ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
Honorable Frank R. Addy, Jr., Circuit Court Judge
Appellate Case No. 2017-000775

THE STATE,

Respondent,

vs.

HOWARD JAMES WOODS, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

In November of 2015, Appellant Howard James Woods, Jr. was arrested following an investigation into allegations he repeatedly and routinely sexually abused a minor child who resided with him over the course of an extended number of years. In January of 2017, the Greenwood County Grand Jury indicted Appellant for one count of first-degree criminal sexual conduct with a minor and one count of second-degree criminal sexual conduct with a minor. On March 14, 2017, a jury trial was commenced in the Greenwood County Court of General Sessions with the Honorable Frank R. Addy, Jr., circuit court judge, presiding. At the conclusion of the two-day trial, the jury convicted Appellant of second-degree criminal sexual conduct with a minor while acquitting him of the other charge. Following the verdict, the trial judge sentenced Appellant to a term of imprisonment of fifteen years. Appellant then filed a timely notice of appeal.

STATEMENT OF FACTS

On October 6, 2015, a twenty-one-year-old woman ("Victim") contacted Officer Kerry Cooper of the Greenwood Police Department and reported she had been sexually assaulted by Appellant Howard James Woods, Jr., whom she had lived with since she was just an infant, at a location within the city limits of Greenwood, South Carolina, beginning when she was nine years old. (R. p. 26; p. 38; pp. 48-49; pp. 70-71; p. 95). Victim further reported the abuse continued until she became pregnant at the age of fifteen. (R. p. 71). In response to the allegations, Officer Cooper took a preliminary report and then referred the matter to Investigator Blake Moore of the Greenwood Police Department for investigation. (R. pp. 72-73; p. 78).

Two days later, Investigator Moore met with Victim at his office, and Victim again reported Appellant sexually assaulted her. (R. p. 49; pp. 79-80). More specifically, Victim indicated the abuse began when she was eight or nine years old, and she noted Appellant began "messing with her vagina" while she was blindfolded during the first instance of abuse, which occurred at a residence on Baptist Avenue. (R. pp. 50-51; pp. 79-80). Victim reported the abuse then resumed when she and her family moved to a new residence and continued until Appellant impregnated her when she was fifteen years old. (R. pp. 79-81). Additionally, Victim reported the pregnancy ended when her family took her to a clinic in Augusta, Georgia, for an abortion, and she noted she had not been sexually active with anyone other than Appellant prior to becoming pregnant. (R. pp. 81-82). Furthermore, Victim indicated she delayed disclosing the sexual abuse for a number of years because her mother ("Mother") did not want her to report it until after she had completed her high school education.[1] (R. p. 52; p. 82). At the conclusion of

[1] Later on during trial, Mother indicated she did not want Victim to report the sexual abuse after it was disclosed to her because it made her feel like a failure as a parent and she "simply wanted it to go away." (R. p. 148).

the conversation, Investigator Moore believed the allegations could lead to some jurisdictional issues based on the different locations where the abuse was alleged to have occurred, so he arranged for Investigator Sharon Middleton of the Greenwood County Sheriff's Office to take over the investigation. (R. pp. 82-83; p. 88).

A few days later, Investigator Middleton met with Victim, and Victim once again reported she was sexually abused by Appellant when she was between the ages of nine and fifteen. (R. pp. 52-53; pp. 89-91). Regarding the abuse, Victim again discussed the incident in which she was blindfolded when she was nine years old, and she indicated Appellant, whom she identified as her step-father, performed an act that made her feel a "funny" and "wet" sensation on her vagina during that particular incident. (R. pp. 63-64; p. 92; p. 92). After that, Victim stated the family moved to a new residence, which was located on Barley Drive, and Appellant subsequently resumed sexually abusing her from the time she was in the sixth grade in school until she became pregnant at the age of fifteen. (R. pp. 93-94). Moreover, Victim reported she discovered she was pregnant when Mother took her to an urgent care clinic, and she again indicated she had an abortion performed at a clinic in Augusta following the discovery of the pregnancy. (R. p. 95).

After speaking with Victim, Investigator Middleton obtained the medical records from Victim's visit to the urgent care clinic and confirmed the information regarding Victim's pregnancy.[2] (R. p. 96; p. 102; pp. 127-128). After doing so, Investigator Middleton contacted Appellant, and Appellant agreed to speak with her at the sheriff's office. (R. pp. 106-108).

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[2] During trial, the medical records from both the urgent care clinic and the clinic where the abortion was performed were admitted into evidence. (R. pp. 127-128; pp. 131-134). Based on the absence of certain information in the records related to the abortion, an administrator familiar with the records indicated Victim's pregnancy must have been five weeks or less in length at the time of the procedure. (R. p. 135).

During their conversation, Appellant revealed he lived continuously with Victim and her family for a period of approximately fourteen years, and he asserted he treated Victim as a daughter during that time period. (R. p. 111). However, Appellant denied inappropriately touching, raping, or sexually abusing Victim, and he further was adamant he neither had any knowledge of Victim's abortion nor had ever been to an abortion clinic. (R. pp. 111-114; p. 117; p. 119).

