STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2013-001753

THE STATE, ...RESPONDENT

v.

LEONARD EUGENE JENKINS, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether Appellant's claim that the trial court erred in refusing his Rule 613(b), SCRE, request to use a video recording of a police investigator's interview of the victim to impeach her credibility is not preserved for appellate review where: (1) Appellant never challenged the trial court's factual findings that the victim admitted making the allegedly prior inconsistent statements; and (2) Appellant waived his Rule 613(b) claim because he never moved to introduce the video after the State advised it would not object to any further motion by Appellant seeking admission. Furthermore, to the extent the claim is preserved, whether the trial court properly exercised its discretion not to admit the extrinsic evidence pursuant to Rule 613(b) where: (1) Appellant was given a full and fair opportunity to confront the victim; (2) the foundational requirements of the Rule were not met; (3) any minor inconsistencies did not impact the "essential meaning" of the prior statement; and (4) exclusion was proper pursuant to Rule 403.

STATEMENT OF THE CASE

Leonard Eugene Jenkins (Appellant) was indicted at the June 13, 2013 term of the grand jury for York County for one count of lewd act upon a child (2012-GS-46-2101). He was represented by Dan Hall, Esquire, of the York County Bar. The State was represented by Assistant Solicitor Jennifer Desch of the Sixteenth Circuit Solicitor's Office. (Tr.p.1). On August 14, 2012, Appellant proceeded to trial by jury before the Honorable Donald Hocker, pursuant to which he was found guilty as indicted. The trial court sentenced him to ten (10) years' imprisonment suspended upon the service of three (3) years' imprisonment and three (3) years' probation. (Tr.p.270, line 3-p.282, line 13; Indictment & Sentencing Sheet). Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent (the State) follows.

STATEMENT OF FACTS

One afternoon during the summer of 2011, Appellant committed a lewd act on the twelve-year-old victim by sticking his hand down the front of her shorts and underwear and touching her "privates." The victim first disclosed the incident to her mother in February of 2012 when she turned thirteen. (Tr.p.63, line 8-p.82, line 14). Appellant was subsequently arrested and indicted for lewd act upon a minor. On August 13-14, 2013, he proceeded to trial by jury pursuant to which he was found guilty as indicted.

At the call of the case, Appellant made a motion in limine raising seven evidentiary issues, the last of which concerned a video recording of a police detective's interview of the victim. Appellant's counsel said: "I state at this point, there was a video-recorded interview from the detective with the 13-year old child. We certainly don't have any objections if the state intends or wishes to introduce that. So if we get to that point and they want to introduce that video of the interview then it would be without objection from the defense." (Tr.p.9, lines 7-14). After the jury was selected and sworn, the trial court gave preliminary instructions and asked the parties to proceed with opening statements. (Tr.p.47, line 2-p.58, line 15). Appellant noted the victim would be the only witness to the alleged incident and asked the jury to focus on how her story changed over time in assessing her credibility and whether the State would be able to meet its overall burden of proof. (Tr.p.58, line 16-p.63, line 1).

The State then called the victim to the stand. She gave specific testimony about the lewd act committed by Appellant in the summer of 2011, when she was twelve years old. One morning the victim was playing outside with her friend, eleven-year-old Kacie Jenkins. Kacie lived across the street in a house with Appellant, Appellant's wife Janet,

and two other children, Amber and Gracey.[1] Sometime in the early afternoon, Kacie went into her house to cool off. A few minutes later the victim followed her inside and sat on a couch to wait for Kacie to get out of the bathroom. While she was waiting, Appellant came into the room carrying Gracey, sat down on the couch, and placed Gracey on the victim's lap. The victim began bouncing Gracey up and down on her knee when Appellant reached over and put three of his fingers down the front of the victim's shorts and underwear. Appellant touched the victim's "privates," making skin to skin contact. The victim handed Gracey back to Appellant just as Kacie walked into the room, and the two girls went back outside to play for the rest of the day. At first, the victim did not tell anybody about the incident because she did not want to lose her only friend who lived on the same road. She continued being friends with Kacie but tended to stay outside and avoided Appellant when they played. The victim did not disclose the incident to anyone until February of 2012 when she and her mother were watching a news story about some other person being reported for similar behavior, at which point she decided to tell her mother what had happened. The victim's mother called the police and reported the incident. (Tr.p.63, line 8-p.82, line 14).

On cross-examination, Appellant asked the victim if she remembered being interviewed by Detective Neely after her mother reported the incident to the police. She testified she remembered being interviewed and acknowledged the interview was video recorded. Appellant proceeded to question the victim about particular statements she made during that interview in an apparent attempt to show inconsistencies between those statements and her testimony at trial. Appellant focused on five specific alleged

[1] Gracey, whose full name is Graceland Jenkins, was a toddler at the time of the incident and is the biological daughter of Appellant and Janet. Kacie and Amber are Janet's children from a prior marriage.

"inconsistencies" involving: (1) the timing of the incident; (2) the shirt the victim was wearing; (3) the position of the victim's legs; (4) the reason the victim gave for the delay in her disclosure; and (5) whether Appellant's hand had actually touched the victim. (Tr.p.82, line 14-p.93, line 25).

