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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

John C. Hayes, III, Circuit Court Judge

Opinion No. 5257 (S.C. Ct. App. filed 8/6/2014)

09-GS-42-04016

THE STATE,

RESPONDENT,

V.

JEFFERSON PERRY,

PETITIONER.

APPELLATE CASE NO. 2014-002519

APPENDIX

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Jefferson Perry, Appellant.

Appellate Case No. 2012-211430

Appeal From Spartanburg County
John C. Hayes, III, Circuit Court Judge

Opinion No. 5257
Heard March 4, 2014 – Filed August 6, 2014

AFFIRMED

Appellate Defender Robert M. Dudek, of Columbia, for
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Columbia, for Respondent.

GEATHERS, J.: Appellant Jefferson Perry was convicted of committing a lewd act on a minor. Appellant challenges his conviction, arguing the trial court erred in: (1) charging the jury that time is not a material element of committing a lewd act on a minor; and (2) admitting into evidence a DVD recording of the minor victim's two interviews with a forensic examiner. We affirm.

FACTS/PROCEDURAL HISTORY

During the week of Christmas 2007, Victim, who was nine years old, stayed with her father, a few relatives, and family friends at her uncle's mobile home in Inman, South Carolina. At some point during the week, Appellant and his cousin, Brad, slept overnight at the mobile home. Victim returned to the home she shared with her mother and stepfather in early January 2008. Later that month, Victim disclosed to her mother that Appellant had touched her inappropriately one night while she was sleeping at the mobile home.

As a part of the subsequent police investigation, Victim twice interviewed with forensic interviewer Wiley Garrett at the Children's Advocacy Center in Spartanburg, South Carolina. During the first interview, on February 7, 2008, Victim disclosed that she was sleeping on her uncle's living room floor when she awoke to find Appellant with his hand down her pants. According to Victim, the alleged incident occurred "after my Daddy Jimmy's birthday and Christmas." Victim indicated that at the time of the alleged incident, her cousin, Brittany, who was also staying at the mobile home, had recently given birth to a baby boy. At the second interview, on February 14, 2008, Victim made a similar disclosure of sexual touching. Victim, however, did not identify Brittany as one of the individuals present in the mobile home at the time of the alleged incident.

The grand jury indicted Appellant on one charge of committing or attempting to commit a lewd act upon a child under the age of sixteen.¹ The case proceeded to trial on April 10-12, 2012. At the start of trial, the trial court held an in camera hearing to determine the admissibility of a DVD recording of both forensic interviews. During the in camera hearing, Garrett provided a detailed description of his approach to questioning a child who may have been sexually abused. Following Garrett's testimony, the recording was played for the court. Defense counsel objected to the admission of the recording on the ground that it would bolster Victim's testimony. The trial court determined the recording was admissible under section 17-23-175 of the South Carolina Code (2003), which allows the admission of out-of-court statements by a child under the age of twelve when certain requirements are met.

¹ Appellant was indicted pursuant to section 16-15-140 of the South Carolina Code (2003), which was repealed on June 18, 2012 by 2012 Act No. 255 § 14.

Victim, who was thirteen years old at the time of trial, testified in detail concerning the alleged incident. She asserted the alleged incident occurred on December 29, 2007. When questioned by the solicitor how she knew the exact date, Victim replied that the alleged incident happened "a day or two before" her father's birthday on December 31. Victim identified several people who were present at the mobile home on the night of the alleged incident. She stated: "It was me, [my uncle] Bryan, [my cousin] Bryanne, my dad, my Nana, my dad's girlfriend, and [my cousin] Paul."

Victim's mother, Stacy Gregory, testified Victim had a scheduled visitation with her father during the week of Christmas 2007. Gregory stated she picked Victim up from the mobile home sometime around New Year's Day 2008. According to Gregory, on January 29, 2008, Victim disclosed to her that Appellant had inappropriately touched her.

The State also presented the testimony of Wiley Garrett, who was qualified as an expert in forensic interviewing. Garrett testified he conducted two fact-finding interviews with Victim and one joint interview with Victim's mother and stepfather. The trial court admitted into evidence the DVD recording of Garrett's two forensic interviews with Victim, which was played for the jury. On cross-examination, Garrett confirmed that during one of the interviews Victim told him "Brittany that . . . just had a baby" was present in the mobile home on the night of the alleged incident.

Appellant testified he stayed at the mobile home "only once." Although Appellant could not recall the exact date he spent the night at the mobile home, he indicated it was a few days after Brittany delivered her baby. Appellant admitted that he had about four or five beers that night; however, he denied he was drunk. Appellant adamantly denied touching Victim inappropriately.

Appellant's cousin, Elizabeth Blackwell, testified she was in a relationship with Victim's uncle and had previously invited Appellant to stay at the mobile home. According to Blackwell, Victim and Appellant were present in the mobile home at the same time on only one occasion. Blackwell claimed that on this occasion her daughter, Brittany Fowler, was also present in the mobile home, along with Brittany's then-newborn son. Blackwell indicated her grandson was born in early January 2008. Brittany Fowler corroborated Blackwell's testimony regarding the timeframe. Additionally, Fowler presented her son's birth certificate, which was admitted into evidence.

After the completion of testimony, defense counsel moved for a directed verdict, arguing that it was impossible for the incident to have occurred on either of the dates listed on the indictment.² Specifically, defense counsel pointed to the fact that Brittany Fowler's son was born in early January 2008. The State countered that the only contradictory evidence concerned whether Appellant touched Victim. Additionally, the State argued the case did not involve a time-specific incident. In response, defense counsel noted that Victim stated in one of the forensic interviews that Brittany had already had her baby at the time of the alleged incident. The trial court denied defense counsel's motion, reasoning the timing issue went to Victim's credibility.

During the charge conference, the State requested the trial court instruct the jury that time is not a material element of the offense of committing a lewd act with a minor. Defense counsel objected to the requested instruction, and engaged in the following colloquy with the trial court:

Mr. Hall: [W]e have a specific date alleged. They presented it several times. The child testified, if I'm not mistaken, that it occurred the weekend before my daddy's birthday. Daddy's birthday was [December 31st]. Very specific and I think to do that is giving, carving out another special consideration for a child victim that cuts in the rights of my client. So, Your Honor, I would oppose that.

The Court: I will charge it, but you know that the other interesting wrinkle about this particular issue is that the mother, Mrs. Gregory, testified that she picked up, [Victim], on New Year[']s Day. So --.

