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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES BROWN,

APPELLANT

APPELLATE CASE NO. 2024-000425

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

I. Did the trial court err in failing to conduct an *in camera* review of mental health counseling records to determine whether disclosure was necessary due to the importance of the witness to the prosecution's case and the reasonable likelihood the records contained evidence relevant to the witness's credibility?

II. Whether the trial court improperly limited appellant's closing argument regarding the minor's relationship with her fiancé and the motivation for fabrication of the sexual assaults based upon concerns surrounding the Rape Shield statute?

III. Did the trial court err in failing to quash the indictments, that covered a five year period of time and were issued shortly before trial, since they were not stated with sufficient certainty and particularity to enable appellant to know what he is called upon to answer and whether he may plead an acquittal?

STATEMENT OF THE CASE

Appellant was initially indicted by a Greenville County grand jury in March of 2022 for disseminating obscene material to a minor and two counts of criminal sexual conduct with a minor, first degree, in violation of S.C. Code §16-3-0655(A)(1) involving oral sex with a minor under 11 years of age between January 1, 2015, and December 31, 2016. R. * 2022-GS-23-001373; 1374, 1375. All three of these indictments have *nolle prossed* notations with the Greenville County Clerk of Court's office. R.* nolle prosequi notations.

In October of 2023, the state secured additional indictments. 2022-GS-23-001376, 2023-GS-23-006566, 2023-GS-23-006567, 2023-GS-23-006568, 2023-GS-23006569, 2023-GS-23-006570, 2023-GS-23-006571, 2023-GS-23-006572, 2023-GS-23006573, 2023-GS-23006574. Collectively, these indictments covered behavior alleged to have occurred between August 15, 2014 until July 21, 2019. At the start of trial, appellant was arraigned on the October 2023 indictments, entering his plea of not guilty. Tr. 6, l. 10 – 8, l. 4. The state then moved to amend all the indictments to correct the date range allegations. For all indictments, the 2017 date allegations were changed to 2016, bringing the date allegations to match the statutory requirements for SP's date of birth. Tr. 8, l. 4 – 10, l. 14.

On January 8, 2024. a motion hearing was held concerning access to certain material, notably the mental health records of SP, before the Honorable Perry H. Gravely. Motion Hearing, p. 1. Britni McCall and Seth Johnson appeared on behalf of the state and Paul Neely and Anastasia Walker represented appellant. Motion Hearing, p. 1. By written order dated January 12, 2024, Judge Gravely directed production of some additional material. Discovery Order.

The case was tried before Judge Gravely and a jury from January 29, 2024 – February 2, 2024. R. *. Britni McCall and Seth Johnson continued for the state and prosecuted the case with Paul Neely and Anastasia Walker continuing their representation of appellant. R. *. The jury returned a guilty verdict on all charges.[1] The trial court sentenced appellant under 2022-GS-23-1376 to 33 years; 6566A to 30 years; 6567A to 15 years; 6568A to 30 years; 6569A to 33 years; 6570A to 15 years; 6571A to 15 years; 6572A to30 years; 6573A to 15 years; and 6574A to five years (suspended on time served), with all sentences to run concurrently.

A motion for new trial was filed and denied by written order dated March 6, 2024. This appeal follows.

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[1] Those charges requiring a finding of a prior conviction resulting in registration as a sex offender were bifurcated, with the jury provided testimony regarding registration following a verdict on the underlying charge. Tr. 541, ll. 6 – 22.

STATEMENT OF FACTS

Appellant was a long-time friend of the Powers family. Tr. 182, l. 1 – 183, l. 25. Appellant lived at two separate addresses very close to the Powers family. Tr. 351, l. 10 – 352, l. 17. At times, appellant lived for short periods of time in the Powers home and, at the time of SP's disclosure, was living in a shed on the Powers property. Tr. 200, l. 20 -201, l. 21; 352, ll. 12 – 14. The case against appellant relied heavily on the testimony of SP. There was no forensic evidence regarding DNA or bodily fluids introduced during trial. Tr. 353, ll. 3 – 24. SP's physical exam, conducted following her initial disclosure, was normal. Tr. 308, ll. 4 – 10. There were no eyewitnesses to the alleged sexual assaults. Tr. Appellant denied any knowledge of the allegations. Tr. 339, l. 25 – 340, l. 20.

