and would pull her pants down and position her so her "butt was on his boy part." (T. 204; R.214). The Victim testified Appellant would breathe hard and white

stuff would go on the chair and floor. (T.206; R.216). The Victim explained multiple instances that occurred at various locations, including details of when Appellant would put his "boy part" in her "girl part" and behind and expressed the pain that would occur. (T.206-210; R.216-220).

When the victim explained to her mother the abuse by Appellant, her mother initially did not believe her and thought she was lying. Once the victim explained how Appellant would start kissing her on the neck and ear, and then play with her breasts, and then continue from there, the victim's mother knew it had happened because it was how Appellant started foreplay with her. (T.454; R.464). Deanie further testified and gave the court a walkthrough of Appellant's signature bedroom foreplay. (T.455; R.465).

The Victim's brother testified he witnessed Appellant grabbing the Victim's butt and they would cuddle under blankets on the couch and in the bedroom. (T.136-137; R.146-147). He also testified Appellant would take Victim to school but would not drive him to school, even though Appellant went "right by [his school]," and Appellant gave the Victim money for school but would not give him money for school because Appellant needed it for his own lunch. (T 137-138; R.147-148). The brother described how Appellant would enter the bathroom with Victim when Victim was not dressed. (T.135-136; R.145-146).

There was conflicting testimony surrounding Appellant's perceived preferential treatment of Victim compared to the other children in the family. Several family members of Appellant testified they didn't really see any difference in the way Appellant treated the other children compared to the victim[1]. However, the Victim testified she did receive special attention and Appellant and Deanie would fight about Appellant not treating all the children the same. (T.214; R.224). Appellant's biological daughter testified to the special attention Appellant

[1] T. 517-21; 523-26; 535-39; 540-43; 548-50; 552-59; 562-64. R. 527-531; 533-536; 545-549; 550-553; 558-560; 562-569; 572-574

would give the Victim compared to how he treated the other children. Appellant's biological daughter even testified about gifts the Victim would receive like clothing, shoes, and perfume. (T.400; R.410). Deanie testified that after Appellant was arrested, she found clothing, jewelry, perfume, lotions, and a lot of cash that Appellant had given the Victim that she did not know about. (T.462; R.472).

On June 1, 2017, the Victim was interviewed by Heather Bennett (Bennett) at Beyond Abuse, which is a Children's Advocacy Center. (T.287-288; R.297-298). The Victim was twelve years old at that time. In her interview, the Victim asserted something happened to her at the Teague Road and Beaver Dam Road homes from when she was six years old until she was twelve years old. (T.288-289; R.298-299). On June 8, 2017, Dr. Lyle Pritchard performed a sexual assault medical examination on the Victim. (T.364; R.374). Dr. Pritchard testified that he did not find any signs of trauma and that it was a normal exam. (T.366; R.376). Pritchard also testified that 95% of exams in cases where children have been sexually assaulted the exams render a normal finding. (T.366-368; R.376-378). Specifically, Dr. Pritchard testified it is not definitive of abuse or no abuse. (T.372; R.382).

Samantha Black, a therapist employed by the Beckman Mental Health Center, met with the victim on June 14, 2017, and "got her background, history, family abuse allegations, symptoms, and [] assessment measures." (T.292; R.302). Based on Ms. Black's assessment of the Victim, she thought the Victim should undergo a therapy known as trauma focused cognitive behavior therapy. (T.292; R.302). Dr. Eman Sharawy, the medical director of Beckman Mental Health Center, testified that she reviewed Black's notes and records and then interviewed the Victim. After her interview and review, Dr. Sharawy diagnosed the Victim with posttraumatic stress disorder, PTSD. (T.315; R.325). Dr. Sharawy testified that the Victim was "very anxious,

very avoidant" and further noted the Victim's behaviors and symptoms. (T.316; R.326). Dr. Sharawy further testified the Victim's therapy was decided from that meeting and she prescribed an anti-depressant for the Victim. (T.316; R.326).

The trial court qualified Shauna Galloway-Williams, a licensed professional counselor and executive director of the Julie Valentine Center, as a blind expert in the field of child abuse dynamics. (T.377; R.387). Ms. Galloway-Williams proffered expert testimony regarding disclosure and the process involved.[2] (T.378-381; R.388-391). Ms. Galloway-Williams testified that age, frequency of abuse, comfort level with therapist or interviewer, knowledge of anatomy, even who the interviewer is can affect the details of the story a victim will share. (T.378-381; R.388-391). Ms. Galloway-Williams further testified that children often delay disclosure of sexual abuse because of the relationship with the alleged abuser and or fear of consequences for themselves or for the abuser. (T.382; R.392). Ms. Galloway-Williams testified that fears are very powerful for children and this can impact their willingness to disclose anything. (T.382; R.392).

[2] Contrary to Appellant's assertion, it clearly appears Ms. Galloway-Williams misspoke or the transcript was inaccurate when she testified "So we refer to disclosure as a process, meaning that we would expect that a child or an adult is going to tell every single detail or every single event that they've experienced related to child abuse at one time." (Final Brief of App. p. 18.; T. 378, R. 388). In fact, her next sentence stated, "[t]here may be factors that influence when they initially disclose and factors that influence what they tell throughout that entire process." When taken in context to the questions and answers before and after this particular statement, it is undeniable that Ms. Galloway-Williams meant "we would [**not**] expect a child or an adult is going to tell every single detail or every single event that they've experienced related to child abuse at one time."

ARGUMENT

I. The trial court properly admitted the testimony of the State's expert witnesses regarding the victim's diagnosis of PTSD because the testimony was substantive evidence and its probative value significantly outweighed any possible prejudice. (Appellant's Issues I and II).

Appellant contends the trial court erred in admitting testimony from several State's expert witnesses regarding their treatment of the child victim and the victim's diagnosis of PTSD. The testimony was properly admitted under established case law in South Carolina. Further, the testimony was not impermissible bolstering. Additionally, any argument regarding bolstering occurring by any specific testimony is not preserved for review on appeal.

Preservation

First, any argument that the testimony provided by Ms. Black or Dr. Sharawy impermissibly vouched for or bolstered the testimony of the victim is not preserved for review on appeal. During the discussion to exclude the testimony, the trial court ruled he would admit the testimony as long as "these witnesses stay away from any sort of vouching or statement about the veracity of the victim in this case." (T.299; R.309). The trial court continued after hearing more argument particularly about Ms. Black's testimony:

> It is circumstantial evidence that explains some of the behavioral characteristics that we heard the victim testify to earlier. So long as we don't wind up in a vouching situation, and presumably the next witness will be qualified as an expert in this particular field. Again, the Court finds that the probative value of this evidence outweighs any prejudicial effect so long as we stay away from the vouching that was so troublesome in Kromah. That'll be my ruling.

(T.301-302; R.311-312). Importantly, the trial court ruled it admissible as long as the testimony did not vouch for the child or violate Kromah. Most significantly, immediately after counsel asked that his objection to the admission of the testimony be noted for the record, the trial court

stated: "Now, Mr. Wise, I would ask this. If you feel like they're getting into vouching evidence, like I believe the child, I need to hear from you. Okay?" Counsel immediately responded "I understand." (T.302; R.312). The trial court, therefore, clearly expected counsel to object in the event any testimony bolstered or vouched for the child. Because counsel never raised an objection during any of the testimony of Ms. Black or Dr. Sharawy, any argument that the specific testimony presented impermissibly bolstered or vouched for the child victim is not preserved for review on appeal. See e.g., State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court). If a party fails to properly object, the party is procedurally barred from raising the issue on appeal. State v. Johnson, 363 S.C. at 58-59, 609 S.E.2d at 523.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

Merits

On the merits, the testimony regarding the child's therapy, her behaviors, and the diagnosis of PTSD were all properly admitted by the trial court based on clearly established case law in South Carolina. The Courts of this state have examined behavioral testimony in several

cases. Initially in State v. Hudnall, 293 S.C. 97, 359 S.E.2d 59 (1987), the South Carolina Supreme Court held expert testimony regarding common behavioral characteristics exhibited by child victims of sexual abuse was not admissible to establish abuse had occurred. The Court held this evidence admissible only to rebut a defense claim that the victim's response was inconsistent with such a trauma. Id. at 100-101, 359 S.E.2d at 61. The Supreme Court changed direction in State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), holding trauma testimony of a rape victim is relevant to prove the elements of criminal sexual conduct since such evidence makes it more or less probable that the offense occurred.

In State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), the South Carolina Supreme Court considered expert testimony regarding rape trauma syndrome. The expert testified to characteristics commonly found in sexual assault victims. Id. at 505, 435 S.E.2d at 861. The Supreme Court overturned its holding in Hudnall, and specifically found: "both expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect."

This Court had a chance to address similar behavior testimony in State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). In Weaverling, an expert testified regarding behavior and characteristics of a sexually abused victim. This Court stated: "Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible." Id. at 474-475, 523 S.E.2d at 794 (citing Frenzel v. State, 849 P.2d 741 (Wyo.1993); State v. Lujan, 192 Ariz. 448, 967 P.2d 123 (1998) (opinion testimony describing behavioral characteristics outside jurors' common experience is permitted as long as it meets other admissibility requirements)). This Court explained:

> Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. Frenzel, *supra*. It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor. Id. See also Lujan, *supra* (when facts of case raise questions of credibility or accuracy that might not be explained by experiences common to jurors—like reactions of child victims of sexual abuse—expert testimony on general behavioral characteristics of such victims should be admitted).

Id. at 475, 523 S.E.2d at 794.

In Anderson, the South Carolina Supreme Court specifically stated:

> Certainly we recognize that there is such an expertise: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims. See, e.g., State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999); see also State v. White, 361 S.C. 407, 605 S.E.2d 540 (2004) (such witness may be more crucial where alleged victim is a child).

State v. Anderson, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015).

This case is very similar to the case of State v. White, 361 S.C. 407, 605 S.E.2d 540 (2004). In White, the appellant maintained testimony that the victim's symptoms were consistent with those of a recent trauma sufferer was more prejudicial than probative and not allowed pursuant to Schumpert. While White involved an adult victim, the South Carolina Supreme Court explained that Schumpert clearly allowed testimony of the type admitted and further elucidated:

> Expert testimony on rape trauma may be **more crucial** in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior. Nevertheless, the importance of rape trauma testimony in the case of a child victim does not negate the relevance of rape trauma evidence where the victim is an adult. The purpose of rape trauma evidence is to prove the elements of criminal sexual

> conduct since such evidence may make it more or less probable the offense occurred.

White, 361 S.C. at 414–15, 605 S.E.2d at 544 (emphasis added). Additionally, the Court found the evidence not unduly prejudicial and found it probative to dispute the appellant's claims.

In the instant case, the testimony that the child victim suffered PTSD as a result of trauma refutes Appellant's claims that the only touching that occurred was innocent touching and that nothing more happened with the child victim.[3] The fact that after the alleged abuse occurred and was disclosed that the child suffered behaviors consistent with PTSD, including being "very anxious, very avoidant" and "guarded and withdrawn," having "nightmares, bad dreams," and having "depressive symptoms, low mood . . . ." (T.316; R.326). This testimony and diagnosis was not mere repetition of hearsay, but was instead the exact type of behavioral testimony described in Schumpert and White which directly refutes Appellant's claim that nothing traumatic happened to the child and instead supports the existence of sexual abuse.

Additionally, the testimony by Ms. Black and Dr. Sharawy did not impermissibly bolster or vouch for the child victim's allegations of sexual abuse. As noted before, neither tied the symptoms of trauma or PTSD to sexual abuse. Additionally, as the Supreme Court of Virginia noted in a similar case in which testimony of PTSD was admitted: "[the doctor's] testimony merely tended to corroborate the victim's testimony, in the same way that a doctor's testimony describing a rape victim's physical injuries tends to corroborate the victim's testimony." Ward v. Commonwealth, 264 Va. 648, 653, 570 S.E.2d 827, 831 (2002). Accordingly, the trial court did not err in admitting the testimony by Ms. Black and Dr. Sharawy.

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[3] It is significant to note that neither Ms. Black nor Dr. Sharawy testified as to the cause of the trauma suffered by the child victim. Neither indicated they believed it was sexual abuse which resulted in the PTSD or the symptoms of trauma. They merely explained the symptoms and indicated the child victim exhibited those symptoms consistent with a recent traumatic experience.

II. The trial judge did not abuse his wide discretion when he permitted the State to question the child victim regarding pornography she was exposed to by Appellant. Additionally, Appellant opened the door to any testimony presented. Even if the trial judge erred in admitting the testimony, any error was harmless.

Appellant maintains the trial court erred in allowing the State to question the child victim about pornography kept by Appellant. Testimony regarding pornography kept by Appellant was relevant when the child victim testified she was exposed to that pornography by Appellant. Further, Appellant opened the door to its admission through his examination of the child on cross-examination. Finally, any argument regarding Rule 404(b), SCRE, and character evidence is not properly preserved for review on appeal.

Preservation

As an initial matter, Appellant's argument regarding Rule 404(b), SCRE, is not preserved for review. Appellant at no point during trial objected to the testimony as "improper character evidence" under Rule 404(b), SCRE, and therefore this issue is not preserved for review on appeal. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. at 142, 587 S.E.2d at 693. 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. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). "Appellant is limited to grounds raised at trial." State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997). Therefore, this issue is not preserved for appeal. See State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001) (A party may not argue one ground at trial and an alternate ground on appeal.).

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

"A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

Merits

A defendant may open the door to otherwise improper evidence through defendant's own introduction of evidence or witness examination. State v. Culbreath, 377 S.C. 326, 333, 659 S.E.2d 268, 272 (Ct. App. 2008). "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though the latter evidence would be incompetent or irrelevant had it been offered initially." State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (citations omitted). When a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003); see also, State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999) ("[W]hen a party introduces evidence about a

particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially."). A party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991). "Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge." State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2009) (citations omitted).

Prior to trial, the State indicated it did not intend to go into the pornography owned by Appellant, including pornography seen on a cell phone. (T.92; R.102). Nevertheless, Appellant in cross-examination of the Victim introduced the subject of pornography by questioning the Victim about videos she saw on Appellant's cell phone. (T.238-243; R.248-253). Additionally, he specifically opened the door to testimony about the remainder of Appellant's collection of pornography by asking questions designed to make it appear to the jury the only time the child saw pornography or was exposed to pornography was when it was on Appellant's cell phone. (T.238-244; R.248-254).