First, Appellant asked about the victim's trial testimony that the incident happened in the summer, which he incorrectly characterized as approximately "eight or nine" months before her disclosure. He then asked if the victim had initially told Detective Neely it happened only two to three months before the disclosure. The victim unequivocally admitted making this statement to the Detective, but explained it was made because she was so nervous during the interview. Next, Appellant asked the victim if she later told Detective Neely the incident happened right before school started; however, he did not give her an opportunity to admit or deny the statement because he compounded the question by immediately asking if she had seen the video. The victim replied "no," and explained she had never seen the video recording of her interview. Later, Appellant again asked about timing at which point the victim unequivocally acknowledged making a statement to Detective Neely that the incident happened "right before school started." She then explained she thinks she meant to say it was "right before school ended," and realized the slip-up sometime after the interview when she was trying to "get her story right." (Tr.p.83, line 10-p.84, line 15; p.90, lines 5-25).

Second, Appellant questioned the victim about her testimony that she was wearing a blue and white top when the incident occurred. He then asked if she had told Detective Neely she was wearing the same top as the one she was wearing during the interview, which was an olive green T-shirt rather than a blue and white one. The victim

testified she believed she had made that statement. She then explained she could not remember exactly what top she was wearing, but that it was either blue or green. (Tr.p.84, line 16-p.85, line 9). Third, Appellant asked the victim about her trial testimony that Appellant put Gracey on her lap just before the incident. He then asked if she had told Detective Neely she had her knees up to her chest and her legs spread at the time of the incident. The victim unequivocally admitted making that statement during the interview. (Tr.p.87, line 16-p.88, line 4).

Fourth, Appellant questioned the victim about her testimony that she refrained from immediately disclosing the incident because she did not want to harm her friendship with Kacie. He asked the victim whether she ever said this to Detective Neely during the interview. The victim testified she thought she had, and Appellant commented: "Maybe we will get an opportunity to see that." (Tr.p.91, lines 16-23). Finally, Appellant addressed the victim's testimony at trial that Appellant had touched her with his hand. He asked if she remembered telling Detective Neely "I think" that his hand was touching me. The victim testified she did not remember making that particular comment, but did not deny it. (Tr.p.92, lines 1-9). Appellant concluded his cross-examination without making a motion or any other attempt to introduce all or part of the video recording into evidence. (Tr.p.93, lines 24-25).

On re-direct, the victim repeated her testimony that she had never seen the video recording of her interview with Detective Neely, and she testified she had never even talked about the video with the solicitor before trial. The victim testified that during cross-examination she was trusting Appellant's counsel's version of what happened during the interview as being accurate. She testified she couldn't remember exactly what

she said during the interview with Neely, only that it was about the general incident, what happened, and where on her body she was touched. (Tr.p.94, line 3-p.103, line 6). The victim never claimed she did not remember making a statement to Detective Neely. Indeed, throughout her testimony she unequivocally admitted being interviewed after Appellant's arrest. Appellant declined when the trial court asked if he wished to conduct any re-cross-examination, and he again made no motion to introduce the video recording into evidence. (Tr.p.103, lines 7-11).

Following a break and outside the presence of the jury, the solicitor advised the judge she had concerns about any attempt to introduce the video recording of what was essentially a "forensic interview" with Detective Neely. She explained she believed the State could not simply introduce the video into evidence because it was inadmissible hearsay, except possibly the specific portions of the video that might qualify for admission under Rule 801(d) as prior consistent statements being offered to rebut an allegation of recent fabrication, and that even then those statements would likely be limited to the time and place of the incident. Appellant responded: "I am not objecting to the whole video coming in." He contended there was "exculpatory information" on the video and repeatedly stated he wanted it to come in to evidence. The solicitor commented that Appellant could put the video recording into evidence as a defense exhibit if he wanted. Appellant however complained that the State was trying to "stand behind a rule that it is inadmissible when my client is willing to waive and give up that and determine whether it is admissible. He wants it in." (Tr.p.111, line 7-p.118, line 11).

The parties continued to argue about whether all or parts of the video would be admissible and on what basis. After hearing the arguments, the trial court found the State

would be allowed to introduce evidence of the victim's prior consistent statements as to time and place because Appellant's cross-examination implied recent fabrication. The court also found that at the appropriate time, if Appellant wanted to move to introduce the entire video, the court would address the issue at that time. Appellant's counsel stated: "I certainly agree with that analysis and the way to handle it." He then argued, for the first time, that pursuant to Rule 613(b), SCRE, the video recording should be admissible as extrinsic evidence of a prior inconsistent statement of a witness because the victim did not admit she made the prior inconsistent statements during his cross-examination. (Tr.p.121, line 7-p.125, line 10). Counsel said:

> I understand I may have the burden of trying to figure out whether or not I want to put it in or not, but however, I am at a little bit of a quandary of how to introduce this extrinsic evidence of a prior inconsistent statement. I disagree with the solicitor in that there are consistent statements in the video, that there are a number of inconsistent statements that are exculpatory. And certainly, I did try to do those without showing the video with the child to impeach her.