Appellant's defense centered on the credibility of SP, and critically, evolutions in her story regarding appellant's alleged abuse and her potential motivation to lie about the alleged abuse. As to SP's allegations, there was an evolution over time regarding the details. SP's early reports, documented in the investigative notes and recorded during a forensic interview, varied from the version of events she related during trial.[2] During opening statements, the state turned these varying versions of events into a positive for the prosecution:

> And it took her a few years to talk about the discloser. And then it took us another four years to get this case before you. That's a long time. So it's understandable that over the course of time, as [SP] disclosed, she may not have told every detail every time she told about that chronic abuse. She may have forgotten some of the details. Possibly, as a virtue of time or maybe as a way to cope with the abuse that she suffered throughout the years.

Tr. 176, ll. 1 – 10.

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[2] The forensic interview, while the subject of testimony during trial, was not admitted into evidence or played for the jury.

Testimony was elicited during trial regarding the importance to the Powers family regarding SP's virginity. SP's cultural celebration of adulthood, her quinceanera, required virginity except in the cases of rape. Tr. 190, ll. 2 – 11; 206, l. 15 – 207, l. 8. During the time surrounding her disclosure, as the quinceanera approached, SP was dating a young man who lived in her household who would, at the time of trial, become her fiancé. Tr. 248, l. 12 – 250, l. 13.

ARGUMENT

I. The trial court erred in failing to conduct an *in camera* review of mental health counseling records to determine whether disclosure was necessary due to the importance of the witness to the prosecution's case and the reasonable likelihood the records contained evidence relevant to the witness's credibility.

Standard of Review.

When balancing the competing interests between protected mental health records of a central witness and a defendant's right to a fair trial, the trial judge "alone should review the contents of the records to determine whether 'disclosure is necessary for the conduct of proceedings before the court and that failure to make the disclosure is contrary to public interest.'" State v. Blackwell, 420 S.C. 127, 154–55, 801 S.E.2d 713, 727–28 (2017) (internal citations omitted). "In making this determination, the judge should assess the importance of the witness to the prosecution's case and whether the records contain exculpatory evidence, including, but not limited to, evidence relevant to the witness's credibility." Id.

While no specific standard of review of the trial judge's ultimate ruling on the access to and scope of use related to such records has been established to date, a ruling on the "admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001); *see also* State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011).

Relevant Facts.

Following SP's delayed disclosure of alleged sexual abuse by appellant, she was provided mental health counseling services by the Julie Valentine Center. SP eventually testified during trial about this counseling. Tr. 242, ll. 1 – 8. Prior to trial, counsel for appellant sought a court order for an in camera review of these records under State v. Blackwell, 420 S.C. 127, 801 S.E.2d 713 (2017). Motion Hearing p. 21, l. 13 – 22, l. 5. The trial court denied the motion, finding appellant's counsel had not met the threshold required by Blackwell to conduct such a review. Discovery Order dated January 12, 2024.

Appellant's counsel issued a subpoena to have the records custodian appear for trial and again requested the trial court to review the records under Blackwell. Tr. 136, ll. 10 – 20; 142, ll. 6 – 23. The trial ultimately obtained a copy of the mental health records of SP, but ruled an *in camera* review was not required since the threshold hurdle set out in Blackwell had not been cleared. Tr. 156, l. 15 – 157, l. 17.

Discussion.

This issue is controlled by our Supreme Court's decision in State v. Blackwell, 420 S.C. 127, 801 S.E.2d 713 (2017). When a witness does not consent to disclosure of protected mental health records,

> the judge alone should review the contents of the records to determine whether 'disclosure is necessary for the conduct of proceedings before the court and that failure to make the disclosure is contrary to public interest.' In making this determination, the judge should assess the importance of the witness to the prosecution's case and whether the records contain exculpatory evidence, including, but not limited to, evidence relevant to the witness's credibility.

Id., 420 S.C. at 154–55, 801 S.E.2d at 727–28 (internal citations omitted).

Rather than conduct an *in camera* review of the records, the trial court focused on the lack of a showing of a reasonable belief the records would contain exculpatory type evidence. The source of this ruling is found in a footnote to Blackwell which states:

> This hearing should be conducted only after the party requesting the records has met the minimal threshold requirement of presenting evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence, including, but not limited to, evidence relevant to the witness's credibility. *See* State v. Johnson, 440 Md. 228, 102 A.3d 295, 309 (2014) ("We recognize how unlikely it may be that a defendant or defense counsel will know in advance what information is in a patient's privileged mental health or psychotherapy records. Nonetheless, in order to gain access to any information in those records, the defendant may (and must) be able to point to some fact outside those records that makes it reasonably likely that the records contain exculpatory information."). We believe this preliminary showing, in contrast to a generalized assertion, is necessary to guard against a "fishing expedition" of a witness's mental health records. The mere fact that a witness has received mental health counseling is not sufficient to warrant an in camera hearing as there is no evidence that receipt of counseling somehow automatically makes a witness less credible.