The State questioned the child victim about watching pornography and about Appellant's collection of pornography. She indicated he watched it when he would lay on the bed with her, he showed her what was in the tub of pornography that he kept in the barn, and he had her move it in the closet to better conceal the pornography. (T. 266-268; 272-276; R.276-278; 282-286). Appellant opened the door to the discussion of the pornography by asking the child about the video and search on the iphone. The State needed to explain to the jury that it was not just an isolated incident in which the child victim was exposed to the pornography by Appellant, but that

he watched it while she was in the room and also that he showed her what he collected and where he kept it.

The information was relevant because the child was knowingly exposed to adult pornography by Appellant as a means of desensitizing her to what was about to happen to her. She explained the first time she saw something was right before the physical touching began occurring and that she told her mom because she thought it was wrong. However, when she watched further videos after the touching started happening she did not tell her mom. (T.239; R.249). The exploration of this grooming was directly relevant to the charges, especially when Appellant placed his intent in regards to the barn incident at issue.

Additionally, the admission of the tub as well as the testimony following the objection was entirely harmless in light of the testimony which was admitted without objection. On re-direct, the State and the child victim engaged in the following colloquy without objection:

> Q And he was asking you about some videos, pornographic videos. Was that something you saw Cliff doing on more than one occasion, looking at dirty videos?
>
> A Yes, sir.
>
> Q And you were talking about in the narrative a Google search or Youtube search that you found.
>
> A Yes, sir.
>
> Q Told your mother about. And then there was another time he was looking up a video. Those were times when he was looking at them by himself or was he asking you to watch them?
>
> A He was looking at them by himself.
>
> Q Were there ever times when he asked you to watch videos or showed you videos?
>
> A He'd lay down beside me and put them on.

Q There's a TV in that barn. Did he ever show you videos in there?

A He showed videos to me on the TV in the house.

Q The TV in the house?

A Yes.

Q Which TV?

A In his bedroom.

. . . .

Q Did you ever know where he kept all his pornographic videos?

A Yes, sir.

Q Where did he keep them?

A In his storage building.

Q Was there a little bit or a lot of them?

A A lot.

(T.266-268; R.276-278). It was only at this point that counsel interjected an objection. As a result, a significant amount of testimony regarding the existence of Appellant's pornography was admitted before the jury without objection. See State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence.); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (any error in admission of evidence cumulative to other unobjected to evidence is harmless). Additionally, the trial court limited the discussion to solely the existence of the pornographic material and not the contents of the materials; thereby greatly reducing prejudice to Appellant.

Accordingly, the trial court did not err in admitting the testimony and if it was error, it was entirely harmless.

III. The trial judge did not abuse his wide discretion when he allowed the State to question Appellant about internet searches he performed as they were relevant to the question of intent, especially as it related to the third degree criminal sexual conduct with a minor charge.

Appellant maintains the trial court erred in allowing the State to question Appellant about internet searches he performed. He alleges they were improper prior bad act testimony and also unduly prejudicial. The testimony was directly relevant based on the allegations in this case and Appellant's defense that he did not intend certain things to happen with the child victim. Further, the evidence was highly probative and, therefore, the trial court properly did not exclude the testimony.

Standard of Review

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001); State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("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."). An abuse of discretion occurs when the trial court's ruling lacks any evidentiary support or is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

Merits

"'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." Rule 401, SCRE. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." See e.g., In re Care and Treatment of Corley, 353 S.C. 202, 205, 577 S.E.2d 451,

453 (2003). "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). Determination of relevancy is largely within the discretion of the trial court and will not be reversed absent an abuse of that discretion. See Saltz, at 127, 551 S.E.2d at 247 ("The trial court is given broad discretion in ruling on questions concerning the relevancy of evidence, and its decision will be reversed only if there is a clear abuse of discretion.").

Additionally: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

"Probative" means "[t]ending to prove or disprove." Black's Law Dictionary 1323 (9th ed. 2009). "Probative value" is the measure of the importance of that tendency to the outcome of a case. State v. Gray, 408 S.C. 601, 609-10, 759 S.E.2d 160, 165 (Ct. App. 2014). "It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues." Id. at 610, 759 S.E.2d at 165. "[T]he more essential the evidence, the greater its probative value." Id. (quoting United States v. Stout, 509 F.3d 796, 804 (6th Cir. 2007)) (internal quotation marks omitted). "Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." Gray, 408 S.C. 610, 759 S.E.2d 165.

Generally, evidence of a defendant's character is inadmissible to show a propensity to commit the specific crime charged; however, an exception exists for evidence tending to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or (5) the identity of the person charged with the present crime. See Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). Even if the evidence is clear and convincing and falls within a Lyle exception, the trial judge must exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Wallace, 384 S.C. 428, 435, 683 S.E.2d 275, 278-279 (2009).

In the instant case, the Appellant maintained he had low testosterone, erectile dysfunction, and general difficulties obtaining and maintaining an erection. The State questioned Appellant regarding his use of pornography to become aroused and assist in obtaining an erection. After a sidebar which was not put on the record,[4] the State asked: "I'm going to ask the million dollar question. Are you attracted to young girls?" (T.644; R.654). Appellant maintained he was only interested in girls over 18 but when asked again indicated: "I mean, you need to describe how - - what you mean by young." The State then sought to question Appellant about specific websites he searched. The Court allowed the solicitor to ask generally about his prior internet searches: "Had you done internet searches where you looked for young looking girls?" Appellant responded: "I have done searches." The State clarified: "Have you done searches where you looked for younger looking girls?" and Appellant responded: "Yes, sir." (T.652-653; R.662-663).

[4] As a result, any objection to the immediately following testimony would not be properly preserved for review on appeal.

The question was directly relevant to the question of intent and whether Appellant "**wilfully and lewdly** commits or attempts to commit a lewd or lascivious act upon or with the body, or its parts, of a child under sixteen years of age, **with the intent** of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child." S. C. Code Ann. § 16-3-655(C) (Supp. 2018). Appellant cites to State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998) to allege the testimony was improperly admitted on intent. Nelson is clearly distinguishable. In Nelson, the trial court permitted children's toys, videos, photographs of young girls, and other evidence tending to depict the defendant as a pedophile into evidence. There the trial court stated the evidence was probative of a "personality characteristic," specifically, that the defendant was a pedophile. Our Supreme Court reversed the trial court because "[s]uch evidence could only invite the jury to infer Petitioner was acting in conformity with this character trait when he committed the crimes with which he was charged." Id. at 7, 501 S.E.2d at 719. Further, the Court found that "the State's argument [that] th[e] evidence was relevant to show motive or intent [wa]s merely a cleverly disguised way of asserting Petitioner committed the crimes because he has a propensity to commit sexual offenses." Id. at 12, 501 S.E.2d at 722.

In the instant case, the central question regarding the incident where the child victim was in Appellant's lap and he ejaculated was whether this was a lewd or lascivious act in which he intended the arousal he obtained or if it was an incident in which the girl was misbehaving and he attempted to prevent what occurred. The testimony about the prior internet searches for young looking girls was probative of his intent since he acknowledged the pornography he viewed was for purposes of arousal; meaning he became aroused looking at younger girls engaged in sexual situations. The fact he became aroused looking at younger looking girls

engaged in sex made it more likely that the incident in the barn was a willful act done by Appellant with the intent to create arousal and not the innocent accident he alleged.

Finally, the evidence was not unduly prejudicial. Its high probative value, assisting the jury in determining the likelihood of Appellant's ejaculation being a mere accident as opposed to a result of a willful and intentional lewd or lascivious act, is not outweighed by the prejudice. The State is required to prove the elements of third degree criminal sexual conduct with a minor including that Appellant acted with the requisite intent. The prior searches assisted the State is establishing that intent and directly refuting Appellant's claim it was an accident or unintentional act. Accordingly, the trial court properly admitted the testimony regarding the internet searches for "younger looking girls."

IV. The trial judge properly permitted the State to ask Appellant to demonstrate for jurors how the victim was "wiggling" when she sat on his lap and caused him to ejaculate. Furthermore, Appellant failed to preserve any issue regarding the demonstration.

Appellant contends the trial court erred in permitting Appellant to demonstrate to the jurors how the Victim, was "wiggling" when she sat on his lap because the only purpose was to humiliate Appellant. Appellant further contends that this demonstration was "to obtain fodder" for the solicitor's closing arguments that "repeatedly mocked" Appellant. (Brief of App. p. 38.) However, the demonstration was not improper because it provided the jury a visualization of Appellant's claim of what Victim was doing on his lap that caused him to ejaculate. Additionally, the issue is not preserved for review on appeal.

Preservation

Appellant testified his eighty-one-pound stepdaughter was "wiggling" on his leg and moving in "circular motion[s]" on his leg and these motions caused him to ejaculate. (T. 661-662; R. 671-672). The solicitor asked Appellant to come down and show the jury how the child victim was moving on his leg. (T. 661; R. 671). It was at this point that Appellant's counsel stated:

> **The State**: Your Honor, I don't - - I don't know if this is a proper demonstration even because it's - - having never heard of it before.

(T. 661-662; R. 671-672). The trial judge responded:

> **The Court**: If he's able to pull it off, then he's able to pull it off. Let's see if he can do it. Go ahead.

(T.662; R.672). Appellant's counsel never raised an objection on a specific ground. See State v. Jennings, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011) ("An objection must be made on a specific ground."); State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007) (finding a broad generic objection not sufficient to preserve issue for review on appeal); State v. Varvil, 338 S.C. 335, 340, 526 S.E.2d 248, 251 (Ct. App. 2000) (finding [a] general objection is ordinarily insufficient to preserve an issue for appeal). Significantly, he never maintained the demonstration was so highly prejudicial as to require a new trial as he does on appeal. As a result, the issue is not preserved for review on appeal. See State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to

and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

Standard of Review

"A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

Merits

Demonstrative evidence explains or summarizes other evidence and testimony. Clark v. Cantrell, 339 S.C. 369, 383, 529 S.E.2d 528, 535 (2000). "Demonstrative evidence, [particularly], reenactments of events, can be highly persuasive" and provide the jury an opportunity "to see what supposedly happened can accomplish in seconds what might otherwise take days of testimony." U.S. v. Wanoskia, 800 F.2d 235, 237–38 (10th Cir. 1986). Demonstrations of various behaviors by the defendant are properly allowed and assist the jury in understanding the defendant's testimony. See e.g., Moore v. State of Texas, 154 S.W.3d 703, 708 (Tex. App. 2004) (holding a defendant's use of a doll during cross examination to demonstrate how he handled a child was a fair comparison to the act in question because the defendant was demonstrating his own conduct); State v. Fisher, 805 N.W.2d 571, 578–79 (S.D. 2011) (allowing defendant to demonstrate how he shook his baby with a rubber doll); Commonwealth v. McGee, 11 N.E.3d 1043, 1049 (Mass. 2014) (allowing demonstration, on a couch, to show position in which defendant's mother was lying as the he was choking her). As the Colorado Court of Appeals stated:

> Demonstrative aids can take various forms, including diagrams, maps, computer animations, or, as relevant here, models or mock-ups. See Black's Law Dictionary 675 (10th ed. 2014). Regardless of the particular form, demonstrative aids generally serve the same purpose: to illustrate or clarify a witness's testimony. In other words, the primary purpose of a demonstrative aid is to "illustrate other admitted evidence and thus to render it more comprehensible to the trier of fact." 2 George E. Dix et al., McCormick on Evidence § 214 (Kenneth S. Broun ed., 6th ed. 2006) (McCormick); see also Intermill v. Heumesser, 154 Colo. 496, 501, 391 P.2d 684, 686 (1964) ("[D]emonstrative aids should be encouraged since they give the jury and the court a clear comprehension of the physical facts, certainly much clearer than one would be able to describe in words.").

People v. Palacios, 419 P.3d 1014, 1018 (Colo. 2018).

As our Supreme Court stated: "Demonstrative evidence often is admitted only for use in the courtroom to explain and illustrate a witness's testimony." Clark, 339 S.C. at 383, 529 S.E.2d at 535. Here, this is exactly the purpose of having Appellant demonstrate to the extent he could how the child victim was moving on his leg. It enabled the jury to better understand and assess the defense he was setting forth by allowing them to visualize Appellant's allegation and not just rely on his testimony and descriptions. Accordingly, the trial court did not abuse its broad discretion in admitting the demonstration as it was relevant to the issues for the jury to resolve and allowed a "clear comprehension of the physical facts, certainly much clearer than one would be able to describe in words."

V. Appellant's argument the solicitor improperly made inflammatory arguments during closing arguments to the jury is not preserved for appeal and does not meet any exception for review without proper preservation.

Appellant maintains the solicitor made such inflammatory remarks during closing argument that he is entitled to a new trial even without having made the requisite objections during the closing argument. The statements by the solicitor do not rise to the level of "vicious

inflammatory argument" which "results in clear prejudice" as would be necessary to warrant the extreme remedy of a new trial.

The Supreme Court of South Carolina "has routinely held the plain error rule does not apply in South Carolina state courts." State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011). Indeed, "it is the responsibility of trial counsel to preserve issues for appellate review. Only limited exceptions to this rule have been recognized." Jackson v. Speed, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997). In the absence of a contemporaneous objection, "a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) (citing South Carolina Highway Dept. v. Nasim, 255 S.C. 406, 179 S.E.2d 211 (1977)). Nevertheless, "the issue of inflammatory argument must be raised to the trial judge by way of post-trial motion to preserve the issue for appeal." Dial v. Niggel Associates, Inc., 333 S.C. 253, 257, 509 S.E.2d 269, 271 (1998).

Here, Appellant contends the solicitor's closing argument remarks were "highly inflammatory" and even a "dehumanizing attack on the character of [Appellant] and his cousin, Mitchell Eubanks." (Brief of App. p. 39.) Appellant points to several arguments made by the solicitor that he maintains were unduly and clearly prejudicial. Nevertheless, Appellant never objected to the solicitor's argument, nor did Appellant make any post-trial motion based on the solicitor's arguments. In fact, Appellant concedes that the issue is not usually preserved for appeal, however, Appellant maintains the solicitor's arguments were so egregiously inflammatory and vicious that the issue falls within the narrow exception to our state's error preservation rules. In rare instances, South Carolina appellate courts have deemed that a new trial should be granted in the absence of a contemporaneous objection if a vicious or

inflammatory argument results in clear prejudice to one party. See Lynch, 314 S.C. at 263, 442 S.E.2d at 615.