(Tr.p.125, lines 12-23). Counsel proposed that he be allowed to show pertinent parts of the video during his cross-examination of Detective Neely as proof of the alleged inconsistent statements without introducing them into evidence. The trial judge noted that typically a party would impeach a witness with evidence of prior inconsistent statements through that witness herself, but asked the State's opinion. The solicitor disputed the claim that the victim failed to admit her prior inconsistent statements, and argued that in any event Appellant had already effectively brought out the alleged inconsistencies during cross without actually showing the video. Ultimately, the trial court ruled it would proceed as previously discussed, with the State being allowed to use Detective Neely to present evidence of prior consistent statements from the victim, and

Appellant being allowed to cross-examine Neely on the interview, and possibly use the video to do so. (Tr.p.125, line 24-p.130, line 18).

The State then called Detective Carson Neely of the York County Sheriff's Office to the stand. He testified he had worked in law enforcement since 1998 and had been a detective since 2005. Detective Neely was assigned to the Violent Crime Unit, which investigated any crime against a person, including sexual conduct or assault against an adult or a child. He had special training in interviewing techniques, including classes in "finding words" and the RATAC method of forensic interviewing. Detective Neely testified he interviewed the victim on February 14, 2012, in a conference room at the Sheriff's Office. At that interview the victim was able to identify who had assaulted her. She initially said the incident happened two or three months prior, but later explained it happened in the summertime, between two school years. The victim told Detective Neely the incident took place in the living room at Appellant's house. (Tr.p.131, line 18-p.146, line 6).

On cross-examination, Appellant asked several questions about Detective Neely's interview of the victim. He acknowledged it was recorded and that his written report referenced a DVD recording of the interview. Neely testified the only time he watched the full video recording was once trial started. He admitted the video "cut off" towards the end so that the final portion of the interview was not recorded. Appellant did not move to introduce all or any part of the video into evidence. (Tr.p.146, line 9-p.153, line 19). After brief re-direct examination and re-cross, Appellant asked to take up a matter outside the presence of the jury. He said he was not yet finished with the witness. (Tr.p.153, line 23-p.156, line 25).

The jury was excused and the video recording was marked for identification as Defendant's Exhibit #2. Appellant said: "I would like to try to introduce the video through Carson Neely on his part of cross. I would like to proffer it through him. I would let the Court look at it. I believe it is admissible." He argued that portions of the video were not hearsay and admissible because they included prior inconsistent statements, and that under the rule of completeness the entire video should be admissible. Appellant asked to proffer the video through Detective Neely and for the trial court to make a ruling on its admissibility. The solicitor took the position the video was inadmissible except for any specific portions which could come in under Rule 801 and/or Rule 613. The video recording was then played outside the presence of the jury. Neely testified it was fair and accurate representation of the interview with the exception of one to five minutes at the end when the recording cut off. (Tr.p.157, line 3-p.162, line 24).

After the proffer, Appellant asked that the entire video recording be "presented to the jury." He argued it was not hearsay under Rule 801(d) because the victim testified at trial and was subject to cross-examination concerning the statement, and because the statement was inconsistent in certain respects to her trial testimony. Appellant further argued it was not hearsay because the State sought to admit the victim's prior consistent statements to rebut an allegation of recent fabrication, and that since both parties identified prior statements that are not hearsay, the entire video recording where those statements were made should be admissible under the "rule of completeness." (Tr.p.162, line 25-p.164, line 21).

The trial judge asked Appellant to point out specifically which statements from the interview he believed were inconsistent with the victim's trial testimony. Appellant

alleged there were inconsistencies involving the timing of the incident, the position of the victim's legs, and the reason the victim gave for the delay in her disclosure. The solicitor opposed introduction of the entire video recording arguing it was a "back door attempt to get it in with the rule of completeness." She reiterated her concerns with admitting portions of the video recording which could run afoul of recent appellate court decisions regarding forensic interviews and vouching, and then argued Appellant should not be allowed to now introduce the video recording as a prior inconsistent statement because it was too late. The solicitor argued Appellant has missed his opportunity because the proper time to try to impeach the victim would have been during cross-examination. She also said she was not conceding the statements were in fact inconsistent. (Tr.p.164, line 16-p.169, line 17).

The trial judge agreed that Rule 613 seems to contemplate addressing prior inconsistent statements of a witness by examining that particular witness and introducing extrinsic evidence of a prior inconsistent statement through that witness if the proper foundation has been laid. Appellant argued Rule 613 was not limited in this regard and that once the proper foundation was laid with the witness he should be allowed to introduce the extrinsic evidence at any point during trial. (Tr.p.169, line 18-p.171, line 20). The solicitor ultimately agreed there were some inconsistencies between the trial testimony and the victim's statements from the interview, but argued they had been "handled on cross-examination and for the most part admitted." She then appeared to concede Appellant could bring in portions of the video through Detective Neely if the proper foundation was laid under Rule 613(b) and the victim actually denied making the statement. (Tr.p.171, line 21-p.175, line 9).