Following the interview, Appellant was arrested for the sexual abuse, and he was ultimately indicted for one count of first-degree criminal sexual conduct with a minor along with one count of second-degree criminal sexual conduct with a minor. (R. pp. 2-3; p. 122; pp. 220-223). Through the indictment for first-degree criminal sexual conduct with a minor, Appellant was charged with committing a sexual battery upon Victim, whose date of birth was specifically identified, in Greenwood County when she was under the age of eleven between the dates of "January 1, 2003 and December 31, 2004." (R. pp. 220-221). Meanwhile, through the indictment for second-degree criminal sexual conduct with a minor, Appellant was charged with committing a sexual battery upon Victim, whose date of birth was again identified, in Greenwood County when she was at least fourteen years old but less than sixteen years old. (R. pp. 222-223). Furthermore, that particular indictment alleged the sexual abuse occurred between the dates of "January 1, 2005 and December 31, 2009," and it identified the offense being charged as a violation Section 16-3-655(B)(2) of the South Carolina Code of Laws.[3] (R. pp. 222-223).

[3] Specifically, in identifying the offense charged, the indictment included the CDR Code 0397, which was the assigned code for second-degree criminal sexual conduct with a minor in violation of Section 16-3-655(B)(2). CDR Codes, South Carolina Judicial Department Website, https://www.sccourts.org/cdr/; see DOUGLAS S. STRICKLER, SOUTH CAROLINA CRIMINAL OFFENSES AND PENALTIES 39 (2015) (identifying 0397 as the CDR code for a violation of Section 16-3-655(B)(2)).

Subsequently, Appellant proceeded to trial, and, at the outset of trial, defense counsel moved to quash both indictments as overbroad. (R. p. 4). In doing so, defense counsel acknowledged the discovery materials the defense had received revealed Victim disclosed one act of sexual abuse that occurred during the two-year time span identified in the first-degree criminal sexual conduct with a minor indictment while also revealing Victim disclosed twenty to thirty acts of sexual abuse that occurred with regularity throughout the five-year time span identified in the second-degree criminal sexual conduct with a minor indictment. (R. pp. 4-5). Nonetheless, defense counsel maintained the broad time spans identified in the indictments violated Appellant's due process right because they allegedly gave him "an impossible task of proving a negative for a period of seven years" and would allegedly prevent him from raising an alibi defense if he had, in fact, had one. (R. pp. 5-6).

After hearing defense counsel's arguments, the trial judge reviewed the indictments and noted the second-degree criminal sexual conduct with a minor indictment identified a time span for the offense extending from 2005 to 2009 but only actually charged Appellant with committing a sexual battery against Victim after she reached the age of fourteen, which would have occurred in 2008 based on her date of birth. (R. pp. 50-51). In response, the solicitor indicated he believed the first part of the time period identified in the indictment was designed to cover the sexual abuse falling within subsection (a) of the second-degree criminal sexual conduct with a minor statute while the second portion of the time period was designed to cover the sexual abuse falling within subsection (b).[4] (R. p. 7). The solicitor further asserted he believed the

[4] Although the solicitor referred to the different subsections as (a) and (b), it appears the solicitor was attempting to distinguish between subsections (B)(1) and (B)(2) of Section 16-3-655 based on the fact he referenced the elements of subsection (B)(2) in making his argument. (R. pp. 7-8).

indictment as drafted contained a scrivener's error in regard to the identified time span, which he indicated should have started with the date Victim turned fourteen years old. (R. pp. 7-8).

At that point, the trial judge confirmed the indictment specifically charged Appellant with a sexual battery occurring between Victim's fourteenth birthday and December 31, 2009. (R. p. 8). The trial judge then ruled:

> [T]he State's going to be limited to any sort of testimony in that date range, [Victim's date of birth in] 2008 to December 31, 2009 as it related to [the second-degree criminal sexual conduct with a minor] indictment, the CSC with a minor second degree. That's equitable, and it's also exactly what [Appellant] was indicted for. If a longer period of time or a more broad period of time had been desired, then a different indictment should have been prepared or different charges should have been prepared.

(R. pp. 8-9). Furthermore, the trial judge found the first-degree criminal sexual conduct with a minor indictment was not overly broad based on the alleged offense's nature coupled with Victim's young age at the time of the abuse, and he denied the motion to quash. (R. p. 9).

Thereafter, the trial proceeded forward, and Victim, who was twenty-two years old at that time, testified as the first witness for the prosecution. (R. p. 26). During her testimony, Victim discussed the first occurrence of sexual abuse that took place when she was nine years old and home from school due to an ankle injury, and she indicated she believed Appellant, who lived with her from the time she was an infant until she was fifteen years old, performed oral sex on her during that incident.[5] (R. pp. 26-28). Following that testimony, the solicitor inquired when the next instance of sexual abuse occurred, and Victim responded it happened when she was

[5] Although she initially indicated she lived with Appellant until she was fifteen years old, Victim later inconsistently stated she moved out of Appellant's home two years before she became pregnant, which would have meant she was approximately thirteen years old at that time. (R. p. 68). However, Mother later stated they moved into their own apartment in early 2009, and she indicated Appellant lived with them at that apartment for a period of time preceding Victim's pregnancy. (R. p. 141; p. 143; p. 154).

twelve years old and about to start her sixth grade year in school. (R. p. 30). At that point, defense counsel objected on the basis Victim's testimony went to sexual assaults that occurred outside the time frame alleged in the indictment, the solicitor responded the testimony was admissible as part of the res gestae of the charged crime, and the trial judge conducted a bench conference on the matter off the record. (R. p. 30). Following the bench conference, the trial judge overruled defense counsel's objection and indicated he would permit Victim to "allude" to the beginning of the sexual assaults. (R. pp. 30-31). Victim then broadly reported the sexual abuse involved vaginal penetration, oral sex, and reciprocal oral sex along with anal penetration on one occasion, and she indicated it occurred approximately once or twice a week until she became pregnant when she was around the age of fifteen without specifically identifying when any of the different sexual batteries occurred during the time span of the abuse.[6] (R. pp. 33-35; pp. 38-41). After that, Victim indicated she revealed the abuse to her mother and Appellant subsequently drove her to Augusta for an abortion. (R. pp. 36-37). Moreover, she revealed she delayed disclosing the abuse to anyone other than her mother for several years and finally disclosed it to law enforcement after experiencing anxiety attacks and feeling a need for closure. (R. pp. 38-39).