Blackwell, 420 S.C. at fn. 21, 801 S.E.2d at fn. 21.

Here, the trial court noted:

> And that, generally, we talked about mental health and therapy records. I ruled that because of the footnote in there about fishing expedition, kind of felt like there was no information presented that said what some facts outside the records that make it reasonably likely that the records contain exculpatory information.

Tr. 144, ll. 5 – 11. The trial court then asked appellant's counsel to "point something to, outside the record, that makes it likely that there's some exculpatory information in these records?" Tr. 144, ll. 19 – 23.

Counsel for appellant explained to the trial court SP's evolving account of the alleged events with appellant:

> Your Honor, the night that she was interviewed or the night that she disclosed to law enforcement, she -- Penny Audrey, who was one of the first officers who responded to the scene, talks to Joshua Water and Roseanna Power. And they give a version of events that had been disclosed to them by the victim. Later they talk to the victim. She referred to the Julie Valentine Center where she gives similar versions of events but it's different. The details are not the same.
>
> Then she goes to the forensic medical exam a week later, and what she tells Dr. Pritchard is, again, different. High points are the same but different. Inconsistent. And then based on the Riddle conversation that we had with the solicitor's office, when they met with the victim in preparation of this trial four weeks later, differ. And as I said, the substance is similar. And I agree the substance is similar but it's different.

Tr. 144, l. 25 – 145, l. 18. Appellant's counsel pointedly referred to the importance of SP's credibility and the importance of her testimony to the state's case against appellant. Tr. 158, ll. 2 – 23.

Importantly, these records were of counseling sessions SP received directly related to the events that allegedly occurred with appellant and not generalized mental health treatment:

> MR. NEELY: The fact is that she was referred to the Julie Valentine Center for therapy in regards to this case. She is in therapy discussing this case. She's made four inconsistent statements, she's talk to the therapist. It's a fifth version of events. I think that makes it likely that there's exculpatory material that's in there. I think the standard is met and what it triggers is not that we get the records. And this is why we have Ms. Green[3] here was to expedite the process of providing to Your Honor the records. Because all it triggers is a in-camera review. And then, after the in-camera review, if Your Honor sees something exculpatory . . .

Tr. 146, ll. 9 – 21.

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[3] Ms. Green was the designated records custodian for the Julie Valentine Center. Tr. 147, ll. 4 – 6.

While not contesting what the state deemed as "minor differences" in the stories SP related, the state focused on appellant's lack of foresight that the records would contain additional versions of events:

> Your Honor, first and foremost, I think Blackwell, obviously, has been a pretty clear opinion for a reason. And not as to protect these medical records and peoples HIPPA rights. And it's very clear, as Your Honor pointed out, that there has to be some fact outside the record that makes it reasonably likely that the records contain exculpatory information. And just because she has continued treating and has been receiving therapy does not mean that they're entitled to those records. *Just because she has made other inconsistent statements does not mean that's not a fact that means there will be exculpatory information or that it's reasonably likely that there will be exculpatory information in those records.*

Tr. 148, ll. 4 – 18 (emphasis added).

In trying to find an acceptable source outside the mere presence of mental health counseling, the trial court noted:

> THE COURT: I mean, I would think one type of example of the fact that would satisfy Blackwell is, you know, she told her friend that she told this therapist something different or lied about it or changed her story to the therapist. I mean, that's a fact outside the record. I still don't see what you're asking for is fishing and hoping I will find some exculpatory information in there that I have to hand over to you.

Tr. 150, ll. 10 – 18. After taking the matter under advisement, the trial court elected not to conduct an *in camera* review of the records, ruling that:

> THE COURT: All right. I think the only issue under advisement from the evening was the records, the subpoena of records from the Julie Valentine Center. As I indicated in chambers, I have reviewed Blackwell and, you know, my duty, at this point, is waive the rights of an individual's privacy rights to their therapy records. And those would be right to cross-examine confrontation by The Defendant. And as I indicated in the previous hearing, I believe the victim, alleged victim, was there and indicated that she objected to these documents or that was what was represented by The State.