Next, Appellant argued an alternative theory for admission of the video recording, contending he should be able to use it to impeach Detective Neely by showing he did not strictly follow the protocol for conducting a forensic interview as described in his trial testimony. The solicitor continued to object to Appellant's request to admit the entire video recording under the "rule of completeness" and argued the trial court would have to decide whether each statement was admitted or denied by the victim before allowing it in under Rule 613(b). The trial court took the matter under advisement overnight and recessed for the evening. (Tr.p.176, line 20-p.183, line 11).

The following morning, the trial judge announced he had obtained a transcript of the victim's testimony for review in light of Appellant's motion. He noted the victim acknowledged being interviewed by Detective Neely and that the interview was being videotaped. The judge then conducted a detailed examination and consideration of her testimony in regard to each of Appellant's five alleged inconsistencies before ruling: "So based upon what was listed during cross-examination, I do not believe the video would be admissible for impeachment. So based upon what she admitted to in cross-examination, I think under the rules the video would not come in for impeachment purposes." (Tr.p.190, line 1-p.191, line 23). The trial judge then allowed the parties to look at the transcript together and said: "If you disagree with my summary of the testimony, then I will be glad to hear from you." After reviewing the transcript, Appellant did not challenge the trial court's factual finding that the victim admitted making the prior statement as a whole, including the first four inconsistencies. He also did not offer any argument or challenge to trial court's conclusion that her testimony of not remembering the fifth inconsistency was equivalent to an admission for purposes of

the analysis. Instead Appellant simply stated: "Your Honor, I respect the Court going through the testimony and pointing out the things of what the record accurately reflects. I don't need to do that. I respect the court's ruling on that. I have registered my objection. Based on what it appears the Court is going to rule, I have no further rationale to get the video in for the purpose of impeaching [the victim] through this witness." (Tr.p.191, line 24-p.192, line 21). Appellant stated: "I respect the Court's opinion, but for the record, I do object to the Court's ruling;" however, Appellant never articulated a particular objection to that ruling in regard to the finding that he failed to meet the foundation requirements of Rule 613(b), SCRE. (Tr.p.193, lines 4-14).

Next, Appellant resumed his re-cross-examination of Detective Neely. Appellant asked to use the video to refresh Detective Neely's memory of his interview with the victim, which led to a discussion outside the jury's presence about whether the State would agree to admit the video into evidence. The solicitor said: "If the defense moves it in, I will agree to have it come in . . . ." (Tr.p.193, line 15-p.204, line 3). Appellant then advised the trial court that when Detective Neely resumed testifying he intended to lay the foundation for the video, move it into evidence, and show the video to the jury. He repeated his desire that the entire video be admitted into evidence. Next, the trial judge re-stated his previously ruling in regard to the use of the video recording for impeachment purposes. He noted he had deemed the victim as having admitted everything she was asked in regard to what she stated on the video, and that therefore was no need to impeach her with the video itself. Appellant again failed to challenge the trial court's ruling that the victim had admitted every inconsistency from her prior statement. (Tr.p.204, line 6-p.207, line 24).

Appellant then continued his re-cross-exmaination of Detective Neely, followed by additional re-direct examination from the State, and more re-cross-examination by Appellant. Appellant did not move to introduce the video recording of the interview either time he addressed additional questions to Detective Neely. (Tr.p.208, line 4-p.211, line 25). When Detective Neely finally stepped down, the State rested. (Tr.p.212, lines 2-4). Appellant moved for a directed verdict and the motion was denied. Appellant then called the victim's mother, Katrina Babb, as a witness but elected not to testify in his own defense. (Tr.p.212, line 14-p.231, line 16).

After a brief charge conference, the parties agreed to the trial judge's proposed jury charges and made closing arguments. Appellant explained the judge would be charging the law of inconsistent statements and asked the jury to consider the victim's testimony in light of any inconsistencies and her admission that she had never watched the video recording of her interview before trial. The solicitor responded that even though there were inconsistencies between the victim's testimony and things she said during her interview, this did not mean she was lying and the jury had the duty to judge her credibility and believability. (Tr.p.234, line 14-p.257, line 25). The trial court then charged the jury on the burden of proof, the presumption of innocence, reasonable doubt, the respective and exclusive roles of the judge and jury, direct and circumstantial evidence, the credibility of witnesses, and the elements of the offense. (Tr.p.257, line 16-p.269, line 16). In regard to credibility the court charged:

> There has been evidence presented that witnesses have made prior statements which are not consistent with witnesses' present testimony. You may use this evidence to decide whether to believe the witness. You may also use evidence of the earlier contradictory statements to determine the truth of those statements. It is up to you to decide whether to believe the earlier statements or the testimony given at trial.

(Tr.p.264, lines 2-11). The jury deliberated for less than an hour before finding Appellant guilty as indicted. The trial court sentenced him to ten (10) years' imprisonment suspended upon the service of three (3) years' imprisonment and three (3) years' probation. (Tr.p.270, line 3-p.282, line 13).

ARGUMENT

I.