In addition to Victim's testimony, Officer Cooper and Investigator Moore testified about the disclosures of sexual abuse Victim made to them. (R. pp. 70-88). Likewise, Investigator Middleton testified about her investigation into the sexual abuse, including in regard to her conversations with both Victim and Appellant. (R. pp. 89-124). During her discussion of Victim's statements, Investigator Middleton noted Victim disclosed she was sexually abused

[6] Based on the lack of specificity in regard to when the different sexual batteries occurred, defense counsel subsequently moved for a directed verdict on the second-degree criminal sexual conduct with a minor charge while arguing "there was no clear testimony of exactly when those incidents occurred." (R. pp. 156-159).

once when she was nine years old and then was abused again starting when she was in the sixth grade and living at a new address. (R. pp. 91-93). At that point, defense counsel objected, and the trial judge instructed the solicitor to "move it along a little bit." (R. p. 93). The questioning then resumed, and Investigator Middleton confirmed Victim reported she was sexually abused until she became pregnant at fifteen years old with the sexual batteries taking a variety of forms, including vaginal penetration, oral sex, and reciprocal oral sex. (R. p. 94). Thereafter, Investigator Middleton discussed Appellant's statements to her, confirmed Appellant readily acknowledged he lived continuously with Victim for a period of approximately fourteen years, and further noted he claimed to have treated Victim as a daughter. (R. p. 111). However, Investigator Middleton acknowledged Appellant consistently denied committing any acts of sexual abuse upon Victim throughout their conversation. (R. pp. 112-113; p. 117; p. 119).

Finally, Mother testified for the State, and she recounted Appellant was her boyfriend in the past, had lived with her and her children at residences on Baptist Avenue and Barley Drive up until a point in early 2009, and had acted as a step-father to Victim. (R. pp. 138-141; p. 154). During that time period of cohabitation, Mother noted Appellant was regularly at home with Victim while she was away and at work. (R. p. 145). Additionally, she confirmed Appellant stayed home one day with Victim when Victim was nine years old after Victim injured her ankle while leaving for school. (R. pp. 139-140). Furthermore, she recounted Victim later became pregnant when she was approximately fourteen or fifteen years old at a point in time when they were living in an apartment with Appellant, Victim identified Appellant as the person who impregnated her, she confronted Appellant about the allegations, and Appellant denied them. (R. pp. 141-143). At that point, Mother indicated she scheduled an abortion for Victim, Appellant

both drove them to Augusta for the procedure and paid for it, and she then had no further contact with Appellant after it was completed. (R. pp. 143-144).

Subsequently, at the conclusion of the evidentiary phase of trial, the parties presented their closing arguments to the jury. (R. pp. 163-187). During the solicitor's closing argument, the solicitor focused her remarks regarding the second-degree criminal sexual conduct with a minor charge on the abuse that occurred around the time Victim became pregnant at the age of fifteen, which was a time period during which Victim was between the ages of fourteen and sixteen. (R. p. 169). Furthermore, the solicitor urged the jurors to convict Appellant of that particular offense based on what he did to Victim when she was fifteen years old, and she concluded her remarks without making any references whatsoever to the fact Victim alleged the sexual abuse began occurring again when she was twelve years old. (R. pp. 163-171). Thereafter, during defense counsel's closing argument, defense counsel argued the second-degree criminal sexual conduct with a minor charge related to what Appellant was alleged to have done to Victim when she was between the ages of fourteen and sixteen, which was fully consistent with the solicitor's closing argument remarks. (R. p. 169; p. 171; p. 187).

Following the closing arguments, the trial judge instructed the jury on the applicable law. (R. pp. 188-199). In doing so, the trial judge expressly explained the indictments were simply formal charging documents, indicated each of the indicted offenses had to be decided separately, emphasized the State had the burden of proving Appellant's guilt, discussed the presumption of innocence for criminal defendants, thoroughly defined reasonable doubt for the jury, and instructed the verdict had to be unanimous. (R. pp. 189-191; p. 197). Moreover, the trial judge defined the elements of the charged offenses, and, in defining the elements of second-degree criminal sexual conduct with a minor, he expressly indicated the offense involved a sexual

battery committed upon a victim who was at least fourteen years old but under the age of sixteen by a person who either was in a position of familiar, custodial, or official authority to coerce the victim or was older than the victim. (R. pp. 195-196).

Subsequently, at the conclusion of trial, the jury convicted Appellant of second-degree criminal sexual conduct with a minor while acquitting him of first-degree criminal sexual conduct with a minor.[7] (R. pp. 210-211). During the ensuing sentencing proceedings, defense counsel specifically characterized the trial as a "fair trial" and noted "everyone involved respected [Appellant]'s rights." (R. pp. 216-217). The trial judge then sentenced Appellant to a fifteen-year term of imprisonment. (R. p. 219).