Mr. Hall: That -- picked [Victim] up, yes, sir.

The Court: Right. Which is before Brittany had her baby.

² The indictment listed the lewd conduct as occurring "between the dates of" December 29 and December 30, 2007.

Mr. Hall: This - - yes, sir, that's another thing that I believe, on my side, is physically impossible for it to have happened beforehand, yes, sir.

The Court: Well, that's your argument to the jury.

Thereafter, the trial court gave the requested instruction. The trial court also charged the jury on its duty to consider the credibility and believability of the witnesses.

The jury ultimately found Appellant guilty of committing a lewd act on a minor. Defense counsel moved for a new trial. The trial court denied the motion and sentenced Appellant to five years' imprisonment, suspended on the service of three years' probation. The trial court also required Appellant to enroll in the registry of child abuse and neglect, and to enroll in sex offender counseling. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in charging the jury that time is not a material element of committing a lewd act on a minor?
2. Did the trial court err in admitting into evidence a DVD recording of Victim's two interviews with the forensic examiner?

LAW/ANALYSIS

I. Jury Charge

Appellant contends the trial court erred in charging the jury that time is not a material element of the offense of committing a lewd act on a minor because he centered his defense strategy on attacking inconsistencies in the evidence regarding the timing of the alleged incident. He further argues the charge was "gratuitous" and "unfairly prejudicial." We disagree.

"In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)). "A jury charge is correct if, when the

charge is read as a whole, it contains the correct definition and adequately covers the law." *Id.* (quoting *Adkins*, 353 S.C. at 318, 577 S.E.2d at 464). "A jury charge that is substantially correct and covers the law does not require reversal." *Id.*

"The trial court is required to charge only the current and correct law of South Carolina." *Id.* at 479, 697 S.E.2d at 583. "The law to be charged must be determined from the evidence presented at trial." *Id.* (quoting *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). "A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused." *Id.* (quoting *State v. Austin*, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989)).

In support of his argument that the trial court erred in instructing the jury that time is not a material element of committing a lewd act on a minor, Appellant cites to *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001). The trial court in *Jones* indicated during a charge conference that it would charge the jury that reasonable doubt meant a doubt which would cause a reasonable person to hesitate to act. 343 S.C. at 576, 541 S.E.2d at 820. Defense counsel specifically incorporated the "hesitate to act" language in his closing argument, telling the jury that "when you go through this testimony and this evidence in this case, you're gonna hesitate." *Id.* at 576-77, 541 S.E.2d at 820-21. The trial court subsequently, upon request from the solicitor, removed the "hesitate to act" language from the jury charge. *Id.* at 577, 541 S.E.2d at 821. On appeal, our supreme court found: "Appellant *reasonably relied* upon the judge's representation that he intended to give that charge to the jury. The decision to alter the charge, *after the argument*, was fundamentally unfair." *Id.* at 578, 541 S.E.2d at 821 (emphases added). Thus, *Jones* requires a defendant to reasonably rely on the trial court's ruling to his or her detriment in order for a subsequent change to impact the fundamental fairness of the defendant's trial.

In the instant case, the trial court made its ruling at the charge conference before closing arguments. Appellant does not contend his strategy of pointing out the inconsistent evidence concerning the timing of the alleged offense was made in reliance on any prior ruling by the trial court. Because Appellant does not argue that an altered ruling impaired his trial strategy, we find Appellant's reliance on *Jones* is misplaced.

Additionally, we find the trial court's charge adequately covered the law and was consistent with our existing jurisprudence. The crime of committing or attempting a lewd act on a minor is set forth in section 16-15-140 as follows:

It is unlawful for a person over the age of fourteen years to willfully 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.

In *State v. Tumbleston*, 376 S.C. 90, 100–01, 654 S.E.2d 849, 854–55 (Ct. App. 2007), this court interpreted section 16-15-140 as a part of its evaluation of the sufficiency of an indictment charging the defendant with committing a lewd act upon a minor. The appellant argued the indictment was insufficient because it did not allege the specific time of the offense charged. *Id.* at 94, 654 S.E.2d at 851. In reviewing the indictment, the *Tumbleston* court noted that where an indictment allegedly includes an overbroad period, the court must examine whether time is a material element of the offense. *Id.* at 98, 654 S.E.2d at 853. Consequently, as a part of its analysis, the *Tumbleston* court interpreted section 16-15-140 and concluded "[t]ime is not a material element of . . . committing a lewd act on a minor." *Id.* at 101, 654 S.E.2d at 855. Thus, the *Tumbleston* court recognized section 16-15-140 does not have a specificity requirement as to the timing of the offense of committing a lewd act on a minor.³ See *United States v. Stuckey*, 220

³ The absence of a specificity requirement in section 16-15-140 is consistent with our legislature's recognition of the special nature of sexual offenses. *State v. Rayfield*, 369 S.C. 106, 117, 631 S.E.2d 244, 250 (2006) ("In enacting [section 16-3-657, which provides the testimony of a victim need not be corroborated in criminal sexual conduct cases], the Legislature recognized that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical or forensic evidence identifying a particular perpetrator."). Where the victim is a child, such cases often involve continued offenses over an extended period of time or, as in this case, are not reported until sometime after their commission. Thus, a specificity requirement would serve to prevent many prosecutions in child sexual abuse cases.

F.3d 976, 982 (8th Cir. 2000) ("Time is not a material element of a criminal offense *unless made so by the statute creating the offense.*" (emphasis added)).

The dissent correctly notes that *Tumbleston* is distinguishable from the instant case because it focused solely on the issue of the sufficiency of an indictment. However, the *Tumbleston* court's interpretation of section 16-15-140 is pertinent to the instant matter because the determination of whether a jury charge is proper centers on whether the charge, read as a whole, "contains the correct definition and adequately covers the law." *Mattison*, 388 S.C. at 478, 697 S.E.2d at 583 ("A jury charge that is substantially correct and covers the law does not require reversal.").

We further note the charge given in the instant case is consistent with the decision in *State v. Anderson*, 59 S.C. 229, 37 S.E. 820 (1901), which upheld an analogous charge in a case involving larceny. Therein, the trial court charged the jury:

Time is not what we term of the essence of a crime when a theft or other criminal offense is said to have been committed at a certain time. The gist of the charge does not consist in proving that it was done at the exact time laid in the indictment. The gist is whether or not the crime as alleged was committed, and, if the state proves that it was committed at any time, -the particular charge contained in the indictment prior to the finding of the true bill, -that would be sufficient; but the state must prove the charge as contained in the indictment. It is not necessary, and the state is not required, to prove the exact time laid in the indictment; but, still, it must prove that substantial charge as having been committed at some date, certainly before the finding of the true bill.