For instance, in Lynch, the South Carolina Supreme Court granted a new trial in this case because there was a clear attempt by Lynch to depict the defendants as being Japanese thereby appealing to racial stereotypes. Lynch at 314 S.C. at 262-63, 442 S.E.2d at 615. Accordingly, the Court determined it "could hardly conceive of a more outrageous argument than that made here" and therefore found the prejudice to the appellant to be clear. Id. at 263, 442 S.E.2d at 615. Contrary to the central issue in Lynch, the solicitor's closing arguments in the case *sub judice* contained no disparaging racially inflammatory remarks, and further did not prejudice Appellant.

Notably, all but one case cited by Appellant deals with racially inflammatory remarks that required the granting of a new trial. In particular, Appellant cites State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007), and attempts to guide the Court by asserting the "[s]olicitor's closing argument 'dehumanizing Appellant' required remand for new trial." (Brief of App. p. 41.) (internal citation omitted) However, Appellant's assertion from Northcutt is misguided and simply put, incorrect. The defense in Northcutt argued seven issues in that case asserting these issues warranted a new trial for the defendant:

> (1) crying numerous times throughout the argument;
> (2) telling the jury "we will kick the baby some more" if they returned a life sentence;
> (3) **dehumanizing Appellant ("I don't even call him a person")**;
> (4) threatening the jury ("it will be on your heads if he kills someone else [during his life sentence in prison]");
> (5) declaring an "open season on babies;"
> (6) telling the jury he "expects" the death penalty; and
> (7) enacting a funeral procession complete with a black shroud covering the baby's crib."

Northcutt, 372 S.C. at 222, 641 S.E.2d at 881 (emphasis added). The Court in Northcutt *actually* found that the "first four alleged mistakes [were] permissible arguments because they were based on the record and reasonable inferences from it." Northcutt, 372 S.C. at n. 6, 641 S.E.2d at n. 6 (emphasis added); see State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996) ("A solicitor's closing argument . . . should stay within the record and reasonable inferences to it."). Thus, Northcutt would serve to guide Respondent and Appellant that dehumanizing an appellant is permissible so long as it is based on the record.

To be sure, solicitors have "substantial latitude to present their case as they see fit" and "[t]hat latitude is not to be casually abridged." Bennett v. Stirling, 842 F.3d 319, 323 (4th Cir. 2016). In fact, the Supreme Court warns "[t]he line separating acceptable from improper advocacy is not easily drawn." Id. (quoting United States v. Young, 470 U.S. 1, 7 (1985)). Therefore, courts "should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning" or that a jury "will draw that meaning from the plethora of less damaging interpretations." Id. (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974)). As well, in cases where a solicitor does present an inflammatory argument, the issue must be raised to the trial court in a post-trial motion. See State v. Young, 364 S.C. 476, 494, 613 S.E.2d 386, 395-96 (Ct. App. 2005) (holding even though solicitor asked racially inflammatory questions of Young, the issue was not preserved for appeal because Young did not make a contemporaneous objection and did not present the issue during a post-trial motion and the issue was not preserved).

As the United States Supreme Court has concluded: "it 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.' . . . The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make

the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986).[5] In the instant case, the commentary by the solicitor was derived from the testimony and record before the jury. Further, it was not of a racial nature nor was it so inflammatory that it infected the trial with unfairness. As a result, the issue should have been raised to the trial court to be preserved and this Court should not reverse Appellant's convictions because of the closing argument.

VI. The trial court did not abuse its wide discretion in denying Appellant's motion for a continuance to have a cell phone examined which was in the Appellant's possession until just before trial.

Appellant maintains the trial court erred in failing to grant a continuance in order to have a cell phone examined. The cell phone was in Appellant's possession until just before trial. He gave no reason why he could not have had the phone examined prior to trial. Appellant did not present sufficient grounds justifying the grant of a continuance directly before trial was set to begin. Thus, the trial judge properly denied the continuance request.

A decision on whether to grant or deny a motion for continuance rests in the sound discretion of the trial judge. State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). The denial of a motion for continuance will not be disturbed on appeal absent a clear abuse of discretion. Morris v. State, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006); State v. Ravenell, 387 S.C. 449, 455, 692 S.E.2d 554, 557 (Ct. App. 2010). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v.

[5] The comments in this case are not nearly as inflammatory and "dehumanizing" as those used in Darden. There, the closing argument included the prosecutor's desire that someone blow the defendant's face off with a shotgun, called defendant an animal, and argued only the death penalty could prevent the defendant from performing future similar acts. Darden, 477 U.S. at 180.

Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) (quoting State v. Greer, 391 S.C. 179, 189, 705 S.E.2d 441, 447 (Ct. App. 2010)). "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." Ungar v. Sarafite, 376 U.S. 575, 589 (1964). "Reversals of refusals of continuances '**are about as rare as the proverbial hen's teeth.**' " Yarborough, 363 S.C. at 266, 609 S.E.2d at 595 (quoting State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)) (emphasis added).

As the South Carolina Supreme Court has stated:

> When a motion for a continuance is based upon the contention that counsel for the defendant has not had time to prepare his case its denial by the trial court has rarely been disturbed on appeal. It is axiomatic that determination of such motions must depend upon the particular facts and circumstances of each case.

State v. Babb, 299 S.C. 451, 454–55, 385 S.E.2d 827, 829 (1989) (quoting State v. Motley, 251 S.C. 568, 572, 164 S.E.2d 569, 570 (1968)).

Appellant had possession of the cell phone until several days before trial. (T.94-96; 358; R.104-106; 368). Prior to turning it over, the phone was in Appellant's possession and the only reason he explained he did not have it analyzed was because SLED would be cheaper than hiring his own expert to do it. (T.96; R.106). Further, Appellant never indicated his expert would be able to examine the phone. Finally, as the trial court correctly determined any issue related to the phone would be a collateral issue and not a central issue in the case.

This case is similar to Meggett, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012). In Meggett, the appellant argued that the trial judge erred in denying his motion for a continuance. Specifically, appellant argued that had he been permitted to have a comforter tested for Victim's

DNA then he could have produced critical evidence to impeach the Victim's testimony regarding their relationship and prior sexual encounters. Meggett, 398 S.C. at 523, 728 S.E.2d at 495. The appellant in Meggett had over 2 years to test the comforter. Id. This Court recognized in Meggett, that appellant "had a significant period of time to obtain the testing and his failure to do so was a result of his own inaction . . . ." Id. Consequently, this Court held the trial court did not abuse its discretion in denying appellant's continuance motion. Id.

Here, Appellant was in possession of his iPhone for over a year. Upon discovering the phone had not been analyzed, Appellant turned the phone over to the State because it was economically friendlier to have SLED analyze the phone than Appellant's expert. (T.96; R.106). However, when Appellant found out the State was not going to get it analyzed or was unable to get it analyzed because of the broken screen, Appellant sought a continuance that may or may not produce collateral evidence. Just as defendant in Meggett, Appellant here had ample opportunity and time to have the phone analyzed himself. Consequently, Appellant made a strategic decision regarding the iPhone and the trial judge properly denied his motion for a continuance.

Additionally, analysis of the phone would have provided minimal benefit to Appellant. If the phone were analyzed and the videos found on the phone then that would have been corroborative evidence of the child victim's claims. If no videos were found, it would establish nothing as the phone was in Appellant's sole possession for more than a year after the allegations were made and before it was finally turned over to the State. He would have had ample opportunity to ensure the videos were not located on the phone.

Accordingly, the trial court properly denied Appellant's request for a continuance because he had ample opportunity to avail himself of an examination of the phone and chose not

to and any result of the examination would have either been detrimental to Appellant or rendered no meaningful evidence.

VII. The trial court did not abuse its wide discretion in denying Appellant's motion for a continuance.

Appellant maintains the trial court erred in granting him a continuance to bring in his doctor to discuss his medical conditions. The trial court did not abuse its wide and wise discretion in denying Appellant's request because Appellant knew well in advance of trial his low testosterone and erectile dysfunction would be the subject of his defense and could have arranged to have his personal doctor available. Additionally, it is questionable whether the issue is properly preserved for review on appeal.

Preservation

On Thursday, the trial court excused the jury for the night. He also asked them to come in later the next morning to allow time for Appellant to obtain Dr. Brownlee to testify about Appellant's medical conditions. (T.680-681; R.690-691). When they returned in the morning, Appellant's counsel did not initially raise any issue related to Dr. Brownlee. Instead, he moved for a directed verdict on all charges, presumably because he had rested his case. (T.684; R.694). It was only after the trial court indicated that Appellant did not intend to call any further witnesses that he indicated he could not obtain Dr. Brownlee and asked to continue the case to the following Monday. (T.688; R.698). Accordingly, the request was not timely made.

Standard of Review

"The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion." State v. Morris, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008) (citing State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)). "An abuse of

discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012). "Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) (citing State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)).

Merits

The trial court did not abuse its broad discretion in denying Appellant's request for a continuance to obtain the testimony of Dr. Brownlee. If the continuance is based on the absence of witnesses, Rule 7(b), SCRCrimP, requires:

> No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and **has made use of due diligence to procure the testimony of the witness** or of such other circumstances as will satisfy the court that his motion is not intended for delay.

Rule 7(b), SCRCrimP (emphasis added). "It is paramount that the party asking for the continuance show 'due diligence' was used in trying to procure the absent witness." State v. Colden, 372 S.C. 428, 439, 641 S.E.2d 912, 918–19 (Ct. App. 2007); see also, State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595-96 (Ct. App. 2005) (witness's sudden decision not to cooperate did not mandate a continuance where no evidentiary hearing was necessary and, alternatively, where due diligence in asserting an attempt to acquire affidavits was not shown).

In the instant case, Appellant indicated he had the medical records from Dr. Brownlee allegedly showing Appellant suffered from low testosterone and erectile dysfunction since at least February prior to trial July 31-August 3. (T.690; R.700). He also knew that part of his

defense was to allege the medical conditions. Further, he claimed at trial it was only after Deanie testified that he knew the medical condition was an issue. She testified prior to lunch on Thursday. Instead of attempting to obtain the testimony of Dr. Brownlee while her offices were clearly open on Thursday afternoon, he waited until later in the day and first thing Friday when the offices were closed to try and contact her. The trial court properly denied the motion for a continuance because Appellant did not exercise due diligence in obtaining the testimony of Dr. Brownlee, a witness he knew would be necessary as early as February prior to trial and not later than lunch time on Thursday when he could have contacted her office. See Herndon v. Southern R. Co., 118 S.C. 466 (1921) (finding no abuse of discretion in denying continuance when after plaintiff's evidence was introduced, defendant was unprepared to meet issue raised by evidence). Accordingly, the trial court did not abuse its wide discretion in denying Appellant's motion for a continuance.

VIII. The trial court did not abuse its discretion in refusing to dismiss a qualified juror who indicated they could be fair and impartial and did not intentionally conceal any information during voir dire.

Appellant maintains the trial court erred by not excluding juror Tony Bailey from the jury panel when Mr. Bailey informed the judge his ex-wife was related to the victim's family and he had sold a house to a relative of the child victim who was present in the courtroom. Appellant further contends that had this information been available during *voir dire*, Appellant would have used a peremptory strike against Mr. Bailey. However, Appellant did not object to the qualification of Mr. Bailey when the judge held additional *voir dire* to assess the possible issues. The issue is not preserved for review. Further, there was no error in qualifying the juror.

Preservation

The trial court properly conducted a hearing to determine whether or not juror Bailey needed to be excused. After conducting *voir dire*, Appellant never raised any issue to the *voir dire* conducted, nor did he object to the trial court's determination not to excuse the juror. As an initial matter, Appellant failed to timely object to the qualifying of Mr. Bailey and only raised this issue in post-trial motions which does not preserve this issue for review by this Court. Certainly, "[i]t is well settled that an issue may not be raised for the first time in a post-trial motion." State v. Geer, 391 S.C. 179, 193, 705 S.E.2d 441, 448 (Ct. App. 2010) (quoting S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007)). Moreover, "it is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error." Id. at 193, 641 S.E.2d at 448-49.

Standard of Review

When presiding over a trial, the trial judge is entrusted with the duty to ensure a jury comprised solely of fair, impartial, and unbiased jurors is impaneled. State v. Powers, 331 S.C. 37, 43, 501 S.E.2d 116, 119 (1998); see State v. Holland, 261 S.C. 488, 495, 201 S.E.2d 1, 18, 122 (1973) ("It is the duty of the trial judge to assure himself that each and every prospective juror is unbiased, fair, and impartial."); see also S.C. Code Ann. § 14-7-1010 ("The presiding judge shall at each term of court ascertain the qualifications of the jurors."). In the event information is discovered during trial reflecting on a seated juror's qualifications or partiality, the trial judge has broad discretion to attend to the situation in several different ways; such as replacing juror with an alternate juror, proceeding forward with the trial without removing the juror, or declaring a mistrial. State v. Coaxum, 410 S.C. 320, 328, 764 S.E.2d 242, 246 (2014); see generally State v. Lindsey, 372 S.C. 185, 194, 642 S.E.2d 557, 562 (2007) (finding a trial

judge did not abuse his discretion in declining to remove a juror and replace the juror with an alternate juror and further noting such a decision rested within the trial judge's discretion).

Merits

The South Carolina Supreme Court has laid out a two criteria test to assess whether a juror's failure to disclose a potential bias warrants granting a defendant a new trial; and if either of the criteria is missing, the trial judge may not remove the juror. Id. 410 S.C. at 329-330, 764 S.E.2d at 264; cf. State v. Sparkman, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004) ("The Court developed a two-part test to determine whether a juror's failure to disclose a potential bias warranted granting the defendant a new trial."). First, the trial judge must determine whether the concealed information was done intentionally by the juror. Sparkman, 358 S.C. at 496, 596 S.E.2d at 377; State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001). Next, if the answer to the first question is yes, then the trial judge must consider whether the concealed information would have supported a challenge for cause or would have been a material factor in the use of a party's peremptory challenges. Id.

Significantly, the intentional concealment of information by a juror supports the inference of impartiality by that juror. Coaxum, 410 S.C. at 328-329, 764 S.E.2d at 246; see State v. Woods, 345 S.C. 583, 587-588, 550 S.E.2d 282, 284 (2001) ("Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial."). Notably though, a juror's unintentional withholding of information, including material information, does not support an inference of partiality or bias. Id. 410 S.C. at 329, 764 S.E.2d at 246. Furthermore, the objecting party bears the heightened burden of establishing the juror's concealment was prejudicial and prevented the objecting party from exercising a peremptory strike grounded on a possible material source of bias. Id.; see

Woods, 345 S.C. at 589, 550 S.E.2d at 282 ("[W]here the failure to disclose is innocent, no inference of bias can be drawn.").