[7] Regarding why the jury may have acquitted Appellant of the first-degree criminal sexual conduct with a minor charge, the State's theory of Appellant's guilt for that particular charge was Appellant performed cunnilingus on Victim when she was nine years old, which was a type of sexual battery that did not necessarily require any evidence of penetration or intrusion. (R. pp. 26-27; p. 66). Notably though, during deliberations, the jury submitted a note to the trial judge asking for "intrusion" to be defined. (R. p. 200). In response to the note, the trial judge informed the jury foreperson "intrusion" was synonymous with entry or penetration. (R. p. 202). At that point, the jury foreperson sought further clarification and asked if mere touching was not sufficient. (R. pp. 202-203). The trial judge then stated: "It has to be intrusion, however slight entry. Mere touching . . . is not sufficient." (R. p. 203). Therefore, based on the trial judge's responses to the jury's inquiries, it is quite possible the jury incorrectly believed some form of penetration was necessary in order for Appellant to be convicted of committing a sexual battery upon Victim even though touching in the form of oral sex could have actually been sufficient. (R. p. 203).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); see State v. 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."). Significantly, an appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); see also United States v. Summers, 666 F.3d 192, 197 (4th Cir. 2011) (instructing an appellate court will not find a trial judge's evidentiary ruling constituted an abuse of discretion unless it was arbitrary and irrational).

ARGUMENT

After correctly declining to quash the second-degree criminal sexual conduct with a minor indictment as overbroad, the trial judge did not abuse his broad discretion by allowing the introduction of evidence related to sexual abuse that occurred before the victim, who was sexually abused by Appellant continually and repeatedly from the time she was twelve years old until she became pregnant at fifteen years old, reached the age of fourteen because that evidence was relevant and admissible as common scheme or plan evidence, constituted part of the res gestae of the charged offense, and did not result in any undue surprise or prejudice to Appellant.

Appellant contends the trial judge reversibly erred by allowing the admission of testimony regarding the sexual abuse Appellant inflicted upon Victim beginning when she was twelve years old. In support of that contention, Appellant maintains the evidence related to the earlier incidents of sexual abuse fell outside the scope of the indictment, was not admissible as common scheme or plan evidence, was unduly prejudicial, and took him by surprise such that his due process rights were violated. To the contrary, after correctly denying the motion to quash the second-degree criminal sexual conduct with a minor indictment as overly broad, the trial judge committed no error by admitting the evidence of the sexual abuse that occurred during the time period Victim was between the ages of twelve and fourteen because that evidence constituted quintessential common scheme or plan evidence since it demonstrated continuous illicit sexual activity between the same parties over an uninterrupted period of time. Likewise, that evidence also constituted evidence of the res gestae of the charged offense since the earlier sexual abuse was inseparable from and interrelated to the abuse for which Appellant was indicted. Furthermore, based on the circumstances of the case, Appellant suffered no unfair prejudice or undue surprise as a result of the admission of the evidence related to the prior abuse because he was aware of the nature of the allegations and simply denied them. Accordingly, the trial judge did not abuse his broad discretion through his rulings regarding the indictment and the evidence of the prior abuse. Appellant's conviction should be affirmed.

In South Carolina, an indictment issued by a grand jury is generally required before an individual can be held to answer in any court for a criminal offense. See S.C. Const. art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger."); see also S.C. Code Ann. § 17-19-10 ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury, except [under certain circumstances]."). Generally speaking, an indictment is a notice document, and its "primary purpose" is " 'to put the defendant on notice of what he is called upon to answer, i.e., to [apprise] him of the elements of the offense and to allow him to decide whether to ple[a]d guilty or stand trial.' " State v. Smalls, 364 S.C. 343, 346-347, 613 S.E.2d 754, 756 (2005) (citation omitted); see State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005) ("The indictment is a notice document.").

When evaluating an indictment, the indictment shall be considered valid and sufficient if "the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent conviction." State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980); see S.C. Code Ann. § 17-19-20 ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided."). Importantly, "the true test of an

indictment's validity is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." State v. Smalls, 336 S.C. 301, 307, 519 S.E.2d 793, 796 (Ct. App. 1999); see Gentry, 363 S.C. at 103, 610 S.E.2d at 500 ("[W]hether the indictment could be more definite or certain *is irrelevant*." (emphasis added)).

If a defendant makes a pre-trial challenge to the sufficiency or validity of an indictment, such a challenge raises "a question of whether a defendant properly received notice he would be tried for a particular crime." State v. Tumbleston, 376 S.C. 90, 96, 654 S.E.2d 849, 852 (Ct. App. 2007); see also State v. Garrett, 305 S.C. 203, 206, 406 S.E.2d 910, 911 (Ct. App. 1991) ("A motion to quash an indictment addresses the sufficiency of the indictment, not the sufficiency of the State's evidence."), overruled on other grounds by State v. Ramsey, 311 S.C. 555, 430 S.E.2d 511 (1993). To answer that question, the trial judge must determine: (1) whether the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce and the defendant to know what he is called upon to answer and to be able to make a decision as to whether to plead guilty or stand trial; and (2) whether the defendant is apprised of the elements of the offense intended to be charged. Tumbleston, 376 S.C. at 96-97, 654 S.E.2d at 852. In making such a determination, the trial judge must look to the indictment with a practical eye and examine the circumstances that existed prior to trial in order to determine whether the defendant was prejudiced in the sense that defendant was taken by surprise and unable to combat the charges against him as a result of the indictment. State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991). Critically, if an indictment satisfies the requisite conditions and, thus, is facially valid, the trial judge should deny the defendant's motion to quash or dismiss the indictment. See State v. Williams, 301 S.C. 369, 371, 392 S.E.2d

181, 182 (1990) (holding a motion to dismiss an indictment was properly denied because the indictment was facially valid and instructing the validity of an indictment is not affected by the character of the evidence considered by the grand jury); see also Tumbleston, 376 S.C. at 98, 654 S.E.2d at 853 ("[A]n indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood.").