Appellant's claim that the trial court erred in refusing his Rule 613(b), SCRE, request to use a video recording of a police investigator's interview of the victim to impeach her credibility is not preserved for appellate review because: (1) Appellant never challenged the trial court's factual findings that the victim admitted making the allegedly prior inconsistent statements; and (2) Appellant waived his Rule 613(b) claim because he never moved to introduce the video after the State advised it would not object to any further motion by Appellant seeking admission. Furthermore, to the extent the claim is preserved, the trial court properly exercised its discretion not to admit the extrinsic evidence pursuant to Rule 613(b) where: (1) Appellant was given a full and fair opportunity to confront the victim; (2) the foundational requirements of the Rule were not met; (3) any minor inconsistencies did not impact the "essential meaning" of the prior statement; and (4) exclusion was proper pursuant to Rule 403, SCRE.

Appellant argues the trial court erred in refusing his request to use a video recording of a police investigator's interview of the victim as extrinsic evidence of a prior inconsistent statement to impeach her credibility. He alleges certain statements the victim made during the interview were inconsistent with her testimony at trial, and contends that by ruling the video itself was inadmissible, the trial court violated his right to confront the witnesses against him and to present a complete defense pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. The State disagrees and submits Appellant's argument should be denied on and dismissed for several reasons.

Issue Not Preserved for Appeal

Initially, the State submits Appellant's argument is not preserved for appellate review because: (1) Appellant did not specifically object to or otherwise challenge the trial court's factual findings that the victim admitted making the prior statements, and

(2) Appellant waived any Rule 613(b) challenge previously argued when he failed to move to introduce the video after the solicitor stated on the record that she would not object to any further motion by appellant seeking admission.

After hearing Appellant's request to admit the video recording of the victim's interview with Detective Neely as a prior inconsistent statement under Rule 613(b), the trial court carefully reviewed a transcript of the victim's trial testimony in regard to each of Appellant's five alleged inconsistencies. The judge then ruled: "So based upon what was listed during cross-examination, I do not believe the video would be admissible for impeachment. So based upon what she admitted to in cross-examination, I think under the rules the video would not come in for impeachment purposes." (Tr.p.190, line 1-p.191, line 23). In other words, the trial judge acknowledged the general provisions regarding the admissibility of prior inconsistent statements pursuant to Rule 613(b), but concluded Appellant had not met the foundational requirements for admission based a factual finding that the victim admitted the prior statement. The trial judge then allowed the parties to look at the transcript together and said: "If you disagree with my summary of the testimony, then I will be glad to hear from you."

After reviewing the transcript, Appellant did not challenge the trial court's factual finding that the victim admitted making the prior statement as a whole or that she explicitly admitted the first four alleged inconsistencies. He also did not offer any argument or challenge to the trial court's conclusion that the victim's testimony of not remembering the fifth inconsistency was equivalent to an admission for purposes of the analysis. Instead, Appellant accepted the trial judge's factual findings but maintained

he had sufficiently registered his objection. (Tr.p.191, line 24-p.192, line 21; p.193, lines 4-14). The State disagrees and submits Appellant's objection was not sufficient in light of the court's factual finding. Appellant never articulated a particular objection to the trial court's finding that he failed to meet the foundational requirements of Rule 613(b), SCRE. This Court is bound by the trial court's factual finding because it is supported by evidence in the record. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Manning, 400 S.C. 257, 264, 734 S.E.2d 314, 317 (Ct. App. 2012). As a result, Appellant's Rule 613(b) argument is not preserved for Appellate review.

Even after the trial judge initially excluded the video, the solicitor said: "If the defense moves it in, I will agree to have it come in . . . ." (Tr.p.193, line 15-p.204, line 3). Appellant then advised the trial court that when Detective Neely resumed testifying he intended to lay the foundation for the video, move it into evidence, and show the video to the jury. He repeated his desire that the entire video be admitted into evidence. (Tr.p.204, line 25-p.206, line 1). Appellant, however, did not move to introduce the video recording of the interview during either subsequent opportunity he had to further cross-examine Detective Neely. (Tr.p.208, line 4-p.211, line 25). A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992); Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI. Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282, 285 (Ct. App. 1987). The State submits Appellant waived any

Rule 613(b) challenge he may have previously raised when he voluntarily chose not to seek introduction of the video recording despite the solicitor's invitation that he do so.

To the extent this Court finds Appellant's argument is preserved for appeal, the State submits it is nevertheless without merit because the trial court's decision does not implicate the confrontation clause and because the trial court properly excluded the video recording under the South Carolina Rules of Evidence.

Confrontation Clause

As an initial matter, Appellant's contention that the trial court's evidentiary ruling denied his constitutional right to confront witnesses and present a complete defense is misplaced. As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed on appeal absent a manifest abuse of discretion. State v. Gracely, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012); State v. Quattlebaum, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000). Pursuant to the Sixth Amendment of the United States Constitution, every criminal defendant has a right to "to be confronted with the witnesses against him" during trial. U.S. Const. amend. VI. Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses. State v. Aleksey, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). "The limitation of cross-examination is reversible error if the defendant establishes he was unfairly prejudiced." State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991).