Ultimately, a decision as to whether to dismiss a juror and replace the juror with an alternate juror falls within the sound discretion of the trial judge. State v. Bell, 374 S.C. 136, 147, 646 S.E.2d 888, 894 (Ct. App. 2007); see Simmons, 360 S.C. at 43, 599 S.E.2d at 452 (recognizing decisions regarding the removal of veniremen rest in the sound discretion of the trial judge). On appeal, an appellate court will not reverse such a decision absent a prejudicial abuse of discretion. See State v. Rogers, 263 S.C. 373, 382, 210 S.E.2d 604, 609 (1974) ("[T]he general principle that error must be prejudicial in order to grounds for reversal applied to rulings on excusing a juror."); see also Coaxum, 410 S.C. at 331, 764 S.E.2d at 247 ("[T]o receive a new trial, the defendant must show a prejudicial abuse of discretion.").

In the case *sub judice*, the trial judge and parties learned just after opening arguments that juror, Mr. Bailey, sold a home to a relative of the victim and was related to a relative of the victim. The record clearly indicates Mr. Bailey did not intentionally conceal the information regarding his prior marriage and the real estate transaction with Appellant's relatives; in fact, when he realized it, he candidly revealed it to the bailiff. (T/ 123-124; R. 133-134). See Woods, 345 S.C. at 588, 550 S.E.2d at 284 ("Unintentional concealment . . . occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.").

Critically, the fact Mr. Bailey did not intentionally conceal information was extremely significant as to whether he could be fair and impartial in deciding Appellant's case because an unintentional failure to disclose even material information does not support an inference of

partiality or bias on the part of a juror. See id. at 589, 550 S.E.2d at 282 ("Where the juror's failure to disclose information is 'without justification,' i.e., intentional, the juror's bias will be inferred. Conversely, where the failure to disclose is innocent, no inference, of bias can be drawn."). Thus, the record shows that Mr. Bailey did not intentionally withhold the information during voir dire.

Next, the trial judge would typically assess whether the second factor analysis would or would not establish Appellant was either biased or potentially biased and would it be materially significant to the manner in which the parties exercised their peremptory challenges. However, this case, there is no indication from the record that Mr. Bailey intentionally withheld the information during *voir dire*. Thus, "if either of the criteria is absent, the judge may not remove the juror on that basis." Coaxum, 410 S.C. at 330, 764 S.E.2d at 246; State v. Burgess, 391 S.C. 15, 19–20, 703 S.E.2d 512, 514–15 (Ct. App. 2010); see Sparkman, 358 S.C. at 497, 596 S.E.2d at 378 ("Because [the juror's] concealment was unintentional our inquiry is over, however, we fail to see how [the defendant] was prejudiced given that the trial judge questioned the jury after the verdict."); Stone, 350 S.C. at 448, 567 S.E.2d at 247–48 (finding that a juror's "scant acquaintance" with the defendant's family would not have prejudiced the State had the juror remained on the jury). The trial judge properly questioned Juror Bailey and correctly determined no cause existed for excusing him because he demonstrated he could be fair and impartial in the exercise of his duties.

IX. The trial court properly denied the motion for a new trial based on the juror's connection to a witness's grandmother and an investigator when no juror bias has been established.

Appellant maintains the trial court erred in failing to hold a hearing regarding juror Bailey's Facebook connection to a witness's grandmother and to the investigator who testified at

trial. There is no basis upon which to grant a new trial because intentional concealment has not been established. In the event the information provided to the trial court is insufficient for him to have reached a decision denying the motion for a new trial, the proper remedy is to remand for a hearing on whether Juror Bailey intentionally concealed information.

In the event of juror misconduct, a new trial is reasonable if the complaining party can show that "(1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." McCoy v. State, 401 S.C. 363, 371, 737 S.E.2d 623, 627-28 (2013) (emphasis added); see also State v. Woods, 345 S.C. 583, 587–89, 550 S.E.2d 282, 284 (2001) (finding that a juror's intentional failure to disclose a relationship may provide the inference of bias and rejecting the State's contention that a new trial should be granted only if the complaining party shows they were prejudiced by the juror failing to disclose the relationship).

During *voir dire*, the trial judge read a list of potential witnesses that included Hunnicutt. The trial judge then asked if any member of the venire was "related by blood or marriage" or if they had "any close business or social relationships" with any of the listed potential witnesses. (T.15-16, R.39-40). No one responded affirmatively. The trial court specifically found the questions asked were not sufficient to require a response regarding Facebook friends. Additionally, the trial court was presented an email from Deputy Solicitor Dale Scott which indicated Bailey did not become friends on Facebook with the investigator until after the trial concluded. (Order Denying New Trial 2; R.5). As other courts have determined: "It is now common knowledge that merely being friends on Facebook does not, per se, establish a close relationship from which bias or partiality on the part of a juror may reasonably be presumed." McGaha v. Commonwealth, 414 S.W.3d 1, 6 (Ky. 2013).

Given the ambiguity of the question posed to the prospective jurors, there was no intentional concealment by juror Bailey because he was not asked about his social media connections. See Woods, 345 S.C. at 588, 550 S.E.2d at 284 ("Unintentional concealment . . . occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.").

The trial judge, in considering the evidence presented to him and the facts and circumstances regarding the alleged underlying concealment determined a hearing was not necessary to find Appellant was not entitled to a new trial. Even if the trial judge erred in deciding the issue without a hearing, the proper remedy is to remand for a hearing in which Juror Bailey can testify to explain his relationship with the investigator and can explain his Facebook connections. See McCoy v. State, 401 S.C. 363, 371, 737 S.E.2d 623, 628 (2013) ("Further, evaluating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing."). Nothing has been presented establishing the right to a new trial.

X. The trial court properly refused to charge second degree assault and battery as a lesser included offense of third degree criminal sexual conduct because it is not a lesser included offense and even if it were, there is no evidence indicating Appellant was solely guilty of second degree assault and battery instead of third degree criminal sexual conduct.

Appellant maintains the trial court erred by declining to charge the jury with second-degree assault and battery (A&B) as a lesser-included offense of third-degree criminal sexual conduct with a minor (CSCM). In support of that contention, Appellant avers that a jury could have found that Appellant touched Victim without "the intent of arousing, appealing to, or

gratifying the lust, passions, or sexual desires of the actor or the child." Contrary to Appellant's contentions, second-degree A&B is not a lesser included offense.

Generally, "[t]he law to be charged to the jury is determined by the evidence presented at trial." State v. Dantonio, 376 S.C. 594, 608, 658 S.E.2d 337, 344-45 (Ct. App. 2008) (citing State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). Additionally, it is the duty of the trial court to instruct the jury on a requested instruction if and when that instruction "is supported by the evidence and correctly states the law applicable to the issues." Dantonio, 376 S.C. at 608, 658 S.E.2d at 345 (citing State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996)).

In particular, the instruction of law to a jury requires a trial judge "to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than greater, offense was committed." State v. Williams, 427 S.C. 148, 829 S.E.2d 702, 706 (2019) (quoting Suber v. State, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007)).)). Primarily, "[t]he . . . test for determining if a particular offense is a lesser included of the offense charged is the elements test. The elements test inquires whether the greater of the two offenses includes all the elements of the lesser offense." State v. Brandenburg, 419 S.C. 346, 350-51, 797 S.E.2d 416, 418 (Ct. App. 2017) (quoting State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 2002)).

A person is guilty of third-degree CSCM "if the actor is over fourteen years of age and the actor wilfully and lewdly commits or attempts to commit a lewd or lascivious act upon or with the body, or its parts, of a child under sixteen years of age, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child." S.C. Code Ann. § 16-3-655(C) (2015) (emphasis added). To compare, a person is guilty of second-degree A&B if they "unlawfully injure[] another person or offer[] or attempt[] to injure another

person with the present ability to do so and: (a) moderate bodily injury resulted or could have resulted; or (b) the act involved the nonconsensual touching of the private parts of a person above or underneath the person's clothing." S.C. Code Ann. § 16-3-600(D)(1) (2015) (emphasis added).

Second degree A&B does not meet the elements test for inclusion as a lesser included offense. First, second degree A&B requires proof of an injury or an offer or attempt to injure and nonconsensual touching of a person's private parts. This is not required by third degree CSCM. Additionally, the ages of the victims are different considerations. As a result, second degree A&B does not meet the elements test and is not a classic lesser included offense.

Further, as explained recently by the South Carolina Supreme Court, the legislature recently codified the assault and battery crimes and as part of the codification indicated what crimes are lesser included offenses of other crimes. See State v. Hernandez, Op. No. 27923 (S.C. Sup. Ct. filed Oct. 23, 2019). As a result, it would not be a lesser included offense even if it would have previously been considered a lesser included offense under prior case law.

XI. Appellant's argument regarding cumulative error is not preserved for review on appeal and he has failed to establish entitlement to a new trial.

Appellant maintains this Court should grant a new trial because of the cumulative error associated with several of the issues he raises. This issue was never presented to the trial court and therefore is not preserved for review on appeal. Additionally, even if it is considered there is no error which so affected the fairness of Appellant's trial as to require the grant of a new trial.

Preservation

First, Appellant never raised the cumulative error doctrine to the trial court. He never raised it during trial or even in a post-trial motion after trial, and as a result, the issue is not

preserved for review on appeal. See State v. Beekman, 405 S.C. 225, 236, 746 S.E.2d 483, 489 (Ct. App. 2013) (finding cumulative error doctrine must be raised to and ruled upon by the trial court in order to be addressed on appeal). Appellant seems to be asking this court to completely ignore longstanding preservation and waiver rules, and instead address this issue as plain error. South Carolina has rejected the plain error doctrine and this Court should not entertain it under the guise of the cumulative error doctrine. See e.g., State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (eliminating *in favorem vitae* review in death penalty cases and holding: "A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured.").

Merits

First, none of the issues Appellant contends combined to create cumulative error were errors. As discussed above, Appellant has failed to establish errors by the trial court, even insubstantial ones. Also, rather than Appellant showing how the errors adversely affected his right to a fair trial and providing supporting case law, Appellant merely restated the alleged errors he had already fully argued in his brief and alleged the combination of the errors had tainted the proceedings based on the prejudicial effect. See Beekman, 405 S.C. at 237, 746 S.E.2d at 490 (finding "[a]n appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground."). Accordingly, this Court should not grant Appellant a new trial.

XII. This Court should decline the opportunity to issue what is at most an advisory opinion requested by Appellant. Further, the issue was addressed by this Court in ruling on Appellant's motions prior to briefing.

Appellant asks this Court to issue an advisory opinion regarding the proper procedure to be followed when a court reporter assigned to record a trial accepts employment with one of the parties that participated in that trial prior to completing the transcript. Appellant has already submitted this argument to this Court in his Petition for this Court to Take Possession of the Tapes of Mr. Eubank's Trial and Order Independent Review and Verification of the Trial Transcript. This Court on January 24, 2019, denied his request and directed Appellant to the appropriate procedures outlined in the Court Reporters Manual.

Notably, in Appellant's Initial Brief he directs this Court to footnotes 17 and 19 and contends the "errors remain that are directly relevant to the questions presented in this appeal." (Initial Brief of App. pp. 57-58.) As of July 13, 2019, Tara Scott reviewed and corrected a total of three errors. On page 435 lines 13 and 16, Dr. Brownlee was mistakenly transcribed as Dr. Bradley and on page 648 line 21 Rule 404(b) was incorrectly transcribed as 404.3. All three of these errors have been corrected and Appellant is in receipt of the corrected pages.

Anything further by this Court would be nothing more than an advisory opinion, which is not appropriate. See Sangamo Weston, Inc. v. Nat'l Surety Corp., 307 S.C. 143, 414 S.E.2d 127 (1992) (concluding that appellate courts will not issue advisory opinions that are purely academic and do not affect the outcome of the case); Matter of Angela Suzanne C., 286 S.C. 186, 189, 332 S.E.2d 542, 543 (Ct. App. 1985) ("It is settled law that this [c]ourt will not issue advisory opinions on questions for which no meaningful relief can be granted."); Gainey v. Gainey, 279 S.C. 68, 69, 301 S.E.2d 763, 764 (1983) ("This Court will not issue advisory opinions on questions for which no meaningful relief can be granted.").

CONCLUSION

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

Respectfully submitted,

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January 23, 2020

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal From Laurens County
Frank R. Addy, Jr., Circuit Court Judge
Appellate Case No: 2018-001684

THE STATE, Respondent,

vs.

MICHAEL CLIFF EUBANKS, Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed January 23, 2020, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).
This 23rd day of January, 2020.

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
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RECEIVED
JAN 23 2020
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

RECEIVED
JAN 21 2020
SC Court of Appeals

Appellate Case No. 2018-001684

The State,..... Respondent,

v.

Michael Cliff Eubanks, ... Appellant.

Final Reply Brief of Appellant

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STANDARD OF REVIEW

The Brief of Respondent ("State's Brief") asserts a number of Cliff Eubanks' questions on appeal are not preserved for appellate review. Mr. Eubanks disagrees. "An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court." *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). *See State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) ("[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court."). This Court has stated:

> 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.

State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) (internal quotations omitted) (citing Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina* 57 (2d ed.2002)).

ARGUMENTS

Question I

***State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993), and similar cases, should be overruled (or the holdings in *Schumpert* and similar cases limited) to the extent that those holdings allow a prosecution expert witness to offer an opinion about whether a complaining witness suffers from trauma, when that expert's opinion is largely based on the hearsay statements of the complaining witness, because that type of opinion testimony is inconsistent with *State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566 (2018) and the *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) line of cases.**[1]

[1] As the threshold matter, the State's Brief combines Cliff Eubanks' Questions I and II into a single argument. In order to keep these two questions separate, Mr. Eubanks will reply to these issues separately.