Meanwhile, when a criminal defendant is indicted for a particular offense, evidence of the defendant's prior bad acts is generally not admissible to prove his or her guilt for the charged crime. State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). That is true "because under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than upon prior criminal or immoral acts." State v. Hough, 319 S.C. 104, 107, 459 S.E.2d 863, 865 (Ct. App. 1995). However, pursuant to our evidentiary rules, evidence of prior bad acts may be admissible "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE; see State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) (recognizing evidence of other crimes is competent to prove a charged offense if it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) common scheme or plan; or (5) identity). Significantly, in sexual assaults cases in which evidence exists as to sexual acts committed by the defendant upon the same victim prior to or subsequent to the acts for the defendant is charged, evidence of such acts is generally admissible as common scheme or plan evidence "to show continued illicit intercourse between the same parties." State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955); see State v. Richey, 88 S.C. 239, __, 70 S.E. 729, 730 (1911) ("The testimony tended to show a continued illicit intercourse between the same parties in the home of the defendant,

covering the time alleged in the indictment, and under the rule stated was admissible."); see also State v. Mathis, 359 S.C. 450, 464-465, 597 S.E.2d 872, 880 (Ct. App. 2004) (holding evidence of three prior incidents of sexual abuse that occurred prior to the incident for which Mathis was indicted was admissible because "the three prior incidents of sexual misconduct by Mathis show the same illicit conduct with the victim over the course of the nine months prior to September 2000"); cf. State v. Clasby, 385 S.C. 148, 156, 682 S.E.2d 892, 896 (2009) ("We find the trial judge properly admitted the proffered evidence of the four incidents of uncharged sexual misconduct committed by Clasby on B.C. prior to the June 1, 2004 offenses for which she was indicted and tried."); State v. Weaverling, 337 S.C. 460, 469, 523 S.E.2d 787, 791 (Ct. App. 1999) ("We find Doe's testimony regarding the pattern of sexual abuse he suffered by Weaverling to be quintessential common scheme or plan evidence.").

Moreover, evidence of a defendant's prior crimes or bad acts may also properly be admitted if those acts form part of the res gestae of the charged offense. Anderson v. State, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003). The res gestae theory recognizes evidence of other bad acts may be an integral part of a charged crime or may be necessary to aid the fact finder in understanding the context in which the crime occurred. State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005). Importantly, in State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-371 (1996), our Supreme Court explained the res gestae theory:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context or the res gestae or the uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . . and is

> thus part of the res gestae of the crime charged. And where evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae.

(citations, brackets, and internal quotations omitted). Thus, where a prior bad act is "inextricably intertwined" with a charged offense, the evidence of the prior bad act is admissible as part of the res gestae of the crime. Id. at 122, 470 S.E.2d at 371; see Wall v. State, 500 S.E.2d 904, 907 (Ga. 1998) ("[E]vidence of the defendant's prior acts toward the victim, be it a prior assault, a quarrel, or a threat, is admissible when the defendant is accused of a criminal act against the victim, as the prior acts are evidence of the relationship between the victim and the defendant and may show the defendant's motive, intent, and bent of mind in committing the act against the victim which results in the charges for which the defendant is being prosecuted.").

Notably, in State v. Berry, 413 S.C. 118, 123, 775 S.E.2d 51, 53 (Ct. App. 2015), this Court was confronted with a challenge to the admission of testimony related to sexual acts Berry committed against his victim that occurred outside the scope of the indictment.[8] In that case, Berry began sexually abusing his victim when she fifteen years old, the sexual abuse was committed at least once a week for an extended period of time that continued for several months beyond the victim's sixteenth birthday, and Berry was ultimately charged with second-degree criminal sexual conduct with a minor for the abuse committed prior to the victim reaching the age of sixteen. Id. at 121-122, 775 S.E.2d at 52-53. During trial, Berry unsuccessfully moved to suppress any testimony related to the sexual acts committed outside the scope of the indictment,

[8] Following this Court's decision in Berry, the Supreme Court granted a writ of certiorari, solely addressed an unrelated issue involving the admission of expert testimony, and affirmed as modified without discussing or altering the portion of this Court's decision addressing the admission of the victim's testimony regarding the acts committed outside the scope of the indictment. See State v. Berry, 418 S.C. 500, 504, 795 S.E.2d 26, 28 (2016) (affirming this Court's decision while solely modifying a portion addressing an unrelated issue involving expert testimony).

was convicted, and appealed. Id. On appeal, Berry raised a number of contentions, including the contention the trial judge erred by admitting the testimony regarding the abuse that continued beyond the time span identified in the indictment. Id. at 125, 775 S.E.2d at 54. However, this Court found no error and affirmed. Id. at 126-127, 775 S.E.2d at 72. In affirming, this Court noted the victim's testimony about the subsequent acts of abuse "established the abuse occurred in the same manner and in the same locations as the conduct that formed the basis of the" charged offense. Id. at 125, 775 S.E.2d at 54. As a result, this Court concluded the trial judge properly admitted the testimony regarding the unindicted acts because it was "relevant, probative, and evidence of a common scheme or plan." Id. at 126-127, 775 S.E.2d at 55.