Id. at 232, 37 S.E. at 821. In upholding the charge, the *Anderson* court reasoned the trial court's instruction was appropriate because South Carolina does not require the State to prove the exact time of the offense where it is not a material element of the crime. *Id.* The same is true in the instant case, as *Tumbleston* established that time is not a material element of committing a lewd act on a minor. See 376 S.C. at 101, 654 S.E.2d at 855.

In addition to *Anderson*, our more recent jurisprudence addressing jury charges in cases involving child sex crimes suggests the charge in the instant case was not

erroneous. In *State v. Rayfield*, the defendant was charged with three counts of criminal sexual conduct with a minor in violation of section 16-3-655 of the South Carolina Code (2003). 369 S.C. 106, 115, 631 S.E.2d 244, 249 (2006). The trial court charged the jury the contents of a related statute, section 16-3-657, which provides "[t]he testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658." *Id.* On appeal, our supreme court recognized, "It is not always necessary, of course, to charge the contents of a current statute." *Id.* at 117, 631 S.E.2d at 250. Nevertheless, the court held the instruction did not constitute prejudicial error because "the charge as a whole comport[ed] with the law." *Id.* at 118, 631 S.E.2d at 250. In so holding, the court emphasized that along with charging the jury the contents of the statute, the trial judge "thoroughly instructed [the jury] on the State's burden of proof and the jury's duty to find the facts and judge the credibility of witnesses." *Id.*

In the instant matter, it was not required that the trial court charge the jury time is not a material element of committing a lewd act on a minor. However, as in *Rayfield*, this instruction did not constitute reversible error as the charge as a whole comported with the law. The trial court instructed the jury as to the contents of section 16-15-140 along with the State's burden to prove the charges in indictment beyond a reasonable doubt. Thus, the jury was adequately advised of the essential elements of the offense that had to be proven. Moreover, similar to *Rayfield*, the trial court in the instant matter instructed the jury on its duty to consider the credibility of the witness testimony. With regard to credibility, the trial court charged the jury:

You're not to infer from anything I have said or done or anything I now say or do as indicating an opinion of mine on the facts. Our law does not allow a trial judge to formulate or express to a jury an opinion on the facts. It's simply, solely up to you to examine the evidence and to give to the evidence the effect, the value, the weight, and the truth you believe it should have.

In doing this, you may believe one witness as opposed to several, several witnesses as opposed to one. You may believe all, part, or none of a witness'[s] testimony. In analyzing the evidence, use your common sense, your sense of logic, your sense of reasoning, and your experiences in life.

As judges of the facts, you must necessarily judge the credibility, that is the believability, of the witnesses who have testified. In assessing credibility, use the things I just talked about. Use the things that you find in your day-to-day life as being indicative of truthfulness in an individual, and you can use certain evaluators, a witness'[s] demeanor, how they act on the stand, are they hesitant or straightforward, is their testimony consistent or inconsistent. Consider the opportunity a witness had to know things to which the witness testified to.

You can consider any bias or prejudice a witness may have. That is, a witness would wish to help or hurt one side or the other, and you can consider whether or not someone has a criminal record in regard to their believability.

In addition to the charge on credibility, the trial court separately instructed the jury as to its duty to assess the believability of a child witness. In its charge, the trial court explained that when a witness is a child "you must determine, as with any witness, whether the testimony is believable." The court further instructed the jury "but as to a child, you may also consider the [child's] age, the child's ability to observe and remember the facts, [and] the child's ability to understand and answer questions."

The dissent argues the circumstances of this case made it improper for the trial court to charge the jury that time is not a material element of the crime of committing a lewd act on a minor. The dissent's argument mirrors the arguments in Justice Pleicones' dissenting opinion in *Rayfield*. In fact, the dissent cites to the *Rayfield* dissent for the proposition that it is not always appropriate for the trial court to charge a correct point of law to the jury. See 369 S.C. at 119, 631 S.E.2d at 251 (Pleicones, J., dissenting) ("Some principles of law, however, are not to be charged to a jury.").

We recognize some principles of law should not always be charged to the jury. However, our supreme court has made clear in at least two instances when a principle of law is not the proper subject of a jury charge. See *State v. Grant*, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980) (holding that it is improper for the trial

judge to instruct the jury on the law of flight); *State v. Hammond*, 270 S.C. 347, 356, 242 S.E.2d 411, 416 (1978) (holding that although it is always proper for an attorney in argument to the jury to point out the failure of a party to call a material witness, "such a charge has no proper place in the judge's statement of the law"). To date, the supreme court has not enunciated the "time is not a material element" instruction is erroneous. In fact, in *State v. Schumpert*, 312 S.C. 502, 508, 435 S.E.2d 859, 863 (1993), the court found the trial court's charge including the language "time is not a material element of a sexual assault involving a child" did not prejudice the defendant.

Based on the determination in *Schumpert*, we believe a precedential inference can be drawn that the jury charge in the instant case was not prejudicial. In *Schumpert*, the indictment alleged the defendant raped the minor victim on one occasion between April 13 and May 18, 1990. *Id.* at 507, 435 S.E.2d at 862. At trial, however, the victim testified the rape occurred on either Saturday, April 14 or Saturday, April 21. *Id.* The trial court charged the jury as follows:

The State is not required to prove that the offense occurred on any exact day between the alleged period of time. But the state is required to prove that the alleged offense did occur sometime during the period of April the 13th, 1990 and May the 18th, 1990. *I charge you that time is not a material element of a sexual assault involving a child.*

Id. at 508, 435 S.E.2d at 862–863 (emphasis added).