> Looking again at famous Footnote 21 says, A hearing should be conducted by The Court to determine whether to review the records in-camera. I understand that these records have been produced. I have -- I have not opened them and at this point I don't plan to open them. But they were from Jody Green emailed it to me. It just says, Therapy file, S.P. Please find the attached therapy records for [SP], including intake and assessments, as well as therapy notes. So I -- just looking at Blackwell, which is 420 S.C. 127, *I do not find that The Defendant has met the minimum threshold, presenting evidence that's sufficient to establish a reasonable belief that the records contain exculpatory evidence. Including evidence relevant to the witness' credibility.*

Tr. 156, l. 15 – 157, l. 17 (emphasis added).

The trial court's error in applying the guidance from footnote 21 was to create an impossible hurdle before the trial court's obligation, in balancing the witness' privacy interests with the accused due process interests, to even review the records *in camera.* Under the trial court and solicitor's application of Blackwell, appellant would first be required to demonstrate that the records in question were not actually needed since the appellant had reliable evidence outside the records that already showed the records contained relevant information. Under this exceptionally limited application of Blackwell, an accused would need to put forth evidence other than the accuser has consistently altered her version of events, to have a court review the records from counseling sessions that would certainly be covering those same events.

By contrast, the source of this requirement in Blackwell, the Court of Appeals for Maryland's decision in State v. Johnson, 102 A.2d 295 (Md. 2014), noted several "accessible" means to clear the initial hurdle that would balance the danger of allowing unfettered fishing expeditions and the due process rights of the accused:

> One such example is evidence of prior inconsistent statements. In State v. Peseti, the victim's sister testified that the victim had on one occasion "admitted that the incident 'didn't happen.'" 101 Hawaii 172, 65 P.3d 119, 129. Similarly, in Brooks v. State, 33 So.3d 1262, 1269 (Ala.Crim.App.2007), other records produced by

> the State during discovery included an inconsistent statement by the victim. Another example is strange behavior by the victim surrounding the counseling sessions, such as Burns v. State, 968 A.2d 1012 (Del.2009), where the victim destroyed notes about alleged abuses after an interview with her psychiatrist. People v. Stanaway, 446 Mich. 643, 521 N.W.2d 557 (1994), a case cited by this Court in Goldsmith, also provides a useful example of a defendant pointing to actual facts to support a proffer that the mental health records likely contained exculpatory evidence. In that case, the defense's theory was "that the claimant is a troubled, maladjusted child whose past trauma has caused her to make a false accusation." In support of a request to review the claimant's mental health records, the defendant pointed to prior abuse of claimant by her biological father and factual support for sexually aggressive behavior by the victim. Although the trial court denied the defendant's request, the Supreme Court of Michigan held, based on defendant's proffer, that in camera review "may have been proper" and remanded for further proceedings, including to further develop the record. 521 N.W.2d at 576–77.

Johnson, 102 A.3d at 309–10.

Other states have noted that this initial showing requiring some review of the protected record by the court before disclosure was not a high hurdle:

> The threshold showing necessary to trigger an in camera review is not unduly high. The defendant must meaningfully articulate how the information sought is relevant and material to his defense. To do so, he must present a plausible theory of relevance and materiality sufficient to justify review of the protected documents, but he is not required to prove that his theory is true. At a minimum, a defendant must present some specific concern, based on more than bare conjecture, that, in reasonable probability, will be explained by the information sought.

State v. Hoag, 749 A.2d 331, 333 (N.H. 2000) (*quoting* State v. Graham, 702 A.2d 322 (N.H. 1997). In Hoag, the defendant asserted the victim's inconsistent statements regarding pain and penetration indicated a reasonably probability that additional inconsistent statements were made during the mental health counseling sessions. The Supreme Court of New Hampshire agreed

that the prior inconsistent statements by the victim cleared the initial hurdle to trigger an *in camera* review of the records:

> In this case, the issue of penetration was contested by the defendant, and the victim made contradictory statements regarding penetration. Therefore, the defendant's theory that the victim may have made additional exculpatory statements in counseling is 'based on more than bare conjecture,' and the defendant has presented a 'plausible theory of relevance and materiality sufficient to justify review.'

State v. Hoag, 749 A.2d 331, 333 (2000).

Here, as in Hoag, appellant's defense centered around challenging the veracity of SP and establishing a motivation for fabrication. Since the state conceded SP had variances in her descriptions of the events, appellant cleared the initial hurdle that SP's therapy records related to the allegations of abuse by appellant may contain additional variances that touched on SP's credibility.