Appellant conducted extensive cross-examination of the victim. He asked her pointed questions regarding her interview with Detective Neely and was successful in

getting the victim to acknowledge inconsistencies between details she provided during that interview and her testimony at trial. The trial could did not impose any limits on Appellant's cross-examination of the victim and Appellant never sought to introduce the video recording of the interview, or any part of that video, during that cross-examination. (Tr.p.82, line 14-p.93, line 25; p.103, lines 7-11). Thus, Appellant's constitutional right to confront the victim and to conduct a meaningful cross-examination of her was fully protected at trial. U.S. Const. amend. VI; Gracely, supra; Aleksey, supra. The trial court did not interfere with Appellant's opportunity for effective cross-examination of the victim; therefore, Appellant's claims regarding the right to confront witnesses and present a complete defense under the Sixth and Fourteenth Amendments to the United States Constitution should be denied.

Rules of Evidence

In regard to the actual evidentiary ruling concerning Rule 613(b), SCRE, the State submits the trial court appropriately exercised its discretion to exclude the video recording as impeachment evidence because the foundational requirements of the Rule were not met. First, the victim was not adequately "advised of the substance of the statement" before she was asked to admit or deny the alleged inconsistencies; thus, the statement was inadmissible. Rule 613(b), SCRE. Second, the victim admitted making the prior statement as a whole, specifically admitted making four of the five alleged inconsistencies in the statement, and did not unequivocally deny making the fifth alleged inconsistency. Therefore, even if small portions of the victim's overall statement were inconsistent with her trial testimony, extrinsic evidence of those prior inconsistencies is inadmissible and the video recording was properly excluded. Rule

613(b), SCRE. Third, any minor inconsistencies not deemed "admitted" for purposes of Rule 613(b) did not go to the "essential meaning" of the victim's prior statement. Thus, they were inconsequential to the jury's assessment of the victim's credibility and the extrinsic evidence was properly excluded. Finally, exclusion was appropriate pursuant to Rule 403, SCRE, because the probative valued of the video recording was substantially outweighed by the danger of unfair prejudice, and because the video would have constituted a needless presentation of cumulative evidence.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The conduct of a criminal trial is left largely to the sound discretion of the presiding judge and the appellate court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way. State v. Commander, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (quoting State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982)). Thus, the admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of discretion. State v. Jennings, 394 S.C. 473, 477, 716 S.E.2d 91, 93 (2011); State v. Morris, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008). A decision to admit or exclude extrinsic evidence of a prior inconsistent statement will not be reversed absent a manifest abuse of discretion that prejudiced the appellant. See State v. Carmack, 388 S.C. 190, 201, 694 S.E.2d 224, 229 (Ct. App. 2010) (finding the trial court did not abuse its discretion in admitting extrinsic evidence of a statement where

the witness did not unequivocally admit making the prior inconsistent statement); State v. Blalock, 357 S.C. 74, 78, 591 S.E.2d 632, 635 (Ct. App. 2003) (emphasis added); see also State v. Fossick, 333 S.C. 66, 69-70, 508 S.E.2d 32, 33 (1998) (concluding the trial judge erred in excluding extrinsic evidence of a prior inconsistent statement when the witness unequivocally denied making the statement).

Discussion / Analysis

Rule 613 of the South Carolina Rules of Evidence provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible. . . .

Rule 613(b), SCRE. Thus, "A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination." State v. Stokes, 381 S.C. 390, 398-99, 673 S.E.2d 434, 438 (2009). However, unlike the federal rule, the South Carolina rule requires that a proper foundation must be laid before admitting a prior inconsistent statement. State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004). Thus, "[i]t is mandatory that a witness be permitted to admit, deny, or explain a prior inconsistent statement." Id.

When a witness specifically denies making a prior statement, it is error for the trial court to exclude extrinsic evidence of that statement as impeachment evidence, although such error may be harmless. State v. Fossick, 333 S.C. 66, 69-70, 508 S.E.2d

32, 33 (1998). Additionally, "where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement." State v. Blalock, 357 S.C. 74, 80, 591 S.E.2d 632, 636 (Ct. App. 2003) (emphasis added); see also State v. Carmack, 388 S.C. 190, 201-02, 694 S.E.2d 224, 230 (Ct. App. 2010) (holding witness did not unequivocally admit making a prior inconsistent statement; therefore, the trial court did not abuse its discretion in allowing extrinsic evidence of the statement) (emphasis added). This wide latitude extends to a situation where a witness indicates an inability to recall or to remember a previous statement. If the witness neither directly admits nor denies the act or declaration, as when he merely says that he does not recollect, or, as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember. Blalock, 357 S.C. at 80, 591 S.E.2d at 636 (quoting State v. Sullivan, 43 S.C. 205, 211, 21 S.E. 4, 7 (1895)).

Here, the proper foundation was not laid for the admission of the victim's allegedly prior inconsistent statements. The victim was advised by Appellant of the time and place her prior statement was made and the person to whom it was made, and she was given the opportunity to explain or deny the statement. See Rule 613(b), SCRE. However, Appellant did not adequately advise the victim of the specific substance of the particular statements. Instead Appellant paraphrased portions of the video recording and advised the victim of the general substance of her responses to Detective Neely's interview questions without either showing her the video or quoting

her exact words. The State submits these efforts were insufficient to comply with the mandatory foundational requirements of the Rule.