Similarly, in State v. L.P., 768 A.2d 795, 796 (N.J. Super. Ct. App. Div. 2001), the New Jersey Superior Court addressed a challenge to the admission of testimony related to sexual acts L.P. committed against his victim, who was a minor at the time of the abuse and was twenty-five years old at the time of trial, that occurred prior to two specific and distinct periods of abuse that were alleged in an indictment. In that case, evidence was admitted during L.P.'s trial detailing incidents of sexual abuse that occurred years before the dates of the sexual abuse that led to the indicted charges. Id. at 802. After he was convicted, L.P. appealed, arguing—amongst other things—the trial judge erred by admitting evidence of the prior sexual assaults. Id. However, the Superior Court disagreed and affirmed. Id. at 803. In affirming, the Superior Court noted the testimony regarding the assaults that occurred prior to the time span identified in the indictment addressed "a continuing course of conduct against the same victim as she grew older" and found it "was critical to the jury's understanding of the facts and context of the crime." Id. at 801-802. Moreover, the Superior Court noted the exclusion of the evidence would have forced the victim to recall and differentiate between assaults occurring over a long span of time, which would have

been difficult for her to do in light of her young age at the time of the assaults coupled with the assaults' "regularity" and "frequency." Id. Accordingly, because "the assaults constituted a continuous unbroken chain of events that would [have been] most difficult and unnatural to separate," the Superior Count found the testimony related to the prior assaults was properly admitted during trial as res gestae evidence. Id. at 802-803. Furthermore, the Superior Court concluded the testimony's admission could not have resulted in any unjust prejudice to L.P. since the case ultimately hinged on the issue of whether the jury believed the victim regarding the assaults, which were "presented as a seamless series of acts" and, thus, were either going to be found to have occurred or not. Id. at 803.

In the case sub judice, the indictment charging Appellant with second-degree criminal sexual conduct with a minor included the relevant language from Section 16-3-655(B) defining the offense with which Appellant was charged, identified the broad time span during which the abuse was alleged to have *continually* and *repeatedly* occurred, provided the victim's name and date of birth, and included a CDR code that specifically alerted Appellant he was being prosecuted pursuant to subsection (B)(2) of the identified statute. See S.C. Code Ann. § 16-3-655(B)(2) (explaining a person is guilty of second-degree criminal sexual conduct with a minor if "the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim"); see also State v. Owens, 346 S.C. 637, 649, 552 S.E.2d 745, 751 (1987) (recognizing the inclusion of a specific reference to the applicable statute in the body of an indictment is sufficient to provide the requisite notice of all elements of the charged offense), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Jacobs, 238 S.C. 234, 243, 119 S.E.2d 735, 739-740 (1961)

("An indictment is ordinarily sufficient if it is in the language of the statute."); State v. Bennett, 375 S.C. 165, 172, 650 S.E.2d 490, 494 (Ct. App. 2007) ("CDR codes are four digit numerical codes which represent the criminal offenses created by the South Carolina General Assembly and common law."). Furthermore, to the extent the indictment was unartfully drafted regarding the timing of the sexual abuse, the specific time the sexual abuse occurred was not an element of the charged offense, and, moreover, the trial judge took steps to amend the indictment to ensure Appellant could only be directly convicted for the acts he committed within the limited period of time in which Victim was at least fourteen years old but under the age of sixteen.[9] See State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App. 1991) ("Where time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly occurred."); see also State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 423 (Ct. App. 1991) ("The specific date and time is not an element of the offense of first degree criminal sexual conduct."). Under those circumstances, the second-degree criminal sexual conduct with a minor indictment was sufficient to provide Appellant with all the required notice as it apprised him of the elements of the charged offenses, informed him of what he was called upon to meet, allowed him to decide whether to plead guilty or stand trial, and enabled the trial judge to know what judgment to pronounce in the event Appellant was convicted. See Edwards v. State, 372 S.C. 493, 496, 642 S.E.2d 738, 739 (2007) ("[A]n indictment is a notice document. The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to apprise him of the elements of the offense and to allow him to decide whether to plead

[9] Significantly, in light of the trial judge's accurate jury instructions defining the elements of second-degree criminal sexual conduct with a minor, the jurors could *only* convict Appellant of that charge if they believed beyond a reasonable doubt Appellant committed a sexual battery upon Victim when she was at least fourteen years old but under the age of sixteen. See State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them.").

guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted."); see also Smalls, 336 S.C. at 307, 519 S.E.2d at 796 ("[T]he true test of an indictment's validity is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet."). As a result, the second-degree criminal sexual conduct with a minor indictment issued in Appellant's case was valid and sufficient, and the trial judge did not abuse his broad discretion by declining to quash it as overbroad.[10] Cf. Tumbleston, 376 S.C. at 102, 654 S.E.2d at 855 ("We reject the notion that a specified time period prevented Tumbleston from adequately preparing his defense to the charges. Reading the indictments objectively from a reasonable person's view, we conclude they contain the necessary elements of the offenses charged and sufficiently apprise Tumbleston that he must be prepared to address his conduct towards [the victim] between 2001 and June of 2004.").