The state, having successfully blocked any review by the trial court of the mental health records, was free to have SP reference her mental health therapy as an explanation for her varying accounts of the events:

> Q Is it difficult for you to remember all the details of what happened to you?
>
> A Yes.
>
> Q And why do you think that is?
>
> A Because I try to forget and try to move on. Like my therapist says, very good thoughts, deep, deep down and don't think about them and just continue living your life.

Tr. 242, ll. 1 – 8.

Remedy.

The records in question were sealed and made a court's exhibit for review on direct appeal.[4] In similar settings, the sealed records have been reviewed by the appellate courts to conduct the *in camera* review in order to determine if the error was harmless. *See* Blackwell, 420 S.C. at 156, 801 S.E.2d at 728 (holding "having thoroughly reviewed the contents of the records, we do not believe Blackwell established the necessity of these records as they were neither material nor exculpatory, particularly since Blackwell conceded guilt."). In the alternative, this Court may remand the matter to the trial court for an *in camera* review as dictated by Blackwell to determine whether or not the records contain material that should have been disclosed prior to trial.

[4] The records have been designated to be included in the Record on Appeal and a transport order will be requested transferring the sealed court's exhibit for appellate review.

II. The trial court erred in improperly limiting appellant's closing argument regarding the minor's relationship with her fiancé and the motivation for fabrication of the sexual assaults based upon concerns surrounding the Rape Shield statute.

Standard of review.

"A trial judge is vested with broad discretion in dealing with the range and propriety of closing arguments and ordinarily his rulings on such matters will not be disturbed. The appellant has the burden of showing that any alleged error deprived him of a fair trial." State v. Finklea, 388 S.C. 379, 385–86, 697 S.E.2d 543, 547 (2010).

Relevant facts.

Prior to closing, the state moved to restrict argument regarding the potential of SP's fabrication of the allegations against appellant.

> MRS. MCCALL: Your Honor, I would like to address one issue that came up in opening argument, I did not object, at that point in time, but it's related to the rape shield argument that we had initially. And I think we kind of touched on this earlier in the week but I just want to be very clear moving into closing arguments, especially, since all the evidence in the case has been closed, no allegation -- in The Defense's opening argument, they made this allegation related to the victim having a boyfriend and she was supposed to have this party when she turned 15, that she couldn't have. And, essentially, if she wasn't a virgin. And so they alluded to the fact that she disclosed this behavior or that she made up these allegations to kind of cover up or possibly some, you know, behavior with related to her boyfriend. That was what I took their argument to insinuate.
>
> The only evidence that has come out is that she had a boyfriend. There's been, obviously, because of rape shield, there's been no evidence of any other sexual activity by any other partners. *Certainly, no evidence has been presented in this trial that would*

> *give them anything to argue on closing that she was trying to cover up for any other sexual behavior that she was concerned about it.*

Tr. 452, l. 6 – 453, l. 6 (emphasis added).

Counsel for appellant disagreed, asserting

> The testimony that the jury has heard during this from the child's mother, was that at the age of 15, they get a Quinceanera. Her mother testified that in order to have this Quinceanera, she has to be a virgin. The mother testifies that there is an exception to that, which is rape. That's the evidence that was in front of the jury.
>
> And then there's other evidence that she's got a fiancé now, that she's been in a relationship with for the last five or six years and that at the age of 13, prior to those allegations being made, the boyfriend lived in the house for three months.

Tr. 453, ll. 8 – 19.

Counsel for appellant also noted that the basis of the argument centered around a motive to fabricate the allegations and were not an attack on SP's character through sexual history.

> MR. NEELY: Your Honor, again, under the rape shield and under State v. Gravenstein, evidence of sexual conduct is allowed to impeach the witness' credibility, it's used for that purpose. Not in order to impugn her character. Rape shield says you can use prior sexual conduct to impugn the character of the witness. It can be used and under the statute and in Grovenstein explains, it can be used to impeach the witness. And so, again, the evidence before The Court and the evidence that's before the jury for them to consider, is she gets a party when she's 15, she has to be a virgin. The mom testified that rape is an exception. And that the boyfriend lived in the house. Whatever conclusion the jury draws from that is for the jury to decide.

Tr. 455, ll. 5 – 19.