In addition, the foundational requirements were not met because the victim effectively admitted each of the prior inconsistent statements. In three of the five instances raised by Appellant the victim made an unequivocal admission of the inconsistent portions of her prior statement. In regard to the timing of the incident, the victim admitted she first told Detective Neely the incident happened only two to three months before the disclosure, but explained she said this because she was so nervous during the interview. The victim also acknowledged making a statement to Detective Neely that the incident happened "right before school started." She then explained she thinks she meant to say it was "right before school ended," and realized her mistake sometime after the interview. (Tr.p.83, line 10-p.84, line 15; p.90, lines 5-25). In both instances the victim merely explained why she gave the admittedly inconsistent statement, but she never gave "an indirect answer not amounting to an admission." Blalock, 357 S.C. at 80, 591 S.E.2d at 636. Indeed, this is precisely the kind of post-admission explanation our supreme court found has no impact on the determination of whether a witness admitted making a prior inconsistent statement. State v. Lynn, 277 S.C. 222, 224-25, 284 S.E.2d 786, 788 (1981). In any event, the State submits that offering an explanation for an inconsistency following an admission it was made enhances rather than detracts from the impeachment value of the inconsistency, and Appellant suffered no prejudice.

In regard to her clothing, the victim admitted she told Detective Neely she was wearing the same top as the one she was wearing during the interview, which was an

olive green T-shirt rather than the blue and white one described in her testimony. She explained she could not remember exactly what top she was wearing but that it was either blue or green; however, she did not deny, explain, or equivocate in regard to making the prior statement. (Tr.p.84, line 16-p.85, line 9). In regard to the position of her legs, the victim admitted she told Detective Neely she had her knees up to her chest and her legs spread at the time of the incident despite her trial testimony that Gracey was on her lap just before she was fondled by Appellant. (Tr.p.87, line 16-p.88, line 4). Because the victim clearly "admits making the prior statement[s]," in these first three instances, the trial court properly found they were inadmissible. Rule 613(b), SCRE.

The fourth instance raised by Appellant did not involve a prior statement at all and instead focused on something that was **not** said by the victim. At trial, the victim testified she refrained from immediately disclosing the incident because she did not want to harm her friendship with Kacie. On cross-examination Appellant said the video showed the victim did not tell Detective Neely this during the interview and asked the victim: "You didn't tell him that on the video did you?" The victim testified she thought she had. (Tr.p.91, lines 16-23). Because there is not even an allegation of a prior inconsistent statement, there can be no extrinsic evidence of a prior statement, and there was no statement for the victim to admit or deny. Thus, the trial court properly found the video was inadmissible. Rule 613(b), SCRE. In any event, the victim simply said she thought she made the comment to Detective Neely, but did not dispute the accuracy of counsel's description, so her testimony would qualify as an admission even if there was in fact a statement for her to admit.

In the fifth instance, the victim never unequivocally denied making the inconsistent statement that she thought Appellant's hand was touching her skin. She merely stated she could not remember exactly what she said. (Tr.p.92, lines 1-9). Just as the trial court is given wide latitude to admit extrinsic evidence of a prior inconsistent statement where there is anything less than an unequivocal admission, it should also be given wide latitude to exclude extrinsic evidence of a prior inconsistent statement where there is anything less than an unequivocal denial. Unlike in Fossick, where there was an unequivocal denial, the victim here made no denial. Certainly, pursuant to Carmack and Blalock, it would not have been error for the trial judge to admit this portion of the video due to the lack of the victim's unequivocal admission. However, it does not necessarily follow that admission of the extrinsic evidence was required by Rule 613(b). The trial court is given wide latitude to admit extrinsic evidence of a prior inconsistent statement, and here the trial court simply exercised that wide latitude by choosing not to admit the evidence. This exercise of discretion was not error. Lynn, supra.

Even if this Court finds the foundational requirements were met in regard to the fifth instance, the trial court properly exercised its discretion to exclude because the only minor inconsistency which was not unequivocally admitted was inconsequential and did not go to the "essential meaning" of the victim's prior statement. In Blalock the witness had given a statement to police that: she "saw [Jane] laying on her stomach in front of the T.V. Brentley [Blalock] was sitting beside her. I noticed he had his hand under her pants leg on her backside." At trial she insisted she only told the detective she saw the defendant's hand on the back side of the victim's leg, not on her

"backside" or her "butt per se" and that some of the details were missing from her statement. Blalock, 357 S.C. at 76-78, 591 S.E.2d at 633-35. This Court affirmed the trial court's admission of extrinsic evidence of the prior inconsistent statement because the disparity "goes to the essential meaning" of what the detective recorded as the statement." The Court noted: "The entire probative value of Ms. Blalocks [sic] statement and trial testimony hinges on where she saw her husbands [sic] hand on Jane's body." Blalock, 357 S.C. at 81, 591 S.E.2d at 636. However, Blalock was tried for criminal sexual conduct with a minor, where "sexual battery" was an element of the offense. See S.C. Code Ann. §§ 16-3-651 to -655 (Supp. 2000). By comparison, in regard to lewd act, as long as the act was "willful," was done "upon or with" the body or its parts, and was done "with the intent of arousing, appealing to, or gratifying the lust or passion or sexual desires of the person or the child" it is irrelevant whether Appellant's hand actually touched the victim's vagina or merely pressed against her vagina through her clothes. See S.C. Code Ann. § 16-15-140 (Supp. 2011) ("It is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child."). Thus, the challenged inconsistency in the fifth instance does not implicate the "essential meaning" of the statement and extrinsic evidence of that statement was appropriately excluded by the trial court.