Similarly, beyond correctly declining to quash the second-degree criminal sexual conduct with a minor indictment, the trial judge committed no error by admitting the evidence related to the prior acts of sexual abuse Appellant inflicted upon his victim because—just like the evidence in Berry—that evidence was relevant and admissible common scheme or plan evidence. See Berry, 413 S.C. at 126, 775 S.E.2d at 55 ("The testimony regarding the continuous and similar illegal conduct in this case was probative to establish the CSC with a minor charge."). That is true because Victim's testimony regarding the sexual abuse—both prior to and during the time period covered in the indictment following the trial judge's limiting ruling—did not reveal one or two isolated incidents of abuse but, instead, revealed a *continual*, *regular*, and *repeated* pattern

[10] Perhaps tellingly, Appellant has not challenged the trial judge's denial of the motion to quash the indictment as overly broad. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (finding unchallenged and unappealed rulings are the law of the case).

of the exact same type of illicit sexual conduct committed by Appellant in a similar manner against the same victim over the course of a number of *consecutive* years. See State v. Kirton, 381 S.C. 7, 36-37, 671 S.E.2d 107, 121-122 (Ct. App. 2008) ("All of Kirton's alleged activity was directed toward the same victim. The six to seven year pattern of escalating abuse of Victim by Kirton is the essence of grooming and continuous illicit activity. . . . The prior sexual acts did not take place just one or twice, six or seven years ago. Victim indicted they happened several times a month for years. While the prior sexual acts are not the same as the exact crime for which Kirton was charged, Victim detailed a clear pattern of escalating sexual abuse and not a few isolated, unrelated incidents. . . . The trial court properly found the evidence was admissible to show a common scheme or plan, and Kirton's continuous illicit conduct toward Victim was extremely probative to prove the charged criminal sexual conduct occurred."). Under those circumstances, Victim's testimony regarding the prior acts occurring outside the limited scope of the indictment constituted quintessential evidence of a common scheme or plan, and the trial judge did not abuse his broad discretion by admitting it.[11] See Weaverling, 337 S.C.

[11] Because the trial judge never expressly placed the grounds for his ruling on the records and was never asked to do so by defense counsel, it is unclear what his specific basis for admitting the evidence of the earlier abuse actually was or whether defense counsel even raised any arguments in opposition to the ground or grounds the trial judge identified during the off-the-record bench conference. See State v. Hawes, 423 S.C. 118, 128, 813 S.E.2d 513, 518 (Ct. App. 2018) (recognizing the appellant has the burden of providing a sufficient record for meaningful appellate review); see also York v. Conway Ford, Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) ("The record should include the ruling on appeal."); In re Richard D., 388 S.C. 95, 100, 693 S.E.2d 447, 450 (Ct. App. 2010) (instructing an appellate court we "cannot review issues not contained in the record" even if they were discussed during an off-the-record bench conference). As a result, the trial judge's ruling on the admission of the evidence of the prior acts of sexual abuse cannot meaningfully be reviewed on appeal. See State v. Hutto, 279 S.C. 131, 132, 303 S.E.2d 90, 91 (1983) ("Appellant has not met its burden of presenting a record which is sufficiently complete to permit this Court to review the lower court's actions; therefore, we find no error."); see also State v. Floyd, 295 S.C. 518, 520-521, 369 S.E.2d 842, 843 (1988) (recognizing preliminary rulings are subject to change based on developments during trial and

at 471, 523 S.E.2d at 792-792 (finding it would be difficult to conceive of a more clear example of a common scheme or plan where "[t]he challenged testimonial evidence of Weaverling's prior bad acts shows the same illicit conduct with the same victim under similar circumstances over a period of several years"); see also State v. Ford, 334 S.C. 444, 453, 513 S.E.2d 385, 389 (Ct. App. 1999) ("Because the testimony of the previous acts [directed at the same victim] was admissible under Lyle, we need not address the issue of admissibility as part of the res gestae.").

Likewise, the trial judge committed no error by admitting the evidence related to the earlier sexual abuse because—just like the evidence in L.P.—that evidence was relevant and admissible as part of the res gestae of the charged crime. Looking to the nature of the abuse alleged, Victim disclosed she was sexually abused repeatedly and continually by Appellant for a period of several years that began when she was twelve years old and only ended when she became pregnant at the age of fifteen. Cf. Myrick v. State, 531 S.E.2d 766, 768 (Ga. Ct. App. 2000) (holding evidence of uncharged sexual intercourse was admissible as res gestae evidence in a prosecution for child molestation because the intercourse evidence was part of a course of conduct that was so interrelated to the charged activity that it would have been difficult to separate). In light of the regular and repeated nature of the sexual abuse coupled with the long span of time over which it occurred, Victim understandably could not and did not distinguish between the different sexual batteries that occurred before and after she reached the age of fourteen. See L.P., 768 A.2d at 802 ("Given the regularity and frequency with which the assaults occurred, it would have been highly improbable to expect the victim to differentiate the details of the thirtieth rape from the fortieth."). Under those circumstances, the prior acts of sexual abuse were inseparable from and interrelated to the acts for which Appellant was charged and were

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instructing "[t]rial judges must not be held, conclusively, to preliminary rulings made without benefit of all the pertinent and relevant evidence").

integrally necessary to present a full, accurate, and truthful account of the sexual abuse to the jury, including in regard to when the abuse resumed following the single incident that occurred when Victim was nine years old. See State v. Martucci, 380 S.C. 232, 258, 669 S.E.2d 598, 612 (Ct. App. 2008) (finding evidence of prior instances of child abuse inflicted by Martucci upon his victim in a homicide by child abuse case was admissible as part of the res gestae of the charged crime "to show the complete, whole story relating to the charge of homicide by child abuse"). As a result, evidence of the prior sexual abuse constituted evidence of the res gestae of the charged offense, and the trial judge did not abuse his broad discretion by admitting it during trial. See Anderson, 354 S.C. at 435, 581 S.E.2d at 836 ("A defendant's prior bad act is admissible if it forms part of the res gestae of the crime."); see also United States v. Williford, 764 F.2d 1493, 1499 (11th Cir. 1985) ("Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or *forms an integral and natural part of* an account of the crime, or is *necessary to complete the story* of the crime for the jury." (emphasis added)).