The trial court agreed with the solicitor, finding the argument would violate the protections afforded by S.C. Code Ann. § 16-3-659.1 (1994 as amended):

> THE COURT: Well, I mean, it's clear that under the rape shield you cannot introduce evidence like that. Except for very limited purposes. That evidence has not been introduced. And I don't think

> it's appropriate for you to argue something that you can't introduce as evidence.
>
> MR. NEELY: I can argue that -- can I not argue the evidence that's already been introduced?
>
> MRS. MCCALL: It hasn't been introduce—
>
> THE COURT: *I don't think you can argue that that all this can be inferred that she had sex. Because I don't think there's any evidence of that.*

Tr. 455, l. 20 – 456, l. 6 (emphasis added).

In closing, appellant's counsel was forced to limit his argument regarding SP's potential fabrication.

> So what do we know? What do we know? Roseanna told us that at the age of 15 they get a Quinceanera. And Roseanna told us, in order to have the Quinceanera, they have to be a virgin. And then she told us that SP was excited about this party. She was looking forward to this party. She told us that the exception to this party was being raped.

Tr. 486, ll. 8 – 14.

Discussion.

Counsel's closing argument should be confined to statements pertaining to the evidence in the record and any reasonable inferences that may be drawn from the facts in evidence. *See* State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975); State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). Here, evidenced was introduced during trial that SP was actively dating during the time period of appellant's alleged assaults, that her boyfriend lived in the family home for a portion of this period, and that there was cultural pressure for SP to either maintain her virginity or be the victim of sexual assault. The trial court improperly restricted

appellant counsel from asserting SP's relationship with her boyfriend, who lived within her family home during a period of time, created a motivation to fabricate the allegations.

The trial court's reliance on S.C. Code Ann. § 16-3-659.1 (1994 as amended) as prohibiting the introduction of this line of evidence, and arguing the inferences that could be drawn from the evidence properly introduced, was an error of law. While S.C. Code Ann. § 16-3-659.1 does restrict evidence of "specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct," there are specific exceptions, including "specific instances of sexual activity which would constitute adultery and would be admissible under rules of evidence to impeach the credibility of the witness may not be excluded."

A similar scenario was addressed by our Supreme Court in State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989). Finley built his defense to the allegations of sexual assault around the argument that the victim was fabricating the allegations to conceal other activity, which happened to be of a sexual nature. Our Supreme Court noted:

> Appellant's defense was that he did not commit the assault, that the charges were fabricated to silence him about the complainant's sexual conduct with her neighbor, and to extort money from him. The unique facts of this controversy, coupled with the appellant's right to confront and cross examine witnesses against him and to present a full defense to the charges makes relevant evidence which tends to establish motive, bias, and prejudice on the part of the prosecuting witness. Since the proffered evidence is essential to a full and fair determination of appellant's guilt and was offered for purposes other than to attack the complainant's character by revelation of her sexual activity with a third party, we conclude that such evidence does not come within the purview of the Rape Shield Statute.

Finley, 300 S.C. at 200, 387 S.E.2d at 90.

As in Finley, the trial court erred in restricting appellant's counsel ability to argue fabrication and the inferences that could reasonably be drawn from the evidence admitted during trial – that SP was actively dating close in time to her initial disclosure, that SP had a motive to remain a virgin, or be the victim of a sexual assault, and that her boyfriend had lived inside her home. As in Finley, this argument was central to appellant's defense, and his rights to present a complete defense as dictated by due process. This type of evidence, and argument, when offered under alternative grounds and not as reputation evidence, should not restricted by a trial court. *See* State v. Grovenstein, 340 S.C. 210, 219, 530 S.E.2d 406, 411 (Ct. App. 2000). As our Supreme Court noted in Finley: "the state's interest in protecting criminal sexual conduct victims from disclosure of sexual acts with third parties must yield to the defendant's right under the circumstances of this case to present evidence that he is being falsely accused because of his knowledge of the complainant's sexual conduct with a third party." Finley, 300 S.C. at 201, 387 S.E.2d at 90. In the present case, appellant's defense was based upon his denial of the allegations and the existence of a motive for SP to fabricate the events. Evidence was introduced during the course of trial, by both the defense and the state, that supported a motive for fabrication.[5]

As appellant's defense centered on the argument that SP's claims of sexual assault were fabricated, the proffered argument was "essential to a full and fair determination of appellant's guilt and was offered for purposes other than to attack the complainant's character by revelation of her sexual activity." Finley, 300 S.C. at 200, 387 S.E.2d at 90. The trial court's restriction was an error of law. Since the case against appellant was solely one of credibility, this error was

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[5] The state introduced evidence regarding the quinceanera during the direct examination of SP's mother. Tr. 190, ll. 4 – 11. The state also questioned SP's siblings regarding her boyfriend and appellant's reactions to that relationship. Tr. 290, l. 3 – 291, l. 9.

highly prejudicial and requires reversal. *See* Grovenstein, 340 S.C. at 221, 530 S.E.2d at 412 (holding that because "the jury's determination of Grovenstein's guilt depended on whether it believed Grovenstein's testimony or the victims' testimony, we cannot say the exclusion of evidence that was critical to Grovenstein's credibility was harmless beyond a reasonable doubt.").