Rule 403, SCRE

Even if this Courts finds that a narrow Rule 613(b) analysis would support admission of the video recording, exclusion was nevertheless appropriate pursuant to Rule 403, SCRE, because: (1) the probative valued of the video recording was substantially outweighed by the danger of unfair prejudice, and (2) the video would have constituted a needless presentation of cumulative evidence.

Throughout the trial, Appellant argued he wanted the entire video recording to be admitted into evidence despite the solicitor's concerns it consisted of an otherwise inadmissible "forensic interview" with Detective Neely. (Tr.p.111, line 7-p.118, line 11; p.164, line 16-p.169, line 17). The solicitor was rightfully concerned the forensic interview might be wrought with hearsay and comments constituting vouching which our appellate courts have found particularly troubling. See State v. Kromah, 401 S.C. 340, 359, 737 S.E.2d 490, 500 (2013) (holding that a forensic interviewer should not have been allowed to testify about a "compelling finding" of child abuse, as that was the equivalent of stating the child was telling the truth); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding the admission of the forensic interviewer' s written report into testimony to be error because the reports stated that each child " provided a compelling disclosure of abuse by appellant."); State v. McKerley, 397 S.C. 461, 465, 725 S.E.2d 139, 142 (Ct. App. 2012) (finding the forensic interviewer's "opinion as to whether she thinks something happened [was] nothing other than her inadmissible opinion as to whether the victim was telling the truth"). As explained in detail above, the video recording had very limited probative value in light of the victim's testimony

about her prior statements. Given the danger of unfair prejudice, the trial court properly excluded it despite Appellant's suspect claim that he wanted the entire video admitted.[2]

The video recording also constituted cumulative evidence. Appellant was allowed to effectively impeach the victim through cross-examination regarding the prior statements, getting her to unequivocally admit the inconsistencies in all but one instance. In light of these efforts, admission of the video recording itself would have been needlessly cumulative. For all of these reasons, there was no abuse of discretion by the trial court and Appellant's conviction should be affirmed.

Harmless Error

Should this court find the issue is preserved and that the trial judge erred in refusing to admit the video recorded interview into evidence, the State submits any error was harmless beyond a reasonable doubt. In determining harmless error regarding any issue of witness credibility, the appellate court will consider the importance of the witness's testimony to the prosecution's case, whether the testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case. Fossick, 333 S.C. at 69, 508 S.E.2d at 34. (citing State v.

[2] Appellant argues the solicitor's re-direct examination of the victim somehow portrayed defense counsel as dishonest by suggesting that what defense counsel said was on the video was not in fact on the video. He claims the solicitor's "deceitful questioning created a false impression for the jury regarding the veracity of [the victim] and of defense counsel personally." (Brief of Appellant, p. 15). However, contrary to these claims, it appears the solicitor took extraordinary steps throughout the trial to ensure the fairness of the proceedings by attempting to limit introduction of potentially inadmissible evidence. Indeed, it was trial counsel's repeated attempts to lure the solicitor into introducing the video recording that suggest a hidden motive. As a public defender and former solicitor with many years of criminal experience, it is unclear whether trial counsel was merely trying to attack the victim's credibility with her prior inconsistent statements, or was attempting to manufacture a future post-conviction relief claim in the event of a conviction.

Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995) and Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)).

Here, the trial court allowed a meaningful cross-examination with numerous opportunities for impeachment, including specifically allowing Appellant to inquire into the victim's allegedly inconsistent statements. The additional introduction of the video recording as sought by Appellant would at best have been marginally relevant. The jury was given sufficient information to judge the credibility of the victim's testimony. Furthermore, the video itself would have been cumulative to the victim's admissions regarding the alleged inconsistencies. In regard to overall strength, the victim gave compelling testimony describing how she was inappropriately touched by Appellant. Appellant suffered no unfair prejudice as a result of the ruling regarding exclusion of the video recording. Fossick, supra. In light of all these factors, exclusion of the video recording as extrinsic evidence of the victim's prior inconsistent statements as impeaching evidence was harmless. Thus, Appellant's conviction should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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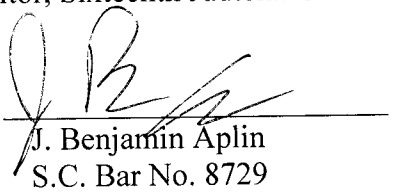
BY: 
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Columbia, South Carolina
October 21, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2013-001753

THE STATE, ...RESPONDENT

v.

LEONARD EUGENE JENKINS, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter* , both dated October 21, 2014, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Susan B. Hackett, Appellate Defender
S.C. Commission on Indigent Defense
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I further certified that all parties required by Rule to be served have been served. This 21st, day of October, 2014.

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ALAN WILSON
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October 21, 2014

Susan B. Hackett, Appellate Defender
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Re: The State v. Leonard Eugene Jenkins
Appellate Case No. 2013-001753

Dear Susan Counsel:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Assistant Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services