On appeal, the defendant challenged the jury charge, arguing "where the State's own proof narrowed the time frame to two Saturdays in April, it was prejudicial to his plea of alibi to allow the jury to find that the offense occurred any time during the time alleged in the indictment." *Id.* at 508, 435 S.E.2d at 863. The *Schumpert* court found that the defendant was not prejudiced by the trial court's charge regarding the time of the offense. *Id.* In reaching this conclusion, the court reasoned: "Despite the charge allowing the jury to consider a larger time period than that introduced into evidence by the State, appellant produced alibi evidence for every weekend during the entire time period charged." *Id.*

Given the court's reasoning in *Schumpert*, we are not convinced the trial court's charge in the instant matter was prejudicial to Appellant's strategy of highlighting

inconsistencies in Victim's statements concerning the time of the alleged incident. At trial, Appellant's defense counsel ably argued these inconsistencies to the jury. In particular, defense counsel noted that Brittany's son, who Victim initially claimed was born just before the time of the alleged incident, was in fact born in January 2008. Defense counsel further contradicted Victim's testimony by offering testimony from Appellant and his cousin, Blackwell. This testimony indicated Appellant visited the mobile home only once and that the visit took place after Brittany had her baby. Moreover, Victim's mother, who was the State's witness, testified she picked Victim up from the mobile home sometime around January 1, 2008, which contradicted Victim's testimony and was consistent with the timeline offered by the defense. Although the trial court instructed the jury that time is not a material element of the offense, defense counsel proceeded with his strategy and presented a defense of factual impossibility. *Cf. Schumpert*, 312 S.C. at 508, 435 S.E.2d at 863 (holding appellant was not prejudiced by charge including the language "time is not a material element of sexual assault involving a child" and allowing the jury to consider a larger time period than that introduced into evidence by the State because "appellant produced alibi evidence for every weekend during the entire time period charged"). Accordingly, we find no prejudice in this case from the charge given.

II. Admission of Forensic Interviews

Appellant argues the trial court erred in admitting the DVD recording of Victim's interviews with the forensic examiner. He contends the content of the recording constituted a prior consistent statement that improperly bolstered Victim's testimony. We disagree.

"Generally, a prior consistent statement is not admissible unless the witness is charged with recent fabrication or improper motive or influence." *State v. Russell*, 383 S.C. 447, 450, 679 S.E.2d 542, 543–44 (Ct. App. 2009) (citing Rule 801(d)(1)(B), SCRE). However, section 17-23-175 of the South Carolina Code (2014) permits the admission of out-of-court statements by a child under the age of twelve when the following conditions are met:

- (1) the statement was given in response to questioning conducted during an investigative interview of the child;

- (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means . . . ;
- (3) the child testifies at the proceeding and is subject to cross- examination [sic] on the elements of the offense and the making of the out-of-court statement; and
- (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

Thus, the legislature has made "specific allowances" for the admission of out-of-court statements by child victims in criminal sexual conduct cases when the requirements of section 17-23-175 are satisfied. *State v. Whitner*, 399 S.C. 547, 558–59, 732 S.E.2d 861, 867 (2012).

Appellant acknowledges that section 17-23-175 has been held by our supreme court to be a valid legislative enactment.⁴ However, he contends it is still impermissible to offer testimony bolstering that of an alleged child victim. In essence, Appellant argues that even though *Whitner* permits the admission of a child victim's out-of-court statements, such statements are only admissible if they do not bolster the credibility of the child witness.

In *Whitner*, the appellant challenged the admission of the victim's forensic interview videotape, arguing "it was cumulative repetition of the minor victim's testimony at trial and improper bolstering." 399 S.C. at 558, 732 S.E.2d at 867. The contents of the interview were similar to the underlying allegations the victim first disclosed to her mother, as well as the testimony given by the victim at trial. *Id.* at 551–52, 732 S.E.2d at 863. In spite of the similarities between the victim's out-of-court statements and the victim's trial testimony, the court noted "the forensic interview of the child and mere foundational trial testimony of the interviewer serve as a model of how the statute is designed to work." *Id.* at 559,

⁴ See *Whitner*, 399 S.C. at 559, 732 S.E.2d at 867 (holding section 17-23-175 is a valid legislative enactment); *id.* (recognizing the South Carolina Rules of Evidence allow the legislature to enact evidentiary rules so long as such an enactment does not violate the state or federal constitutions).

732 S.E.2d at 867 (emphasis added). In reaching this conclusion, the court emphasized "the forensic interviewer did not improperly lead or influence the victim in any way, and the victim answered the questions on her own accord." *Id.* The court further noted, "the forensic interviewer's testimony was for the limited purpose of laying the proper foundation for the admission of the videotape." *Id.* Consequently, the court concluded that there was no error in the admission of the forensic interview into evidence. *Id.* at 559-60, 732 S.E.2d at 867.

Here, the trial court found the DVD recording of Victim's two forensic interviews met the requirements of section 17-23-175, noting:

The statements were not elicited by leading questions. There was one question that was a little toward[s] leading, but it was not answered and another question was asked, and - - but I only remember one being somewhat suggestive of an answer. But, in fact, it was not answered and there were no other, by my viewing of it, any other leading questions, and, again, that one was not answered. Another question was asked.

Appellant does not challenge the trial court's ruling that the statutory conditions required for admission of the recording were satisfied. *See Whitner*, 399 S.C. at 565, 732 S.E.2d at 870 (Pleicones, J., concurring) ("[T]here is no basis for an improper bolstering argument when [a child victim's] prior testimony is admitted pursuant to § 17-23-175."). Furthermore, as in *Whitner*, the forensic examiner never stated he believed Victim, and he gave no indication regarding Victim's credibility. Instead, the forensic interviewer offered testimony for the sole purpose of laying the proper foundation for the admission of the recording. Accordingly, we find the trial court did not abuse its discretion in admitting the recording of Victim's forensic interviews into evidence.

CONCLUSION

For the foregoing reasons, Appellant's conviction and sentence are **AFFIRMED**.

SHORT, J., concurs.

FEW, C.J., concurring in part, and dissenting in part: I concur with the result reached by the majority as to the admissibility of the forensic interviews. I

disagree, however, that the jury charge—"time is not a material element of the offense of criminal sexual conduct with a minor"—was proper in this case. Because I would find giving this charge was error that prejudiced Perry, I would reverse.

I. The "Improper Bolstering" Objection

I first address the admissibility of the forensic interviews because my discussion of that issue sets the stage for my explanation of why the jury charge was improper and prejudiced Perry.

Perry objected to the admissibility of the forensic interviews on the basis that the interviews "improperly bolstered" the victim's testimony. However, an objection on the basis of improper bolstering is not a valid objection unless it is based on a specific rule of evidence, which Perry's objection was not. Similarly, Perry's argument on appeal that the interviews "impermissibly bolstered [the victim's] testimony" is of no legal consequence. As a result, Perry presented no valid issue for this court to address regarding the admissibility of the forensic interviews.