III. The trial court erred in failing to quash the indictments, that covered a five year period of time and were issued shortly before trial, since they were not stated with sufficient certainty and particularity to enable appellant to know what he is called upon to answer and whether he may plead an acquittal.

Standard of Review.

"An indictment is a critical document in criminal defense preparation that is grounded in constitutional and statutory principles." State v. Baker, 411 S.C. 583, 588, 769 S.E.2d 860, 863 (2015) (*citing* 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 . . .") and S.C. Code Ann. § 17-19-10 (2014) ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury . . .")).

If a defendant raises a timely challenge to the sufficiency of an indictment, the reviewing court must determine "whether (1) 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 whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged." State v. Gentry, 363 S.C. 93, 102-103, 610 S.E.2d 494, 500 (2005).

Relevant facts.

Appellant was initially indicted by a Greenville County grand jury in March of 2022 for disseminating obscene material to a minor and two counts of criminal sexual conduct with a

minor, first degree, in violation of S.C. Code §16-3-0655(A)(1) involving oral sex with a minor under 11 years of age between January 1, 2015, and December 31, 2016. R. * 2022-GS-23-001373; 1374, 1375. In October of 2023, the state secured additional indictments. 2022-GS-23-001376, 2023-GS-23-006566, 2023-GS-23-006567, 2023-GS-23-006568, 2023-GS-23006569, 2023-GS-23-006570, 2023-GS-23-006571, 2023-GS-23-006572, 2023-GS-23006573, 2023-GS-23006574. Collectively, these indictments covered behavior alleged to have occurred between August 15, 2014 until July 21, 2019. The state then moved to amend all the indictments to correct the date range allegations, "correcting" the 2017 date allegations to 2016 to bring the dates into the statutory requirements for SP's date of birth. Tr. 8, l. 4 – 10, l. 14. Regardless of these amendments, appellant was required to defend his conduct for a five-year period.

Appellant's counsel moved to quash the indictments:

> Your Honor, The Defendant's moving to quash the indictments before The Court as being unconstitutionally overbroad and vague. The Baker case, which I just handed up, and the cite is 411 S.C. 583, says, An indictment is defective when its allegations set forth such an expansive timeframe that lacks specificity so that it does not allow the defendant to render a defense. And therefore, the only conclusion for The Court to draw is that such a indictment prejudices the defendant and must be quashed. So therefore, we're asking The Court to quash the indictment.

Tr. 52, ll. 14 – 25.

Appellant's counsel noted the convoluted and long delay associated with bringing forth the indictments for which appellant was called to answer during trial. Appellant was originally arrested on September 1, 2019. Tr. 53, ll. 1 0 15. In March of 2022, indictments were returned by the grand jury on four different charges. Tr. 53, l. 16 – 54, l. 2. Following a status conference in September of 2023, the state obtained additional indictments on October 31, 2023. Tr. 54, ll. 3 – 10. And, on the day of trial, those 2023 true billed indictments were further amended.

Appellant's counsel noted that the "alleged events occurring over a continuous five year period and he's now required, after the presentments of these indictments, to attempt to investigate and defend, four years after he was arrested on these charges, a specifically broader time period than that alleged in either" the original arrest warrants from 2019 or the original true billed indictments from 2022. Tr. 54, l. 22 – 55, l. 4. Counsel noted the impossibility of asserting a defense such as alibi over such a broad expanse of time. Tr. 57, ll. 8 – 21.

Discussion.

The present indictments are not stated with sufficient certainty and particularity to enable appellant to know what he is called upon to answer and whether he may plead an acquittal. Our Supreme Court reviewed a similar chain of events regarding the indictments in State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015). In Baker, the state obtained additional indictments just before trial notifying Baker the alleged offenses occurred between June 1, 1998 and September 1, 2004. Prior to the new indictments, Baker was on notice of events that had occurred over a substantially shorter time period, with defined temporal limits. As the Baker court noted: "Although we recognize the difficulty the prosecution faces in identifying exact dates in child sexual abuse cases, the class of criminal case should not translate into an exception that operates to circumvent constitutional and statutory principles." Baker, 411 S.C. at 592, 769 S.E.2d at 865.