Moreover, Appellant was not unfairly or unduly prejudiced by the admission of the evidence related to the earlier sexual batteries that began when Victim was twelve years old for a number of different reasons. Initially, Appellant was fully aware of the nature of Victim's allegations through his discussions with law enforcement, through the broad time frame identified in the indictment, and through the materials received by the defense during the discovery process. See Tumbleston, 376 S.C. at 97, 654 S.E.2d at 853 (instructing a reviewing court must look to all the surrounding circumstances in a practical manner in order to determine whether a defendant was prejudiced by a lack of notice due to an allegedly insufficient

indictment). Additionally, the evidence of the prior abuse did not prejudice or alter Appellant's defense, which was—and necessarily had to be—a defense of complete denial since he admittedly resided with Victim continuously throughout the time span of the abuse. See Wade, 306 S.C. at 83, 409 S.E.2d at 783 ("We do not agree with the defendant that he was unable to prepare a defense to the charge of the indictment because of the time span involved. On the contrary, the defendant proceeded with a defense of denial, and presented evidence of factual impossibility. The jury simply rejected these defenses. Because he possessed these other defenses, the defendant's argument that he was prejudiced by the indictment is severely weakened."); cf. People v. Fritts, 140 Cal. Rptr. 94, 97 (Cal. Ct. App. 1977) ("Since appellant's alibi defense was not specific as to dates but total, in that he made a blanket denial of ever having molested his stepdaughter, he was not prejudiced by the manner of charging [him with a lewd act alleged to have occurred sometime during a twelve-month time span]."). Furthermore, in light of the fact Victim testified about the prior sexual abuse as an inseparable part of a continuous course of sexual abuse, that evidence did not alter the fact Appellant's case still hinged on whether or not the jury credited her testimony about the abuse. Cf. L.P., 768 A.2d at 803 ("Given the manner in which this proof was presented, we agree with the prosecutor who said that this jury was going to . . . either believe that it happened during this entire period or it didn't happen at all. This testimony about the earlier abuse did not unjustly prejudice the time period for which defendant was indicted, because the evidence was presented as a seamless series of acts." (brackets and internal quotations omitted)). Finally, the fact Appellant was ultimately acquitted of first-degree criminal sexual conduct with a minor, which was the most serious charge he faced, demonstrated the jurors were not unfairly swayed or improperly influenced by the admission of the evidence of the prior acts. See Myrick, 531 S.E.2d at 768 ("[T]he jury

clearly was not moved by passion or prejudice [based on evidence of uncharged sexual acts] because it acquitted Myrick of the other, more serious, charges against him."). Therefore, just as defense counsel conceded during the sentencing proceedings, Appellant's received a fair trial despite the fact the evidence of the prior sexual abuse was introduced during trial. See State v. Smith, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956) ("The burden is upon the appellant to satisfy [the appellate] court that there has been *prejudicial* error." (emphasis added)); see also State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (recognizing an issue conceded during trial cannot subsequently be argued on appeal).

Accordingly, for all the foregoing reasons, the trial judge correctly declined to quash the second-degree criminal sexual conduct with a minor indictment and properly admitted the evidence of the prior sexual abuse despite the fact it fell outside the scope of indictment, and Appellant suffered no actual prejudice as a result of the trial judge's rulings.[12] See Berry, 413 S.C. at 126-127, 775 S.E.2d at 55 ("[W]e find the trial court did not abuse its discretion in admitting the victim's testimony regarding Berry's subsequent bad acts. The victim's testimony was relevant, probative, and evidence of a common scheme or plan."); see also Tumbleston, 376 S.C. at 102, 654 S.E.2d at 855 (rejecting Tumbleston's contention the indictments issued in his case, which alleged the charged incidents occurred at some point during a forty-two-month span of time, were unconstitutionally overbroad); cf. United States v. Heimann, 705 F.2d 662, 666 (2nd Cir. 1983) ("Because proof at trial need not, indeed cannot, be a precise replica of the

[12] In fact, Appellant was actually *benefited* by the manner in which he was indicted and tried in the case at bar because the solicitor unquestionably could have indicted Appellant—and still can indict him in the event of a retrial—pursuant to Section 16-3-655(B)(1) for the sexual abuse that he inflicted upon Victim when she was between the ages of twelve and fourteen. See S.C. Code Ann. § 16-3-655(B)(1) (explaining a person is guilty of second-degree criminal sexual conduct with a minor if "the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age").

charges contained in an indictment, this court has consistently permitted significant flexibility in proof, provided that the defendant was given notice of the 'core of criminality' to be proven at trial." (citation omitted)). Appellant's conviction should be affirmed.

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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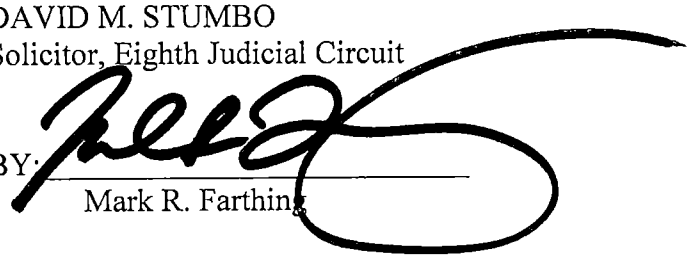
BY: 
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September 6, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
Honorable Frank R. Addy, Jr., Circuit Court Judge
Appellate Case No. 2017-000775

THE STATE,

Respondent,

vs.

HOWARD JAMES WOODS, JR.,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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