The State's Brief, at 10-11, asserts "any argument that the testimony provided by Ms. [Samantha] Black or Dr. [Eman] Sharawy impermissibly vouched for or bolstered the testimony of [J.L.] is not preserved for review on appeal" because the trial judge expected additional objections. The State's argument overlooks what actually occurred at trial, which unequivocally demonstrates that the trial judge understood Cliff Eubanks objected to any testimony about J.L. having post-traumatic stress disorder ("PTSD") as improper vouching; however, the trial judge did not recognize the legal error and overruled the objection. *Oxner, Michael H.* and *Rogers, supra.*

When Samantha Black first testified about "[t]rauma focused cognitive behavior therapy," Mr. Eubanks objected. After a bench conference, the trial judge considered the objection outside the presence of the jurors. The trial judge noted, "Mr. Wise made the argument at the bench that by this witness testifying as to treatment that [J.L.] received for the psychological ramifications of the abuse, that constitutes vouching for the witness as prohibited by" *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). Counsel for Mr. Eubanks further explained:

> That is correct. I really don't know what the probative value of this witness' testimony is frankly going to be if it is not to say I treated this child for whatever she determined to be the problem, which is in essence of saying I determined there to be a problem because she was, in fact, abused.

R. 302-04.

The trial judge added, "The State indicated at the bench that" another witness "will be testifying about the post-traumatic stress disorder that the child was diagnosed with." The trial judge reasoned, because the second "witness' testimony is going to piggyback on . . . . Ms. Black's testimony. . . . it would be best to go ahead and cross the

PTSD bridge. . . . before we proceed with Ms. Black's testimony." The trial judge understood "Ms. Black is going to testify about the traumatic-based cognitive therapy that she offered the minor, and then some other witness is going to testify as about – as to the actual diagnosis of PTSD." R. 304-05.

Mr. Eubanks further explained the objection pertains to the diagnosis of PTSD being secondary to child abuse. The Solicitor represented the witness would not "touch on the fact PTSD was linked to the child's sexual abuse." The Solicitor argued the testimony is admissible pursuant to *Schumpert, State v. Morgan*,[2] and *State v. Barrett*.[3] The trial judge also reviewed *State v. White*, 361 S.C. 407, 605 S.E.2d 540 (2004) and Rule 403, SCRE. R. 306-08.

Mr. Eubanks further argued:

> [T]o have an expert come in and testify the child is suffering from post-traumatic stress disorder I think is doing nothing but vouching for the credibility of everything she's said. And I think it is terribly more prejudicial than probative.

R. 309.

The trial judge explained the court's understanding of *Kromah*:

> [E]ven in *Kromah* they indicated there are times when a sex abuse therapist can testify as to certain things so long as they don't step over the line and say that based upon their expert opinion they think that the child is being truthful. *Kromah*, to summarize the holding, I think really said we can't have people coming in and pretending to be human like detectors. And so long as these witnesses stay away from any sort of vouching or statement about the veracity of the victim in this case, I do see the State's point that the probative value in this case would outweigh any prejudicial effect. I'm hearing the State is going to stay away from any causation type testimony that while clearly because the child was molested

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[2] *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997), *overruled on other grounds by State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009)

[3] *State v. Barrett*, 416 S.C. 124, 785 S.E.2d 387 (Ct. App. 2016).

> by her stepfather, she began suffering from PTSD. I'm assuming that you're not going to be – your saying that you're not going to be eliciting that kind of testimony correct?

R. 309.

The Solicitor re-confirmed the expert testimony would not "link the PTSD to anything in particular." Mr. Eubanks continued to protest:

> [T]reatment going forward is nothing but to me saying we believe the child – she's telling the truth. I don't know what – how treatment going forward is probative of an issue in this case.

R. 310.

The trial judge likened the expert testimony about PTSD in this case to an emergency room doctor testifying about a gunshot wound in an assault and battery case and explained:

> They're testifying as to certain symptoms that are consistent with an element of the crime, certain symptoms that are consistent with someone being shot. I really don't see this as being much different even though it's in the behavioral sciences realm.

R. 311. The trial judge cut off further argument and ruled, "It is circumstantial evidence that explains some of the behavioral characteristics that we heard [J.L.] testify to earlier," and the "probative value of this evidence outweighs any prejudicial effect." The trial judge instructed counsel for Mr. Eubanks, "You do not have to object contemporaneously when they testify." R. 311-12.

When the jury returned to the courtroom, Ms. Black testified about the "trauma focused cognitive behavioral therapy" she provided J.L, including the goal "to complete a trauma narrative." R. 313-15.

When the State offered Dr. Eman Sharawy as "an expert in child and adolescent psychiatry," the trial judge confirmed the court's understanding that Mr. Eubanks has "an

objection that was put on the record a moment ago." R. 318-23. Dr. Sharawy diagnosed J.L. with PTSD "after reviewing Samantha's Black's notes and records" and after interviewing the child. R. 324-27.

Just as the record unequivocally shows that the trial judge understood that Cliff Eubanks objected to any testimony about J.L. having PTSD as improper vouching, the record reveals the trial judge's decision to admit the testimony was controlled by an error of law. As discussed in Mr. Eubanks' opening brief, at 30-33, the testimony of Samantha Black and Dr. Eman Sharawy exceeded the parameters of the procedures approved of by *State v. Anderson,* 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015) and *State v. Brown,* 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) (hereinafter "*Anderson-Brown* procedure"). Ms. Black's treatment was provided at Beyond Abuse, a children's advocacy center, because of the allegations in this case. Dr. Sharawy's diagnosis of PTSD is based on the hearsay statements of J.L., including the trauma narrative, made during Ms. Black's counseling. Dr. Sharawy could not have made this diagnosis if she did not believe J.L. The jurors knew this.[4] This testimony violated the *Kromah* line of cases and *State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566 (2018).[5] In *Simmons*, our Supreme Court expressly declined to "sanction the State's use of Dr. Simmons as a conduit for this

[4] The State's Brief, at 14 (fn. 3), points out that neither Ms. Black not Dr. Sharawy directly "testified as to the case of the trauma suffered by" J.L. This assertion is disingenuous because Ms. Black's therapy occurred at the children's advocacy center, solely as a result of her allegations of sexual abuse, and included preparation of a trauma narrative detailing the first, last, and most serious allegation of sexual abuse. R. 313-15

[5] Ironically, the State's Brief, at 14, cites *Ward v. Commonwealth*, 264 Va. 648, 653, 570 S.E.2d 827, 831 (2002) ("[the doctor's] testimony merely tended to corroborate the victims testimony, in the same way that a doctor's testimony describing a rape victim's physical injuries tends to corroborate the victim's testimony."). The State's Brief, however, completely omits a discussion of *Simmons,* which explains the limits of a doctor's testimony.

glaringly inadmissible hearsay to be brought before the jury." 423 S.C. at 565, 816 S.E.2d at 573. The Court noted, "If this tactic were permitted, the legitimate use of the Rule 803(4), SCRE, medical diagnosis and treatment exception would be undermined and the general approach of Rule 801(d)(1)(D), SCRE, would be thwarted." *Id.* Stated another way, an expert witness "recounting" of a complaining witness' "statements amounted to nothing more than 'hearsay shrouded in a doctor's white coat.'" *Id.* Here, the jurors were very aware that Dr. Sharawy's PTSD diagnosis was based on the trauma narrative that Ms. Black helped J.L. draft.

At trial, the State relied on *Schumpert, Morgan,* and *Barrett.* Our Supreme Court limited the application of these and similar cases by the holdings in *Kromah* and similar cases. As seen above, our Supreme Court approved the *Anderson-Brown* procedure as method for the prosecution to present testimony about trauma symptoms in a limited, non-prejudicial manner. As the State's Brief, at 13, acknowledges *Anderson* considered *Schumpert* and related cases when adopting the *Anderson-Brown* procedure. *Simmons* forbids an expert from basing a diagnosis of sexual trauma on the hearsay statements of the complaining witness. The testimony of Dr. Sharawy and Ms. Black exceeded the permissible limits of *Simmons* and the *Anderson-Brown* procedure. This Court should recognize and apply those limitations. In the alternative, *Schumpert* and similar cases should be overruled or limited to the extend these cases are contrary to the *Kromah* line of cases. This Court should reverse the trial court, vacate the convictions, and remand this case for a new trial.

Question II

The trial judge erred by admitting evidence of J.L.'s Post-Traumatic Stress Disorder when the "probative value [of this evidence was] substantially outweighed by the danger of unfair prejudice," pursuant to Rule 403, SCRE, and the prosecution used this evidence in its closing argument to bolster the credibility J.L.'s testimony, thereby denying Cliff Eubanks due process of law in contravention of the Fourteenth Amendment to the United States Constitution and Article I, § 3 of the South Carolina Constitution.

As seen in Question I above, Mr. Eubanks objected to testimony about PTSD as "terribly more prejudicial than probative" during the testimony of Samantha Black. R. 309. The trial judge recognized the court must conduct a Rule 403, SCRE analysis,[6] R. 308, ruled the "probative value of this evidence outweighs any prejudicial effect," R. 311, instructed counsel for Mr. Eubanks, "You do not have to object contemporaneously when they testify," R. 312, and recognized the ongoing objection when qualifying Dr. Eman Sharawy as an expert witness, R. 323. This issue, accordingly, is preserved for appellate review. *Oxner, Michael H.* and *Rogers, supra.*

In his opening brief, at 33-34, Mr. Eubanks offered a definition of "unfair prejudice," citing *Old Chief v. United States*, 519 U.S. 172, 180 (1997), *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991), and *State v. Gray*, 408 S.C. 601, 616, 759 S.E.2d 160, 168-69 (Ct. App. 2014). The State's Brief not only did not address any of these cases but also never addressed Mr. Eubanks' argument that the prejudicial effect of testimony about PTSD substantially outweighed its probative value. Nor could it because, under the circumstances of this case, the testimony about PTSD conveyed to the jurors that the prosecution's expert witnesses believed J.L. had been

[6] *See also Schumpert*, 312 S.C. at 506, 435 S.E.2d at 862 ("[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect.").

sexually abused. *Alexander*, 303 S.C. at 382, 401 S.E.2d at 149 ("Applying the test to the unique facts of this case, we hold that the emotional trauma evidence is unduly prejudicial and should have been excluded."). This Court should reverse the trial court, vacate the convictions, and remand this case for a new trial.

Question III

The trial judge erred by allowing the prosecution to question J.L. on re-direct examination about her knowledge of an "enormous tub of pornography" in response to defense counsel asking J.L. limited questions about the titles of two iPhone internet searches when this testimony was not relevant, pursuant to Rule 401, SCRE, improper character evidence pursuant to Rule 404(b), SCRE, and the prejudicial effect of the testimony substantially outweighed its probative value, pursuant to Rule 403, SCRE?

The State's Brief, at 15, argues, "Appellant at no point during trial objected to the testimony as 'improper character evidence' under Rule 404(b), SCRE, and therefore this is not preserved for appellate review." Counsel for Cliff Eubanks, eventually, did raised a Rule 404(b), SCRE at R. 658; *see also* corrected Tr. 648, R. 807. Even if this issue is not preserved for review under Rule 404(b), SCRE, the Rule 403, SCRE objection is preserved for appellate review. *See* R. 280 ("it's more prejudicial than probative"). *Oxner, Michael H.* and *Rogers, supra.* Additionally, it should be noted that the prosecution's theory—at trial and on appeal—for introducing this evidence is that counsel for Mr. Eubanks opened the door, which was addressed during a lengthy *in camera* hearing during the trial. R. 278-82.

The State's Brief, at 16, acknowledges that the evidence of an "enormous tub of pornography" was "otherwise improper evidence," but rather argues counsel for Mr. Eubanks opened the door to the evidence by questioning J.L. about statements she made to Heather Bennett, about telephone internet searches, during the child advocacy center

interview, which was part of the police investigation. And, "Additionally, he opened the door to testimony about the remainder of Appellant's collection of pornography by asking questions designed to make it appear to the jury the only time the child saw pornography or was exposed to pornography was when it was on Appellant's cell phone." *Id.* at 17 (citing R. 248-254). These statements misrepresent the record.

The record reveals Mr. Eubanks' counsel merely asked about two specific internet searches that J.L. identified in her child advocacy center interview. The record also confirms counsel asked J.L. about telling her mother about these internet searches. *See* R. 279, lines 15-18, trial counsel explaining, "It was for the purpose of showing that she could talk to her mother about one thing and did, but then wouldn't talk about the other," *i.e.* the sexual abuse, and arguing, it "is a door that I don't think even came close to open."

Because trial counsel did not open the door to this "otherwise improper evidence," this Court should reverse the trial court, vacate the convictions, and remand for a new trial.[7] The evidence was not admissible because the prejudicial effect substantially outweighed its probative value pursuant to Rule 403, SCRE. As seen in Question II above, Rule 403, SCRE protects an accused from "unfair prejudice" which is an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Alexander*, 303 S.C. at 382, 401 S.E.2d at 149. Although

[7] The State's Brief, at 18-19 (quoting R. 276-78), argues "the admission of the tub as well as testimony following objection was entirely harmless in light of the testimony which was admitted without objection. A failure to object before the evidence was introduced does not transform "otherwise improper evidence" into harmless evidence.

arguing the evidence was admissible for a limited purpose, the prosecution used it to launch an emotional and merciless attack on Cliff Eubanks' character.

Question IV

The trial judge erred by allowing the prosecution to cross-examine Cliff Eubanks about his internet searches of legal adult pornography when such evidence did not "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," pursuant to Rule 401, SCRE, was inadmissible character and propensity evidence pursuant to Rule 404(b), SCRCP, and the "probative value [of this evidence was] substantially outweighed by the danger of unfair prejudice," pursuant to Rule 403, SCRE.

Cliff Eubanks argues the Deputy Solicitor's cross-examination of him about lawful internet searches of adult pornography was irrelevant, impermissible character evidence, and the danger of unfair prejudice substantially outweighed any probative value. The Solicitor at trial and the State's Brief on appeal, at 20, argues, "The testimony was directly relevant based on the allegations in this case and Appellant's defense that he did not intend certain things to happen with the child victim." A full reading of the transcript reveals the "smoke and mirrors" used by the State to make this argument:

> Q. Well, I mean, now's your chance. Tell me your favorite storylines.
>
> MR. WISE: Your Honor, if I may, I think he has explored this area as far as it needs to be explored.
>
> THE COURT: I understand. I'm going to give him a little bit more latitude. He is on cross. So go ahead.
>
> Q. Tell some of your favorite storylines. Tell me some things – you've got low T. You testified about that. Testosterone.
>
> A. Yes.
>
> Q. Low testosterone. How does that effect you?
>
> A. It is harder for me to like get an – you know, an erection.