The concept of "bolstering" relates to the capacity of testimony or evidence to make other testimony or evidence more credible. Evidence that bolsters other evidence is generally relevant because it makes the existence of disputed facts more probable by enhancing the credibility of the evidence that proves those facts. *See* Rule 401, SCRE ("Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). In this case, the forensic interviews are relevant for the additional reason that they contain the victim's statements about what happened to her and who committed the crime. Under Rule 402, SCRE, "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." As with any relevant evidence, therefore, a trial court may not exclude evidence that bolsters other evidence unless the exclusion is "provided" for by some constitutional, statutory, or rule-based principle of law.

Historically, trial courts have excluded evidence that bolsters other evidence in two primary circumstances. First, witnesses "may not offer an opinion regarding the credibility of others." *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499

(2013). In *State v. Taylor*, 404 S.C. 506, 745 S.E.2d 124 (Ct. App. 2013), we explained this basis for excluding evidence that bolsters: "the prohibition against bolstering is for the purpose of preventing a *witness* from *testifying* whether another witness is telling the truth," and "[i]mproper bolstering occurs when a[] . . . *witness* is allowed to give his or her opinion as to whether the complaining witness is telling the truth." 404 S.C. at 514, 745 S.E.2d at 128 (emphasis added); accord *State v. Whitner*, 399 S.C. 547, 559, 732 S.E.2d 861, 867 (2012) (describing bolstering testimony as "to have the forensic interviewer, improperly imbued with the imprimatur of an expert witness, invade the province of the jury by vouching for the credibility of the alleged victim"); see also James F. Dreher, *A Guide to Evidence Law in South Carolina* 21 (S.C. Bar 1967) ("The general rule is that unless the credibility of your witness has been attacked, you may not offer proof that his credibility is good."). In *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012), we explained that this basis for excluding evidence for its bolstering effect is now "incorporated into Rule 608(a) of the South Carolina Rules of Evidence." 397 S.C. at 464, 725 S.E.2d at 141; see also Rule 608(a), SCRE ("The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to [two] limitations . . .").

The second circumstance in which courts have excluded evidence that bolsters is when a party offers an out-of-court statement—consistent with a witness's testimony—before the witness is impeached. See *State v. Barrett*, 299 S.C. 485, 486-87, 386 S.E.2d 242, 243 (1989) (stating "when a witness has not been impeached, evidence of prior consistent statements is inadmissible" and calling the violation of this principle "improper bolstering"). This basis for excluding evidence for its bolstering effect is now incorporated into Rule 802, SCRE—the rule against hearsay—and the non-hearsay provisions of Rule 801(d)(1)(B) and (D), SCRE. See *Whitner*, 399 S.C. at 558, 732 S.E.2d at 867 (citing Rule 801(d)(1) for the proposition that "a prior consistent statement is not admissible unless the witness is charged with fabrication or improper motive or bias").

Under the Rules of Evidence, therefore, the bases on which a trial court may exclude evidence that bolsters other evidence include Rule 608(a) and Rule 802. Conceivably, a trial court could exclude evidence for its bolstering effect under Rule 403, which provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by" considerations listed in the rule.⁵

⁵ See *United States v. Bermudez*, 529 F.3d 158, 165-71 (2d Cir. 2008) (Underhill, J., dissenting) (arguing Rule 403 permits the exclusion of evidence that bolsters

Other than these rules, however, there is no provision under modern evidence law to exclude relevant evidence on the basis of improper bolstering. Thus, neither Perry's objection to the trial court nor his argument to this court that the forensic interviews constituted improper bolstering has any legal import. They are based on an invalid argument under our Rules of Evidence.

Moreover, the trial court admitted the forensic interviews pursuant to section 17-23-175 of the South Carolina Code (2014). This statute reflects our General Assembly's recognition that the central issue in the trial of almost any sexual assault case involving a child—certainly this one—is whether the victim's testimony is truthful and accurate.⁶ It represents our General Assembly's policy determination that a forensic interview should be admissible to enhance the credibility of a child sexual assault victim's trial testimony—bolster—if it meets the criteria of the statute. Under section 17-23-175 and the policy underlying it, therefore, the tendency of a forensic interview to enhance the credibility of the victim's testimony is precisely the reason that admission of the interview is proper.

Thus, Perry's objection to the forensic interviews on the basis of improper bolstering and his similar argument on appeal are invalid. They are not only ineffective under the Rules of Evidence, but inconsistent with section 17-23-175, which specifically provides for the admission of these forensic interviews for the very reason Perry contends admission was improper—the interviews bolstered the credibility of the victim.

II. The Jury Charge

In my opinion, the importance of the victim's credibility also made it improper for the trial court to charge the jury as it did. Although it is true "time is not a material element" of the crime of lewd act on a minor, the fact that it is a correct point of

other evidence). *But see Westfield Ins. Co. v. Harris*, 134 F.3d 608, 613 (4th Cir. 1998) (finding the district court abused its discretion by excluding bolstering evidence under Rule 403).

⁶ Section 17-23-175 applies more broadly than just to child sexual assault cases, and thus also represents a broader general recognition of the challenges courts face in dealing with the credibility of children. *See* § 17-23-175(A) (providing the section applies "[i]n a general sessions court proceeding or a delinquency proceeding in family court").

law does not make it proper for the trial court to charge it to the jury. *Compare State v. Rayfield*, 369 S.C. 106, 117, 631 S.E.2d 244, 250 (2006) ("It is not always necessary, of course, to charge [a particular point of law]."), *with* 369 S.C. at 119, 631 S.E.2d at 251 (Pleicones, J., dissenting) ("Some principles of law, however, are not to be charged to a jury.").

The primary case upon which the majority relies for the correctness of the charge—*State v. Tumbleston*, 376 S.C. 90, 654 S.E.2d 849 (Ct. App. 2007)—has nothing to do with a jury charge. There were two issues on appeal in *Tumbleston*: (1) whether the trial court erred in denying the defendant's motion for a directed verdict, 376 S.C. at 102, 654 S.E.2d at 855, and (2) whether "the trial court erred in denying [the defendant's] motion to quash the indictments." 376 S.C. at 94, 654 S.E.2d at 851. As to the second issue, the defendant argued "the indictments did not allege the specific time of each offense intended to be charged, and thus, failed to provide him with adequate notice to prepare a defense." 376 S.C. at 92, 654 S.E.2d at 850. Therefore, our statement in *Tumbleston*, "Time is not a material element of . . . lewd act on a minor," 376 S.C. at 101, 654 S.E.2d at 855, related only to whether the indictment sufficiently put the defendant on notice of the charges against him. We stated:

We reject the notion that a specified time period prevented [the defendant] from adequately preparing his defense to the charges. Reading the indictments objectively from a reasonable person's view, we conclude they contain the necessary elements of the offenses charged and sufficiently apprise [the defendant] that he must be prepared to address his conduct toward [the victim] between 2001 and June 2004.