Counsel for appellant outlined the similarities between the treatment of the indictments in Baker and the present case:

> Where the other issue is in this case and where we get similar to Baker, again, is that in Baker there was the short timeframe that Baker was notified with the indictments. In this case, for four years, what we've been noticed for, based on the warrants and the

> indictments, was a timeframe of two years in 2016 and one when she was 13. That's the timeframe that we've been on notice for.
>
> Four months before we go to trial or three months before we go to trial, The State seeks new indictments covering an entire five-year timeframe. There's no way for me to go back -- it's almost impossible for The State to go -- or for The Defense to go back and find employment records or housing records or whatever else that would be that would present a possible defense in this case. And again, the courts recognized in Baker, that alibi is the only complete defense. And after a four year timeframe and we've been on notice for a different time range, I believe the prejudice is clear, Your Honor.

Tr. 59, l. 7 – 60, l. 3.

The trial court ultimately denied the motion to quash the indictments, finding the indictments provided sufficient notice of the charges to allow appellant to plead a defense.

> THE COURT: Well, in looking at Baker, I mean, I believe that -- well, let me find my little notes on Baker. I mean, I realize that one it puts you on notice and apprized you of the elements. And the way -- I mean, I realize that they're combined, you're looking at one thing. But when you're looking at one particular indictment, you know, you have a shorter period of time. I believe it has the specificity needed for that.

Tr. 135, ll. 9 – 17.

"It is axiomatic that an indictment must include more than the elements of the charged offense." Baker, 411 S.C. at 592, 769 S.E.2d at 865. Because the indictments covered an overbroad period of time, which significantly limited Appellant's ability to combat the charges against him, this Court should hold the trial judge erred by refusing to quash the indictments, reverse appellant's convictions and sentence, and remand for a new trial. In an effort to circumvent the requirements outlined in Baker, the state here flooded appellant with multiple indictments to "break up" the extensive time period covered by the charges. Tr. 61, l. 5 - 62, l. 15.

The state's argument, and ultimately the trial court's ruling, misapprehends the nature of our Supreme Court's holding in Baker. As the Baker court noted, the concern was not simply with the extensive period of time covered by the indictments, but the timing of the amended indictments so close to trial.

> Due to the State's belated presentation of the new indictments, Baker was given a mere two weeks to complete such an arduous task. In addition to the time constraints, Baker's counsel noted the defense was hampered as Baker's employment records prior to July 2000 had been destroyed and, thus, he could not adequately establish Baker's whereabouts during the time frame identified in the indictments. Aside from this concrete example of prejudice, we are unable to discern how any defendant could effectively defend himself against a six-year time frame.

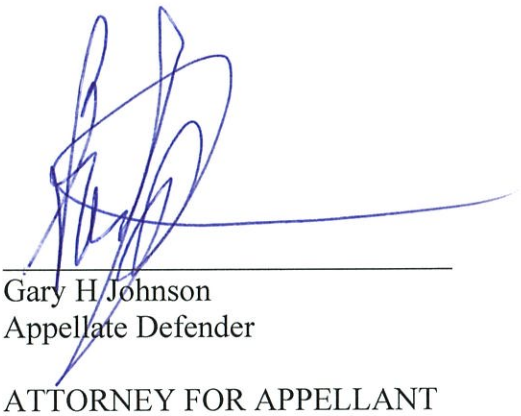
Baker, 411 S.C. at 590–91, 769 S.E.2d at 864.

Here, appellant was placed in the same box as Baker: develop a defense to accusations of criminal sexual conduct with a minor that may have happened sometime over this five year period. The only discernable difference between the problematic indictments in Baker and the present case is the state's decision to divide the alleged conduct by the birthdate of the victim, creating an under 11 and under 16 temporal change. This alteration in no way addresses the expressed concerns of our Supreme Court about the requirement that an indictment have enough of a temporal element to allow a defendant to effectively defend himself.

This court should reverse appellant's convictions under the defective indictments and remand this matter.

CONCLUSION

By reasons of the foregoing arguments, appellant's conviction should be reversed, and the case remanded to the Greenville County Court of General Sessions for a new trial.



Gary H Johnson
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of March, 2025.