Q. But you're still aroused. I mean, like you said, some men like looking at porn.

A. I mean, yeah. I mean, some men like looking at it, but – there was somewhere that I read that, you know, maybe if you start to kind of like looking into magazines and everything, it was boost your testosterone.

Q. What medical journal was that?

A. I mean, I'm not – I'm not no medical person. But, you know, it's something – I was trying to help me and Deanie.

Q. I see. Instead of being with your wife, you looked at porn in hopes that would boost your testosterone. And tell me some of your favorite storylines. What does Cliff Eubanks – I kept asking all your family. You know, what are your sexual interests and desires? What are you attracted to?

MR. WISE: Your Honor, that is going too far beyond anything that's relevant to this case.

MR. SCOTT: From the testimony, Your Honor, he has low testosterone, he has erectile dysfunction, dancing is provocative and –

MR. WISE: Your Honor, if we're going to discuss this in detail, it should be out of the presence of the jury.

(Whereupon, a sidebar was held.)[8]

THE COURT: Mr. Scott, please continue, sir.

Q. All right. I'm going to ask the million dollar question. Are you attracted to young girls?

A. If they're over 18. Yes, sir.

Q. Okay. Over 18. Are you attracted to teens?

A. If they're over 18.

---

[8] The State's Brief, at 22 (fn. 4), suggests this issue in not preserved for appellate review because this sidebar was not placed on the record. Nevertheless, it is clear that Mr. Eubanks objected to the relevance of this line of questioning and, as will be seen below, elaborated on this objection immediately prior to the prosecution introducing the internet searches.

Q. Are you attracted to younger looking females?

A. If they're over 18.

Q. I'm not asking you if you're attracted to women over 18. Are you attracted to younger appearing females?

A. No, sir. I mean, you need to describe how –

Q. All right.

A – what you mean by young.

Q. All right. I will. Let me ask you about a couple.

MR. WISE: Your Honor –

THE COURT: This now fair game.

Q. Let me ask you if you've heard of any of these –

MR. WISE: Your Honor, I'd like to be heard.

R. 653-55 (footnote added). Once the jurors left the courtroom, the trial judge observed, "Solicitor, I assume that you're wanting to now inquire of the witness about the sites that were recovered off of his cell phone?" The Deputy Solicitor agreed and explained he had been lying in "wait[] for" an opportunity to introduce evidence about intent, arguing Mr. Eubanks had denied being "attracted to younger females" and had "opened the door, at least, for me to question him regarding his familiarity with these" internet searches. R. 655-56. Counsel for Mr. Eubanks pointed out that Mr. Eubanks' testimony about his attraction to women "18 and over" did not open the door to evidence about lawful internet searches. Counsel also objected pursuant to Rules 403 and 404(b), SCRE. R. 658.[9]

[9] *See also* corrected Tr. 648, R. 807.

Neither the Deputy Solicitor at trial nor the Attorney General on appeal has explained how lawful internet searches, which by definition is "18 and over," makes it more probable that Cliff Eubanks is interested in children twelve and under, much less how if makes it more probable that he sexually abused J.L. Rules 401 and 402, SCRE. The State's arguments at trial and on appeal are transparent attempts to disguise propensity evidence at evidence of intent. Our appellate courts consistently exclude character evidence about a propensity to commit a crime. *E.g. State v. Peake*, 302 S.C. 378, 396 S.E.2d 362 (1990); *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999); *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998). Even if this Court accepts the State's intent argument under Rule 404(b), SCRE, the prejudicial effect of the evidence substantially outweighs its probative value, and it should be excluded pursuant to Rule 403, SCRE. *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009) ("Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE."). This Court should reverse the trial court, vacate the convictions, and remand this case for a new trial.

Question V

The trial judge erred by allowing the prosecutor to call Cliff Eubanks down from the witness stand to demonstrate to the jurors how J.L. was "wiggling" when she sat on his lap, when the only purpose for the demonstration was to humiliate Mr. Eubanks and to obtain fodder for the prosecution's closing argument that repeatedly mocked Mr. Eubanks.

The State's Brief, at 25, argues this issue is not preserved for appellate review because Mr. Eubanks' "counsel never raised an objection on a specific ground." Yet, the State does not dispute that trial counsel argued this was an unprecedented, improper demonstration. R. 671-72. *Oxner, Michael H.* and *Rogers, supra.*

On the merits, the State's Brief, at 27, argues, "[T]he trial court did not abuse its broad discretion in admitting the demonstration as it was relevant to the issues for the jury to resolve and allowed a 'clear comprehension of the physical facts, certainly much clearer than one would be able to describe in words.'" Yet, the State never explained how this demonstration was relevant to the issues for the jurors to resolve. Nor did it explain how the demonstration allowed a clear comprehension of the physical facts when any purported value of the demonstration was contingent on Mr. Eubanks' ability to perform it. *Consider* R. 672 ("If he's able to pull it off, then he's able to pull it off. Let's see if he can do it. Go ahead.") *and* Brief of Respondent at 27 ("Here, this is exactly the purpose of having Appellant demonstrate *to the extent he could* how the child victim was moving on his leg." (emphasis added)). As one court stated:

> The probative value of evidence of the reenactment of a crime depends primarily on its similarity to the events and conditions that existed on the night of the [crime]. To be admissible, demonstrative evidence must satisfy two requirements: first the evidence must be a reasonable representation of that which it is alleged to portray; and second, the evidence must assist the jurors in their determination of the facts of the case, rather than serve to mislead them. Demonstrative evidence must accurately depict what it purports to show. The demonstration must be relevant to an issue in dispute and must have been conducted under at least substantially similar, although not necessarily absolutely identical, conditions as those of the actual occurrence.

People v. Rivera, 201 Cal. App. 4th 353, 363-65, 133 Cal. Rptr. 3d 721, 729-31 (2011) (internal citations and quotations omitted) ("It is one thing for the jury to hear a defendant's verbal account of a murder. Watching the defendant strangle a substitute for the victim is more likely to inflame the emotions of the jury and evoke an emotional bias, while having exceedingly negligible probative value, if any, on the issues."). *And see Clark v. Cantrell*, 339 S.C. 369, 384, 529 S.E.2d 528, 536 (2000) ("demonstrative

evidence [is admissible] when the proponent shows that the animation is (1) authentic under Rule 901, SCRE; (2) relevant under Rules 401 and 402, SCRE; (3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCRE.").

More concerning is the State's unwillingness to discuss appropriate limitations of the prosecution's use of courtroom demonstrations. By contrast, Mr. Eubanks noted our Supreme Court has held some courtroom demonstrations so inflammatory and prejudicial so as to require a new trial, citing *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873, (2007). The State's Brief never addressed *Northcutt's* application to this issue.[10] This Court should reverse the trial court, vacate the convictions, and remand this case for a new trial.

Question VI

This Court should grant Cliff Eubanks a new trial based on the Deputy Solicitor's highly inflammatory closing arguments that were a direct and dehumanizing attack on the character of Cliff Eubanks and his cousin Mitchell Eubanks.

The State's Brief, at 27-31, argues Cliff Eubanks' "argument the solicitor improperly made inflammatory arguments during closing arguments to the jury is not preserved for appeal and does not meet any exception for review without proper preservation." Mr. Eubanks' opening brief, at 39-41, acknowledges trial counsel did not make a contemporaneous objection to the Deputy Solicitor's improper argument. Rather, he argues an exception to the ordinary error preservation rules pursuant to *Toyota of*

[10] The State's only discussion of *Northcutt* is in response to Mr. Eubanks' Question VI.

Florence, Inc. v. Lynch, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994), *South Carolina Highway Dept. v. Nasim,* 255 S.C. 406, 179 S.E.2d 211 (1977), *Major v. Alverson*, 183 S.C. 123, 190 S.E. 449, 450 (1937), and *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 259, 509 S.E.2d 269, 272 (1998). The State argues these cases do not apply for two reasons, both of which must be rejected.

First, the State's Brief, at 29, argues, "[A]ll but one case cited by Appellant deals with racially inflammatory remarks the required the granting of a new trial." Thus, by the State's own admission, our state's case law does not require the remarks to be racial in nature for this rule to apply.

Second, the State's Brief, at 30, argues, "*Northcutt* would serve to guide Respondent and Appellant that dehumanizing an appellant in permissible so long as it is based on the record." *This Court should consider the implications of the State's argument.* If this Court affirms on the merits of this issue, then prosecutors will have an unrestricted license to attack the character of defendants and their witnesses. Here, the Deputy Solicitor labeled Mr. Eubanks' cousin as "Mitchell twerking Eubanks," called him "pathetic" for not engaging in a ridiculous courtroom demonstration, and implied he was cowardly for not remaining "to talk to" the Deputy Solicitor after he testified. R. 738. Similarly, the Deputy Solicitor mocked Cliff Eubanks and accused Mr. Eubanks of having an "unhealthy addiction" and argued, "I don't know what makes somebody become a Cliff Eubanks." R. 736. The Deputy Solicitor called on the jurors to "*find Cliff smirking smiling Eubanks* guilty" of "everything he's done," R. 739 (emphasis added), when some of what he had done was viewing lawful pornography. Neither *Northcutt* nor any precedent of our appellate courts sanctions this type of argument. This

Court should invoke the exception to the error preservation rules, reverse the convictions, and remand for a new trial.

Question VII

The trial judge erred by not continuing the trial to allow time for examination of Cliff Eubanks' iPhone 5, thereby denying Mr. Eubanks his due process right to a fair trial and his Sixth Amendment rights to present a complete defense and confront and cross-examine J.L. about observing sexually explicit movies on this phone.

The State Brief, at 31-34, argues the trial judge did not abuse his discretion for not granting Cliff Eubanks' "motion for a continuance to have a cell phone examined which was in [his] possession until just before trial" when he "gave no reasons why he could not have had the phone examined prior to trial." This assertion is not accurate. Trial counsel explained he did not appreciate the significance of the evidentiary value of the cell phone prior to trial:

> [J.L.] did say in the forensic interview it was an iPhone. And maybe I didn't pay close enough attention to what phones they were analyzing. But it wasn't until I talked to my client a couple of weeks ago when I realized they did not have the phone that he actually had at about the time that this allegation was made.

R. 104. And, "I did not know they didn't get this phone from him." R. 106.

The State's Brief, at 32, also argues Mr. Eubanks never indicated his expert would be able to examine the phone." This assertion is not correct. Counsel for Mr. Eubanks explained "[r]eplacing the screen would have enabled the State to examine the [phone] but they declined to pay for the new screen." Motion for a New Trial, R. 16.

The State's Brief, at 33, argues "analysis of the phone would have provided minimal benefit to Appellant." This argument is entirely speculative and not based on anything contained in the record. This Court should reverse the trial court, vacate the

convictions, and remand this case for a new trial. If this Court concludes the current record does not contain enough information to reverse the trial judge, then Mr. Eubanks respectfully requests this Court not to make any findings outside the record that could impair his ability to pursue this claim in post-conviction relief.[11] S.C. Code Ann. § 17-27-10, *et. seq.*

Question VIII

The trial judge erred by not continuing the remainder of the trial until the following Monday so that Cliff Eubanks could call Dr. Joanne Brownlee as a witness to reply to Deanie Eubanks' testimony and corroborate Mr. Eubanks' medical condition.

The State's Brief, at 34, argues this issue is not preserved for appeal because, on the final day of trial, counsel for Cliff Eubanks "did not initially raise any issue related to Dr. Brownlee" but rather "moved for a directed verdict on all charges, presumably because he had rested his case." This argument must be rejected because it overlooks the fact that the proceedings resumed on that Friday morning in chambers where a number of issues were discussed. When the proceedings resumed on the record, the trial judge stated, "You wanted to raise another issue Mr. Wise?" R. 691-94. Although trial counsel moved for a directed verdict "[f]irst," R. 694-98, the following exchange occurred on the record, preserving this issue for appeal, when the trial judge reminded:

> Technically, you had not rested before you made your directed verdict motion, but you did indicate ***in chambers*** that you did not intend to call additional witnesses.

---

[11] The State's Brief, at 33, argues Mr. Eubanks "made a strategic decision regarding the iPhone." This argument invites this Court to pre-judge post-conviction claims without a complete record. *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) ("Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness." (emphasis original)).

> MR. WISE: Now that you mention that, we did contact Dr. Brownlee this morning. Her office is closed. He actually went to Laurens County Hospital to see about if they were online there or something, but nothing had come in on that. In lieu of that, I would actually request the Court continue this case to Monday so that we can have Dr. Brownlee available.

R. 698 (emphasis added). The trial judge heard arguments and ruled on the issue, thereby preserving it for appeal. R. 698-701. *Oxner, Michael H.* and *Rogers, supra.*

On the merits, the State does not argue that Dr. Brownlee's testimony was not relevant to the issues presented to the jurors to respond to the testimony of Deanie Eubanks, who testified on the Thursday morning of trial. Rather, the State's Brief, at 35-36, argues counsel for Mr. Eubanks did not exercise "due diligence" because "[i]nstead of attempting to obtain the testimony of Dr. Brownlee while her offices were clearly open on Thursday afternoon, he waited until later in the day and first thing Friday when the officer were closed to try to contact her." This Court should note that the trial judge did not recess until 6:40 p.m. on Thursday afternoon. R. 687. Thus, the opportunity to contact Dr. Brownlee on Thursday afternoon was limited or non-existent. Additionally, the length of the continuance requested by counsel for Mr. Eubanks (one business day) was minimal in comparison to the length of this trial and the sentence ultimately imposed by the trial court. This Court should reverse the trial court, vacate the convictions, and remand this case for a new trial.

Question IX

The trial judge erred by not excluding juror Tony Bailey from the jury panel after Mr. Bailey, a real estate agent, revealed he had sold a house to a relative of J.L, who was present in the courtroom for the trial, when this information was not available to Cliff Eubanks prior to jury selection and would have been the basis of a peremptory strike had this information been disclosed timely.

The State's Brief, at 37, argues this issues is not preserved for appellate review because counsel for Mr. Eubanks did not "object to the trial court's determination not to excuse the juror" and "only raised this issue in post-trial motions." The merits of this issue are based on information Tony Bailey disclosed to the trial judge ***after*** he was sworn as a juror. After opening statements, the trial judge excused all of the jurors, except Mr. Bailey. When the trial judge offered the parties "additional voir dire," counsel for Mr. Eubanks asked to approach the bench to express his concerns. R. 134-36. When Mr. Eubanks raised this matter as grounds for a new trial, R. 17-18, the trial judge's order denying the motion for a new trial treated the matter as properly raised at the bench conference and addressed the merits, R. 5-6. *Oxner, Michael H.* and *Rogers, supra.* This Court should reverse the trial court, vacate the convictions, and remand this case for a new trial.