376 S.C. at 102, 654 S.E.2d at 855. We never intended in *Tumbleston* to address when it might be appropriate, or whether it is ever permissible, to instruct the jury as the trial court did in this case.

The majority also relies on *State v. Anderson*, 59 S.C. 229, 37 S.E. 820 (1901). In that case, the defendant was charged with larceny for stealing a cow. 59 S.C. at 230, 37 S.E. at 820. At trial, "the defendant introduced evidence to prove an alibi." *Id.* The trial court charged the jury that "the defendant assumes the burden of proving [his alibi]." *Id.* The definition of alibi then, as now, required the defendant to prove he could not have committed the crime because he was

somewhere else *at the specific time* the crime was committed.⁷ The court's charge that the burden of proof is on the defendant—an incorrect charge under modern law⁸—demonstrates the reason *Anderson* is not helpful in analyzing the correctness of the charge in Perry's case. To meet the burden the trial court imposed on him of proving his alibi, the defendant in *Anderson* had to prove he was somewhere else at the specific time the crime was committed. Because the specific time the crime was committed was not part of the State's burden, the circumstances of that case justified the trial court's charge that time is not an element of the crime.

Finally, the majority relies on *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993). I find *Schumpert* interesting for two reasons. First, the supreme court chose not to address whether giving the charge was error, but only whether the charge caused prejudice. Second, *Schumpert* relies on *State v. Rallo*, 304 S.C. 258, 403 S.E.2d 653 (1991). The *Schumpert* court explained the prejudicial error in *Rallo*:

In *Rallo* the indictment was amended to allege the offense occurred on February 14. We held the trial judge erred in charging the jury the offense occurred "on or

⁷ Compare *State v. Atkins*, 49 S.C. 481, 481, 27 S.E. 484, 484 (1897) (reciting the following definition of alibi from the trial court's charge: "An alibi means that he was at some place other than where the crime was committed at that time, and, therefore, could not have committed the crime charged" (emphasis removed)), with *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (stating "an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt").

⁸ See *State v. McGhee*, 137 S.C. 256, 260-61, 135 S.E. 59, 60 (1926) (stating the requirement of imposing the burden of proving alibi on the defendant is "illogical," and adopting the concurring opinion of Justice Cothran from *State v. Des Champs, infra*); *State v. Des Champs*, 134 S.C. 179, 181, 131 S.E. 420, 420 (1926) (Cothran, J., concurring) ("But it seems to me that the so-called 'affirmative defense' of alibi is not an affirmative defense at all. It is simply evidence adduced by the defendant to sustain his plea of not guilty; that he did not commit the crime for the reason that he was not at the scene of the crime at the time of the occurrence. The burden was upon the state to prove beyond a reasonable doubt that the defendant was present at the scene of the crime and actually committed it.").

about" February 14 because the indictment alleged February 14 and the defendant had focused on that date in presenting evidence of alibi. Essentially, the defendant in *Rallo* did not have notice of any date other than that alleged in the indictment and it was error to charge the jury with a larger time period.

312 S.C. at 508, 435 S.E.2d at 863. *Rallo* is not controlling, but it demonstrates that a jury charge correct on its face can constitute prejudicial error if it serves to defeat the primary argument the defendant makes in his defense.

Trial courts do not normally charge the jury as to what is *not* an element of the crime. However, under circumstances that justify doing so, such a charge can be proper. *Anderson* is an example of such a circumstance. As another example, it was permissible in certain cases for the trial court to instruct the jury what was not an element of the crime formerly named "assault and battery with intent to kill."⁹ In *State v. Foust*, 325 S.C. 12, 15, 479 S.E.2d 50, 51 (1996), our supreme court clarified that to prove a defendant guilty of the crime, the State need prove only a general criminal intent, not a specific intent to kill. In subsequent trials, despite *Foust*, defendants would often argue the State did not prove a specific intent to kill. In such a circumstance, and certainly others, the trial court could properly instruct the jury on what elements the State did not have to prove.

There are no circumstances in this case that justify the trial court's instruction to the jury that time is not an element of lewd act on a minor. In fact, the circumstances of this case made the instruction improper. Perry built his entire presentation to the jury around what he claimed were the striking inconsistencies in the victim's testimony as to when the crime occurred. In particular, Perry argued the victim's testimony as to the time of the offense was inconsistent because: (1) the victim claimed Brittany was present in the home with her baby when the crime occurred, and (2) the victim's mother testified she picked up the victim from her father's house on January 1, two weeks before Brittany's baby was born. The State argues the victim's testimony as to the time of the offense is not inconsistent, and the record contains support for both positions. Nevertheless, Perry's argument—the inconsistency was critical to the jury's evaluation of the credibility of the victim

⁹ The name "assault and battery with intent to kill" was misleading because the name suggested one of the elements was a specific intent to kill. See S.C. Code Ann. § 16-3-620 (2003) (repealed Act No. 273, 2010 S.C. Acts 1949-50).

and the State failed to prove the time of the alleged crime—formed the basis of his defense.

This case is not unlike *Rallo*. There, the charge constituted prejudicial error because it defeated the defendant's alibi by enlarging the time the State could prove for the crime. Here, the charge contradicted the defendant's claim that the victim's credibility was suspect because she could not identify the time of the offense. Under the circumstances of this case, it was improper for the trial court to instruct the jury that "time is not a material element" of the crime, and this error prejudiced Perry. For these reasons, I would reverse.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

 COPY

THE STATE,

RESPONDENT,

V.

JEFFERSON PERRY,

APPELLANT

APPELLATE CASE NO. 2012-211430

Appeal from Spartanburg County
John C. Hayes, III, Circuit Court Judge

Opinion No. 5257

PETITION FOR REHEARING

RECEIVED

AUG 21 2014

SC Court of Appeals

Pursuant to Rule 221 (a), SCACR, appellant requests rehearing because this Court may have overlooked the fact that the unnecessary and gratuitous jury instruction in this case that "time is not a material element of the offense of criminal sexual conduct with a minor" was extraordinarily prejudicial since the defense had concentrated on the time factor in challenging the allegation. The majority should, most respectfully adopt the view of the dissent on this issue.

Further, appellant submits this Court should reconsider its holding that there is not basis for a bolstering argument where the child's testimony is admitted pursuant to S.C. Code §17-23-175. Moreover, the essence of the concurrence is that any challenge to bolstering must be done pursuant

to Rule 403, SCRE, and that was essentially done in this case. The DVD reveals the prior statement was an improper bolstering of the child's testimony even though it was admitted pursuant to the statute. Bolstering objections were proper prior to this statute, and they, in circumstances such as the facts of this case, remain proper.

Jury charge:

The judge, over objection, charged the jury that time was not a material element of the offense of criminal sexual conduct with a minor. He also charged the jury that the testimony of "the victim need not be corroborated." R. 172, ll. 13-16.

The majority of this Court respectfully overlooked what the dissent in this case saw: The jury charge on time not being an element of the crime in this case was gratuitous, unnecessary and prejudicial. Appellant's defense centered on attacking the inconsistencies regarding the Christmas alleged incident, and when it was reported, and who was allegedly around.

The defense was anchored in the minor's inconsistencies, and the alleged time when the offense occurred. The solicitor requested this jury instruction to negatively impact on appellant's defense. The fact that a time period of when the sex abuse occurred in an indictment can be broad does not mean that the jury instruction that time is **not a material element should be given**. Appellant requests that the majority reconsider its opinion, and most respectfully adopt the well reasoned dissent.

DVD:

As this Court will recall, Wiley Garrett said the alleged victim in this case "made a disclosure on both of those dates [February 7, 2008 and February 14, 2008]." R. 8, l. 10 – 10, l. 6. "She made a disclosure of sexual touching which, which, in which she felt uncomfortable." R. 12, ll. 18-20.

On cross-examination, the defense specifically asked Garrett about the video bolstering the child's testimony which she was also going to present live that day in court for the jury. Garrett admitted: "It may bolster, as you say, or it may cause questions. But, again, that's part of the greater process of which we're here today." However, Garrett reasoned: "It would be an advantage to the court to be able to look at what the child said four years ago to look at what the child said today." R. 16, ll. 9-18. (emphasis added).

After Garrett's in camera testimony, defense counsel objected to the admission of the tape on the grounds it would simply bolster the child's testimony. "I think it's just the same thing the child said on purposes [a prior occasion]. I think it's to bolster what testimony she's going to give in the trial, Your Honor, and we would oppose it." The judge ruled the tape was admissible under S.C. Code § 17-23-175, stating that the child would be subject to cross-examination when she testified. R. 21, ll. 5-14.

The evidence against appellant in this case was very slim. While that likely explains appellant not receiving any prison time, he is still branded for life. He must register as a sex offender, and pay the electronic monitoring hefty fee.

There was evidence appellant had come over on the night in question to help Bryan, who was the boyfriend of his cousin Liz, with yard work the next morning. The minor said she was asleep on the living room floor when appellant walked into the room with her Uncle Bryan. This was apparently about 10:00 or 11:00 at night after appellant was picked-up to spend the night. The minor said the television was off at the time. That fact would be disputed, which tested her allegedly clear memory of the "incident." R. 29, ll. 5-25.

Her allegation was "I was asleep, and whenever his [appellant Jefferson Perry's] hand up or, up my pants, I felt his hand and I woke up and I moved." She maintained: "I woke up and I moved

to the couch.” She claimed appellant followed her to the couch and “he sat down on the couch and asked me if he could lay his head in my lap.” The minor said she was scared and did not say anything to appellant. She acknowledged appellant did not threaten her or her family. R. 31, l. 4 – 33, l. 5. The minor was inconsistent on whether the “head in her lap” portion of her allegation actually occurred also.

The minor’s allegation was that appellant reached his hand up the legs of her pants “to my private.” R. 33, l. 2 – 34, l. 7. The defense sought to show the jury that this was a very implausible allegation. The minor admitted she stayed the rest of the week at the home of her father’s family, but she did not tell anybody what allegedly happened. R. 35, l. 4 – 36, l. 6. She said she told her mother “it think it was after New Years. I don’t remember.” The solicitor asked if it was “after your father’s birthday?” and the minor answered: “Yes.” She did not tell her mother immediately because: “I was still scared something else was gonna happen.” The minor admitted appellant “wasn’t nowhere around, but she did not make the allegation to her mother until the middle of January, 2008 “maybe.” R. 35, l. 13 – 38, l. 20.

On cross-examination the minor said “once we fell asleep I turned off the TV and I went in my Dad’s bedroom.” R. 45, ll. 13-15. The minor also said she was wearing brown capris when appellant allegedly put his hand up her pants. She said appellant’s hand was “smooth.” She said she did not remember saying his hand was smooth on the video. R. 47, l. 2 – 48, l. 23. The significance of this was that appellant worked as a laborer cutting down trees daily, and his hands were not soft or smooth.

The minor’s mother testified that she stayed at her uncle’s house the week of Christmas, 2007. The minor did not tell her about the alleged touching until January 29, 2008. The mother claimed she had seen behavioral changes in the minor after the allegation including the child

wanting to be alone. However, but she said the minor did not have any current behavioral problems. R. 50, l. 11 – 54, l. 6.

The minor's stepfather testified that he did not remember the alleged victim ever saying anything about appellant putting his head in her lap. "She didn't tell me until well after that that that he actually laid his head in her lap there." The stepfather said this allegation only came up after the solicitor mentioned it to him. "But we didn't know all that until afterwards." R. 61, l. 13 – 62, l. 5.

Wiley Garrett was the interviewer in this case. When the solicitor moved the February, 2008 interview into evidence, defense counsel Hall announced: "No additional objections." The DVD of the interview was then published for the jury. On cross-examination, Garrett confirmed that the alleged victim that a hand was put down her pants and that his hand was "smooth." She told Garrett her pants were brown and new and that she was also wearing a short-sleeved shirt. She did not allege to Garrett that appellant put his head in her lap. R. 75, l. 16 – 79, l. 8.

Appellant denied doing anything improper to the alleged victim that night. He was merely there to help his cousin and her boyfriend with the yard work the next morning. R. 81, l. 2 – 88, l. 20; R. 111, ll. 9-14.

Appellant recognizes that S.C. § 17-23-175 has been held to be a valid legislative enactment. However, appellant strongly maintains it is impermissible to offer testimony bolstering that of the alleged victim, and invading the province of the jury. Further, this Court should be aware the matter was hardly raised in State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012) where the Supreme Court made its one, respectfully, unfortunate statement about the interview being admitted pursuant to the statute forecloses a bolstering challenge.