Question X

The trial judge erred by denying Cliff Eubanks' motion for a new trial, without convening a hearing and taking testimony, after Cliff Eubanks learned that juror Tony Bailey is friends on Facebook with Darlene Newsome and Jared Hunnicutt when Mr. Bailey did not disclose this information in response to the voir dire questions by the trial court.

In his opening brief, at 48-51, Cliff Eubanks argues the trial judge erred by not convening a hearing to determine whether juror Tony Bailey intentionally concealed his relationships with Darlene Newsome and Jared Hunnicutt. Although the State's Brief, at 40-41, acknowledges Mr. Eubanks challenged Mr. Bailey's failure to disclose his relationships with two people, the State never explained why the trial judge did not err by not inquiring into the relationship between Mr. Bailey and Darlene Newsome. Nor could

it because the trial judge was obligated to convene a hearing pursuant to *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013).

The State's Brief focuses on Mr. Bailey's relationship with Investigator Hunnicutt and relies on a post-trial email from the Deputy Solicitor to the trial judge, which states:

> [Assistant Solicitor] Julie Kate [Kenney] was able to speak with Inv. Jared Hunnicutt regarding the Foreman showing up as one of his Facebook "friends." Hunnicutt indicated he has no idea who this guy was but received the friend request a few days after the Eubanks trial ended.

R. 24; *see also* order denying motion for new trial, fn. 1, R. 5. As pointed out in Mr. Eubanks' opening brief, at 49, reliance on an email from the Deputy Solicitor was error because "[a]court cannot consider facts appearing only in argument of counsel." *Shinn v. Kreul*, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) (citing *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct.App.1986). *Cf. McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."). Rather, the appropriate procedure was for the trial judge to convene a hearing. *McCoy, supra.* This Court should remand this case for the circuit court to conduct that hearing.

Question XI

The trial judge erred by declining to charge second degree-assault and battery as a lesser-included offense of third-degree criminal sexual conduct with a minor.

The State Brief, at 44, relies on *State v. Hernandez*, S.C.S.Ct. Op. No. 27923 (filed October 23, 2019) for the proposition that second-degree assault and battery is not a lesser included offense of third-degree criminal sexual conduct with a minor because the General Assembly did not identify it as a lesser offense in S.C. Code Ann. § 16-3-600 and "[a]s a result, it would not be a lesser included offense even if it would have

previously been considered a lesser included offense under prior case law." *Hernandez,* however, merely held that the statutory offense of assault and battery of a high and aggravated nature "is not a lesser included offense of" criminal sexual conduct. *Hernandez* did not address whether or not second-degree assault and battery is a lesser included offense of third-degree criminal sexual conduct with a minor.

The State's Brief, at 42-44, additionally argues second-degree assault and battery does not satisfy the elements test to be a lesser included offense of third-degree criminal sexual conduct with a minor. Cliff Eubanks' opening brief, at 51-54, argues second-degree assault and battery does, in fact, meet the elements test to be a lesser included offense of third-degree criminal sexual conduct with a minor. This Court must resolve that debate.

Question XII

This Court should reverse Cliff Eubanks' convictions and sentences and order a new trial based on the cumulative error doctrine.

As discussed in Mr. Eubanks' opening brief, this Court should order a new trial based on the cumulative error doctrine based on the matters he preserved for appellate review during his trial. The State's Brief, at 44-45, however, conflates the "cumulative error doctrine" with the "plain error rule" by misapplying this Court's analysis in *State v. Beekman*, 405 S.C. 225, 746 S.E.2d 483 (Ct. App. 203). Beekman asked this Court to apply the "cumulative error doctrine" based on his unspecified objections sustained during trial and other alleged errors that he did not object to during trial. Under those circumstances, this Court properly concluded Beekman was attempting to invoke the "plain error rule" that is not recognized in our state. *Id.* 405 S.C. at 236-38, 746 S.E.2d at 489-90. As seen, with one exception based on case law, Mr. Eubanks raised at trial all of

the issues set forth in his opening brief. Specific objections to the issues are all that is required to invoke the cumulative error doctrine on appeal.

This case is similar to *State v. Blurton*, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000), *reversed on other grounds by State v. Blurton,* 352 S.C. 203, 573 S.E.2d 802 (2002). This Court observed:

> While we agree that the assistant solicitor's comments were improper, they do not mandate reversal alone. However, the cumulative effect of this error, when coupled with the exclusion of the previously discussed evidence, warrants reversal. *Cf. State v. Johnson,* 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted) ("cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial"). The prosecutor accused Blurton of a recent fabrication, an accusation which could not have been seriously made if the trial court had properly admitted the taped telephone conversations between Blurton and Mayfield. In that regard, the closing arguments served to exacerbate the error in excluding evidence critical to Blurton's defense.

Id. 342 S.C. at 512-13, 537 S.E.2d at 297-98. Mr. Eubanks believes any one of the issues raised in this appeal entitles him to a new trial. However, as discussed in his opening brief, at 54-55, many of the issues raised in this appeal are linked to other issues raised in this appeal, and the prejudice from these overlapping issues combined to deny Cliff Eubanks a fair trial.

Question XIII

This Court should clarify the procedure to be followed when the court reporter assigned to record a trial accepts employment with one of the parties that participated in that trial prior to completing the trial transcript.

The State's Brief, at 46, argues this Court "should decline the opportunity to issue what is at most an advisory opinion" and "the issue was addressed by this Court in ruling

on [Mr. Eubanks'] motions prior to briefing." As will be discussed below, this issue is not fully addressed, and the State currently questions the reliability of the transcript.

Addressing this ongoing issue would not be an advisory opinion for three reasons. First, litigants in this Court are required to object to procedural irregularities and obtain a final ruling in order to preserve such an issue for further appellate review. *E.g. State v. McMillian*, 349 S.C. 17, 20, 561 S.E.2d 602, 603 (2002) (reversing after Court of Appeals "[a]rguments proceeded over the objection of counsel for" the appellant in the absence of a quorum).

Second, the change in employment of this court reporter created problems in other cases, meaning this Court's guidance is still needed. *E.g.* State's Motions dated March 26, 2019, *State v. Charles Tillman,* Appellate Case No. 2018-000495. When "an issue raised is capable of repetition but generally will evade review, the Court can address the issue." *Nelson v. Ozmint*, 390 S.C. 432, 434, 702 S.E.2d 369, 370 (2010).

Third, even after Court Administration reviewed the transcript and made corrections, Mr. Eubanks challenged two pages of the transcript that resulted in three additional corrections. The State's Brief, at 46, acknowledges that the court reporter corrected three errors after Mr. Eubanks' second challenge to the transcript.

Finally, the State, even now, questions the reliability of the transcript. In his Statement of Facts, Mr. Eubanks called this Court's attention to inconsistent testimony by State's Expert Shauna Galloway-Williams:

> Ms. Galloway-Williams initially testified, "[W]e would expect that a child or an adult is going to tell every single detail or every single event that they've experienced related to child abuse at one time." Tr. 378. Later she testified disclosure can be tentative, "which is where most children's disclosures fall, where they share some pieces of information but not all of it." She does not "expect a child to report every single detail of his or her

> abuse in one interview." Age, frequency of abuse, comfort level with the interviewer, knowledge of anatomy, and sexual knowledge could be factors. Children might delay disclosure of sexual abuse because of fear or relationship with the alleged perpetrator. Tr. 379-83.

Brief of Appellant, at 18-19.

The State's Brief counters:

> Contrary to [Mr. Eubanks'] assertion, it clearly appears Ms. Galloway-Williams misspoke or ***the transcript was inaccurate*** when she testified "So we refer to disclosure as a process, meaning that we would expect that a child or an adult is going to tell every single detail or every single even that they've experienced related to child abuse at one time."

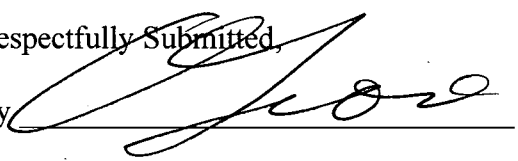
Brief of Respondent, at 9 (fn. 2) (emphasis added). The State, however, has not challenged the transcript even though it expressly questions the accuracy of the transcript.

CONCLUSION

For the reasons set forth in the Brief of Appellant and this Reply Brief, this Court should reverse the trial court, vacate Cliff Eubanks' convictions and sentences, and remand this case for a new trial. In the alternative, this Court should remand this case for a hearing to determine whether juror Tony Bailey had undisclosed relationships with Investigator Jared Hunnicutt and Darlene Newsome.

Additionally, this Court should provide guidance about the procedure to be followed when the court reporter assigned to record a trial accepts employment with one of the parties that participated in that trial prior to completing the trial transcript.

Respectfully Submitted,

By 

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Attorney for Michael Cliff Eubanks

January 13, 2019.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2018-001684

RECEIVED
JAN 21 2020
SC Court of Appeals

The State,..... Respondent,

v.

Michael Cliff Eubanks, ... Appellant.

Rule 211, SCACR Certification

This Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

Respectfully Submitted,

By _____

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January 13, 2020
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael Cliff Eubanks, Appellant.

Appellate Case No. 2018-001684

Appeal from Laurens County
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 5933
Heard April 13, 2021 – Filed August 10, 2022

AFFIRMED

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia, and Solicitor David Matthew Stumbo, of Greenwood; all for Respondent.

MCDONALD, J.: Michael Cliff Eubanks appeals his convictions for first-degree, second-degree, and third-degree criminal sexual conduct (CSC) with a minor. Eubanks raises several evidentiary errors; he further argues the circuit court erred in denying him a continuance, failing to discharge a juror, and declining to charge second-degree assault and battery as a lesser included offense of CSC with a minor. Finally, Eubanks asserts he is entitled to a new trial due to highly

prejudicial statements in the State's closing argument and under the cumulative error doctrine. We affirm.

Facts and Procedural History

The minor's mother (Mother) married Josh Lyons in 2000. Together, they had two children—a son (Brother) and two years later, a daughter (Child). Lyons left the family when Mother was seven months pregnant with Child, and he has not been involved in his children's lives. Mother met Eubanks in 2009, married him in 2010, and moved with her children into Eubanks's home. Eubanks has two daughters from a previous marriage, and Mother and Eubanks have one child together, B.E.

Eubanks began inappropriately touching Child when she was six years old; the abuse lasted until she disclosed it at age twelve. Child first realized Eubanks's behavior was inappropriate when she was eight years old. She recalled Eubanks took her to the couch, pulled down both their pants, and touched his genitals to hers while she was half asleep. Brother recalled that when Child was eight years old, he saw Eubanks go into the bathroom with her, and he stayed in the bathroom with her for twenty minutes. Child testified Eubanks often touched her chest, buttocks, and genitals with his hands and mouth, and he made her touch his genitals. The abuse eventually progressed to vaginal and anal intercourse.

Child, Mother, Brother, and A.E. (Eubanks's biological daughter) all testified Eubanks gave Child more attention than the other children, which resulted in family arguments. Eubanks's preferential treatment included giving Child lunch money even though school lunch was free, taking her places with him, and discussing his marital problems with her. Brother and A.E. also testified about Eubanks's "weird" touching of Child. Brother described this touching as mainly "grabs on the butt." A.E. saw Eubanks "touching her butt" and "would see them up under the covers [of a bunk bed] with each other."

In November 2013, Mother was involved in a serious car accident; she broke her neck in multiple places and severed nerves on the left side of her body. Mother had a difficult time after her subsequent spinal and neck surgery—she was unable to work, and she and Eubanks began to argue.

From November 2014 to April 2015, Child attended counseling sessions because she was having anger issues and had stopped bathing and eating. She also suffered lower grades, nightmares, and an inability to focus. Child explained she believed

Eubanks would stop touching her if she was "nasty" or if he could not look at her in the bathroom. During this time, she almost disclosed the abuse to a counselor but was afraid because she did not know the counselor very well.

In April 2016, Mother, Eubanks, Child, Brother, and B.E. moved in with Mother's parents due to financial issues. Eubanks resumed the abuse about a week after the family's move. Child testified Eubanks abused her in a bedroom and in the barn. Child and Eubanks spent a lot of time together in the barn, and he rarely invited Brother or his daughters to join him there. A.E. thought it was strange that Eubanks often took Child to the barn with him but did not generally invite the other children to the barn. Child described how Eubanks would block the barn door with a piece of wood and take their pants off. Eubanks would then pull her onto his lap in a chair behind a dollhouse and "wiggle" her on his lap. At times, he ejaculated on the chair and the floor. Child stated he "used his boy part" on her in the barn "quite a few times." After Child disclosed the abuse, she and her family destroyed the chair with a hammer and burned it in a bonfire.

In May 2017, Brother attended a counseling session with Dr. Kimberly Little at Gilchrist Consultation Center. During this session, Brother discussed the family dynamic, including Child's role as a "peacekeeper" between Mother and Eubanks. Dr. Little was concerned about Child's wellbeing and asked Mother to bring her in for a session. During her session with Dr. Little, Child disclosed the sexual abuse. Dr. Little then notified law enforcement and the South Carolina Department of Social Services (DSS). Child testified she disclosed the abuse to Dr. Little because she believed she could trust her because Brother trusted her.

Deputy Ronald Richey of the Laurens County Sheriff's Office (LCSO) received Dr. Little's report. After Deputy Richey spoke with Child, he notified DSS and the LCSO investigations department. While Deputy Richey was at the Gilchrist Center taking a report in Child's case, Eubanks unexpectedly showed up with his mother and attempted to enter the building.[1]

On May 17, 2017, LCSO Investigator Jared Hunnicutt was assigned to the case. After reviewing Deputy Richey's report, Investigator Hunnicutt met with Child and Mother; he then met with Eubanks to discuss the allegations. According to

[1] The circuit court sustained the defense's objections to much of Deputy Richey's testimony about Eubanks's tracking of Mother's car to the Gilchrist Center; however, Richey explained Eubanks "was wanting to go inside. I told him it's best to sit in the parking lot right now."

Investigator Hunnicutt, Eubanks claimed he was unsure if anything had happened, and if anything had occurred, it happened while he and Child were asleep in a bed together. During the meeting, Eubanks provided a written statement in which he wrote, "I have no clue what goes on when I sleep. I'm not saying that I did or didn't while I was asleep."

After his meeting with Eubanks, Investigator Hunnicutt contacted Mother to advise her of the investigation's progress. Mother reported that she told Eubanks there was a "nanny cam" in the home or barn area, even though there really was no hidden camera. Investigator Hunnicutt then met with Eubanks again. At this meeting, Hunnicutt "advised him that his stepdaughter said that inside the barn property was where this—these allegations occurred. I slipped the DVD across the table to him and insinuated that I had footage of the act." Eubanks then responded that he and Child were in the barn tearing apart pallets when she sat on his lap in a chair and "started grinding her buttocks into his leg and penis and that it lasted for a few minutes and—until he ejaculated into his pants." Eubanks said he knew this was wrong, and he tried to push her off, but he was scared and panicked and did not know what to do or say. He claimed this was the only time this ever happened. Following Eubanks's completion of a written statement, Investigator Hunnicutt charged him with third-degree CSC with a minor.[2]

Child participated in a forensic interview and medical evaluation. Dr. Lyle Pritchard observed she was underweight and recommended she see another physician for evaluation of a possible eating disorder.

A jury found Eubanks guilty of first-degree, second-degree, and third-degree CSC with a minor. The circuit court sentenced Eubanks to twenty-five years for first-degree CSC with a minor and fifteen years for third-degree CSC with a minor, to be served concurrently. Eubanks received fifteen years for second-degree CSC with a minor, suspended on time served, and five years' probation, to run consecutively to his first-degree sentence. The circuit court also ordered Eubanks to register as a sex offender upon his release. The circuit court denied Eubanks's motion for a new trial.

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[2] The grand jury ultimately indicted Eubanks for first-degree, second-degree, and third-degree CSC with a minor.

Standard of Review

"The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion." *State v. Makins*, 433 S.C. 494, 500, 860 S.E.2d 666, 670 (2021) (quoting *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* (quoting *State v. Douglas*, 369 S.C. 424, 429–30, 632 S.E.2d 845, 848 (2006)).

Law and Analysis

I. Therapy and Post-Traumatic Stress Disorder

Eubanks objected to the admission of therapist Samantha Black's testimony regarding her treatment of Minor, including the type of therapy she provided and the goals of her treatment, and the admission of psychiatrist Eman Sharawy's diagnosis of post-traumatic stress disorder (PTSD). Eubanks argues the circuit court erred in admitting the testimony of these witnesses because their opinions that Child suffered a significant traumatic event and required treatment for "the psychological ramifications of the abuse" improperly vouched for the victim's credibility. Eubanks further contends this testimony should have been excluded under Rule 403, SCRE.

Black testified she worked as a therapist at Beyond Abuse, where she performed assessments and therapy with children who have been abused. Black first met with Child on June 14, 2017, and "got her background, history, family, abuse allegations, symptoms, and then we did assessment measures." Based on her assessment, Black provided Child with trauma focused cognitive behavioral therapy. Black explained the goals of such therapy are to learn coping skills, change thought distortions, and complete a trauma narrative. In the trauma narrative, the patient identifies three incidents: the first, the worst, and the last. The purpose of the trauma narrative is to "focus on their thoughts . . . what are they thinking as a result of the trauma to get rid of any distortions that they have [like] thinking that it's their fault." The circuit court admitted into evidence a redacted version of Child's trauma narrative.

Dr. Sharawy, medical director of the Beckman Center, was qualified without objection as an expert in child and adolescent psychiatry. Dr. Sharawy described her duties at the mental health center as meeting with patients, performing diagnostic assessments, prescribing medication, and supervising treatment teams,

including therapists. Dr. Sharawy defined and explained common symptoms of PTSD. She noted seventy to eighty percent of patients at the Beckman Center have experienced some sort of trauma and a large percentage of those are diagnosed with PTSD.

Dr. Sharawy met with Child on August 31, 2017, and diagnosed her with PTSD based on this session and her review of Black's therapy notes. She testified Child exhibited typical symptoms of PTSD, such as anxiety, avoidance, nightmares, "intrusive thoughts and recollections of the traumatic events," depressive symptoms, low mood, erratic appetite, poor sleep, and poor concentration. Dr. Sharawy prescribed medication and recommended Child continue participating in trauma focused cognitive behavioral therapy. In their testimonies before the jury, neither Black nor Dr. Sharawy connected Child's PTSD to sexual abuse.

A. Vouching

"The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). "[A] witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." *Briggs v. State*, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017). "Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." *State v. Kromah*, 401 S.C. 340, 358–59, 737 S.E.2d 490, 500 (2013). A witness should avoid statements:

> • expressing "a direct opinion as to a child's veracity or tendency to tell the truth;"
>
> • indirectly vouching for the child's believability, such as a statement that "the interviewer has made a 'compelling finding' of abuse;"
>
> • indicating "to a jury that the interviewer believes the child's allegations in the current matter; or"
>
> • providing "an opinion that the child's behavior indicated the child was telling the truth."

Id. at 360, 737 S.E.2d at 500.

In *Makins*, our supreme court held the testimony of Kristin Rich, the minor victim's therapist, did not improperly bolster the victim's testimony. 433 S.C. at 505, 860 S.E.2d at 672. The court noted:

> Rich never testified she advised Minor about the importance of being truthful, never testified directly as to Minor's truthfulness, and never opined Minor's behavior indicated truthfulness. While Rich was allowed to confirm she treated Minor, she was not allowed to explain why she was treating Minor, detail her treatment of Minor, or testify as to her diagnosis of Minor. Rich only addressed the circumstances of Minor's disclosure of abuse and the drawing Minor produced in therapy.

Id. at 503, 860 S.E.2d at 671.

Based on *Makins*, we find the circuit court acted within its discretion in finding Black's testimony did not improperly vouch for Child's credibility. Although she testified she provided Child with trauma focused cognitive behavioral therapy, she specifically noted a trauma narrative is "not investigative at all. It's purely therapeutic and it's just to help them move on with their life to get past the trauma." Black did not testify that she believed Child, nor did she testify that she told Child to be truthful. Even though Black testified she provides therapy for children who have been abused, she made no statements regarding whether Child's trauma was the result of abuse nor did she reference sexual abuse or the specific characteristics and behaviors of sexual abuse victims.[3]

Dr. Sharawy's testimony did not reference sexual abuse, and she did not vouch for Child's credibility or otherwise violate *Kromah*. She testified she diagnosed Child with PTSD based on her one-hour session with Child and her review of Black's notes, and she described behaviors consistent with a diagnosis of PTSD. Dr. Sharawy explained PTSD was the result of a "significant traumatic event" and not simply stress in an individual's life. However, she did not testify as to any specific traumatic event as precipitating Child's PTSD. Nor did she testify as to the full diagnosis reflected in her notes, which was "post-traumatic disorder secondary to

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[3] The State presented a separate "blind witness" as its expert in child abuse dynamics. This witness testified about the ways children disclose abuse, delayed disclosure, grooming, and typical characteristics and behaviors of child victims of sexual abuse.

child abuse." Accordingly, we find Dr. Sharawy's testimony that she diagnosed Child with PTSD, without more, did not constitute improper vouching.

B. Rule 403

"A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Brooks*, 428 S.C. 618, 635, 837 S.E.2d 236, 245 (Ct. App. 2019) (quoting *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014)). "The appellate court reviews the circuit court's Rule 403 ruling 'pursuant to the abuse of discretion standard and [is] obligated to give great deference to the [circuit] court's judgment.'" *Id.* (alterations in original) (quoting *Collins*, 409 S.C. at 534, 763 S.E.2d at 28).

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior." *State v. White*, 361 S.C. 407, 414–15, 605 S.E.2d 540, 544 (2004) (finding no error in circuit court's allowing testimony of psychotherapist who counseled victim and was qualified as an expert in PTSD and assessment and treatment of sexual abuse; the court noted the "purpose of rape trauma evidence is to prove the elements of criminal sexual conduct since such evidence may make it more or less probable the offense occurred").

"'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.'" *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993)). "[T]he determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case." *State v. Stokes*, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009).

We find the circuit court acted within its discretion in finding the probative value of the testimony of these witnesses was not substantially outweighed by the danger of unfair prejudice under Rule 403. The testimony of each was probative to show Child suffered some trauma and to refute Eubanks's contention that nothing

happened, or that if anything inappropriate happened, it happened while both were asleep. *See White*, 361 S.C. at 415, 605 S.E.2d at 544 (holding treating therapist's testimony that victim's symptoms were consistent with suffering a recent trauma was probative to refute the defendant's contention that the sex was consensual and to prove a sexual assault occurred). As discussed above, neither Black nor Sharawy testified about the specific trauma that caused Child's PTSD or precipitated her need for therapy. Based on the record as a whole, we find the circuit court did not err in evaluating the relative probative value and prejudicial effect of this evidence. *See Stokes*, 381 S.C. at 404, 673 S.E.2d at 441 ("[T]he determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case.").

II. References to Pornography

Eubanks argues the circuit court erred in allowing the State to question Child on redirect about Eubanks's "enormous tub of pornography" after he cross-examined her about the titles of two iPhone internet searches. Eubanks contends the testimony was irrelevant under Rule 401, SCRE; inadmissible character evidence under Rule 404, SCRE; and violative of Rule 403, SCRE, as the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

"A party may introduce otherwise inadmissible evidence in rebuttal when an opponent introduces evidence as to a particular fact or transaction." *State v. Heyward*, 426 S.C. 630, 636, 828 S.E.2d 592, 595 (2019). "Testimony in response must be 'proportional and confined to the topics to which counsel had opened the door.'" *Id.* at 637, 828 S.E.2d at 595 (quoting *Bowman v. State*, 422 S.C. 19, 42, 809 S.E.2d 232, 244 (2018)). "A trial court's determination that a party has opened the door to the introduction of otherwise inadmissible evidence is within the sound discretion of the trial judge and is reviewed for abuse." *Id.* at 636, 828 S.E.2d at 594.

Pretrial, the State indicated it would not seek to introduce evidence of Eubanks's pornography collection, including evidence related to pornography found on his cell phone. Yet, Eubanks asked Child on cross-examination if she mentioned in her forensic interview that she had seen a pornographic video on Eubanks's phone. Child responded that she had seen the search terms "Birthday Sex" on Eubanks's iPhone in his YouTube video search history. She clarified she did not see this video itself, only the YouTube search for it. However, Child admitted she had watched a pornographic movie and films on Eubanks's phone when she was younger. She also admitted that she told the forensic interviewer that Eubanks

showed her a video called "step-dad having fun with daughter" on his phone. Child explained she did not tell her mother about later videos she watched with Eubanks on his phone "[b]ecause that's when he was doing the physical things."

On redirect, the State asked Child if she saw Eubanks watching pornographic videos on more than one occasion. Child testified he watched videos by himself, or he would lie beside her in bed and watch them, and that he also showed her videos on the television in the house. Eubanks objected to Child's statement that Eubanks kept pornographic material in a storage tub in a storage building, arguing her testimony that she saw a video on his cell phone did not open the door to questions about other pornographic material Eubanks might legally watch or possess. The circuit court found the State's questioning about the storage building pornography was appropriate on redirect because on cross, Eubanks elicited testimony from Child about pornography when he asked her about the cell phone video in an effort to imply he never showed Child pornography.

In admitting the redirect testimony on the sole basis that it found Eubanks opened the door, the circuit court did not address the relevance of the evidence under Rule 401 or its admissibility (or inadmissibility) as character evidence under Rule 404. Accordingly, we find these arguments—raised for the first time on appeal—are not preserved for our review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."). However, we find the circuit court erred in finding Eubanks opened the door to Child's testimony on redirect about the pornography Eubanks kept in the storage building. Eubanks's cross-examination inquiries about the internet searches and the State's subsequent question on redirect about the tub of videos addressed two separate matters. *See State v. Simmons*, 430 S.C. 1, 15, 841 S.E.2d 845, 852 (2020) (reiterating that our supreme court will not condone "a thinly-veiled attempt to show propensity by way of the open-door doctrine" (quoting *Heyward*, 426 S.C. at 637, 828 S.E.2d at 595)); *Heyward*, 426 S.C. at 637, 828 S.E.2d at 595 (requiring a proportional response confined to the topics on which the door has been opened).

Despite this, we find Eubanks was not prejudiced by the admission of this testimony because Child testified Eubanks never showed her the videos from the storage building. Child had already testified Eubanks showed her "dirty" videos on his iPhone and on the television in his bedroom, and the jury already knew Eubanks watched pornography on his own and in the presence of Child. Thus, any error in admitting the references to the videos Eubanks kept in the storage building

was harmless. *See State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) ("No definite rule of law governs this finding [of harmless error]; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it 'could not reasonably have affected the result of the trial.'" (quoting *State v. Mitchell*, 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008))).

III. Eubanks's Testimony about Internet Searches

Eubanks next contends the circuit court erred in allowing the State to cross-examine him about his internet searches for adult pornography because such questioning was not relevant under Rule 401, resulted in the admission of inadmissible character evidence under Rule 404, and was unfairly prejudicial under Rule 403, SCRE.

When the State asked Eubanks about his sexual interests and attractions, Eubanks's counsel objected as to relevance. The circuit court found Eubanks opened the door to the State's questioning as to whether he had performed internet searches for "young looking girls" when he testified he did not intend to become aroused when Child "wiggled" on his lap. However, the circuit court sustained Eubanks's objection to the State's questioning regarding Eubanks's familiarity with specific sites based on data from his cell phone. Thereafter, the State asked Eubanks if he had searched the internet for "young looking girls," and he responded, "I have done searches." Later, he admitted he was attracted "to young girls, but over the age of 18."

We find Eubanks's testimony that he did not intend to become aroused by Child's wiggling on his lap did not open the door to the State's questioning about his internet searches related to "younger looking girls" because these acts do not arise from the same fact or transaction. *See Heyward*, 426 S.C. at 637, 828 S.E.2d at 595 (requiring a proportional response confined to the topics on which the door has been opened). Nevertheless, we find any error harmless. Child had already testified as to Eubanks's search for a "Birthday Sex" video and his showing her a video called "step-dad having fun with daughter." Thus, even if the circuit erred in finding Eubanks opened to the door to the State's questioning about his internet searches, he was not prejudiced by this.

IV. Courtroom Demonstration