Appellant asks this Court to reconsider since evidence which bolsters the credibility of the complaining witness is inadmissible. See State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (2012).

While bolstering in these types of cases often revolves around the forensic interviewer giving the jury the impression he or she believes the child is telling the truth, that is by no means the only form of impermissible bolstering. See Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010); Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001).

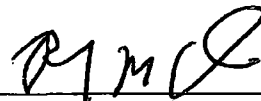
The playing the DVD of the minor's statement to the jury was essentially a **prior consistent statement that unfairly bolstered her credibility and testimony**. Further, as seen, on cross-examination during the in camera hearing the defense specifically asked Garrett about the video bolstering the child's testimony which she was also going to present live that day in court for the jury. Garrett admitted: "It may bolster, as you say, or it may cause questions. But, again, that's part of the greater process of which we're here today." R. 16, ll. 9-18. (emphasis added).

Garrett ironically captured the whole problem with the DVD here. The jury would conclude she said the same thing, or roughly the same thing, years ago so it must be true. That was the basis of trial counsel's objection to the admission of the tape on the grounds it would simply bolster the child's testimony. "I think it's just the same thing the child said on purposes [a prior occasion]. I think it's to bolster what testimony she's going to give in the trial, Your Honor, and we would oppose it."

Moreover, merely because the statute in question is obviously a legislative creation *it still must be considered against the evil of bolstering because our Supreme Court has held the cumulative effect of the prior consistent statement with the present testimony enhances the devastating impact of improper corroboration*. Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994). Defense counsel correctly objected to this improper bolstering testimony.

This Court's opinion on this subject will be exploited and misunderstood. Rehearing is respectfully in the best interests of the bench and bar on this issue.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

This 21st day of August, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

John C. Hayes, III, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

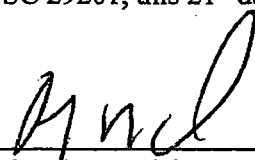
JEFFERSON PERRY,

APPELLANT

APPELLATE CASE NO. 2012-211430

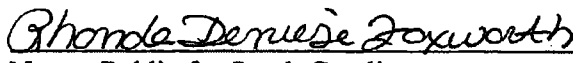
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of August, 2014.


Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 21st day
of August, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021

The South Carolina Court of Appeals

The State, Respondent,

v.

Jefferson Perry, Appellant.

Appellate Case No. 2012-211430

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OCT 23 2014

SC OFFICE OF
APPELLATE DEFENSE

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

John D. Seetham J.

While I adhere to my dissent, I do not believe the panel overlooked or misapprehended any point of law. Therefore, I vote to deny rehearing.

John Cannon, Jr. C.J.

Columbia, South Carolina

FILED

October 23, 2014
VCE

cc:

Robert Michael Dudek, Esquire

William M. Blitch, Jr., Esquire

Alan McCrory Wilson, Esquire

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEFFERSON PERRY,

APPELLANT

APPELLATE CASE NO. 2012-211430


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THE FOLLOWING EXHIBIT IS ON FILE WITH THIS COURT:

STATE'S EXHIBIT #1 (DVD OF ALLEGED VICTIM'S INTERVIEW)

1 STATE OF SOUTH CAROLINA

2 COUNTY OF SPARTANBURG

) COURT OF GENERAL SESSIONS

3
4 STATE OF SOUTH CAROLINA,

5 PLAINTIFF,

6 VS.

7 JEFFERSON LEE PERRY, JR.,

8 RESPONDENT.

) TRANSCRIPT

) OF

) RECORD

) 2009-GS-42-04016

9
10
11 April 10th - 12th, 2012
12 Spartanburg, South Carolina
13

14 B E F O R E:

15 THE HONORABLE JOHN C. HAYES, III, Judge.

16 A P P E A R A N C E S:

17 ABEL GRAY
18 ASSISTANT SOLICITOR
19 Attorney for the State

20 ROBERT HALL
21 Assistant Public Defender
22 Attorney for the Defendant

23
24 PAMELA E. GREEN
25 Circuit Court Reporter
Seventh Judicial Circuit

1 There's no other assigned seating.

2 So, have a pleasant evening and we'll see you back at
3 9:30 in the morning and just follow the bailiff and he'll
4 get you oriented.

5 (WHEREUPON, the following takes place outside the
6 presence of the jury.)

7 THE COURT: All right. We have some motions.

8 First is a motion by the State to require that the
9 defense comply with the Rape Shield Law. But this is a
10 minor, I don't know if that's, even would be an issue,
11 but---

12 MR. HALL: It's not a rape case, Your Honor. It's a
13 lewd act. I don't know why they did it other than in the
14 CAC that they want to put in she actually says that she was
15 also messed with by Ricky at sometime. We have no other
16 information on that, but that's the only information we
17 would have even of anything remotely like that.

18 THE COURT: well, the Rape Shield Law would apply.

19 You don't, you don't intend to go into that, do you,
20 Mr. Hall?

21 MR. HALL: Well, if they, if they get the CAC video in
22 it's in.

23 SOLICITOR GRAY: And we understand that, Your Honor.

24 THE COURT: Okay. Third party guilt, any reference
25 other than saying---

Wiley Garrett - Direct examination
by Solicitor Gray

1 MR. HALL: It's -- his defense is always been I didn't
2 do it. If somebody did, I don't know who it is.

3 THE COURT: Okay.

4 MR. HALL: But there, there are, I think, issue, I
5 think why it came up, I think other adult males involved in
6 her life are also registered sex offenders, and I'm not sure
7 who they're presenting actually for witnesses or not, but---

8 SOLICITOR GRAY: That -- at least one is a potential
9 witness. He's not here. He is a registered sex offender.
10 He's never been accused of doing this particular act to his
11 daughter, Your Honor. So, I don't want some type of third
12 party situation involving that gentleman or stepfather.

13 MR. HALL: We're certainly not saying Greg or James or
14 John or anybody else did it, but, you know, that -- and, and
15 he's never, in his contact with police, ever said anything
16 like that. It's always been I don't know anything about it,
17 I didn't touch her.

18 THE COURT: All right. Self-serving statements by the
19 defendant. I don't know what, what that's addressed to.

20 SOLICITOR GRAY: Your Honor, there were no statements
21 made in this case basically by the victim or anyone else,
22 including the defendant, about, about what he said or may
23 not have said during this incident. And if we don't bring
24 that up, I don't know what kind of -- beyond what Mr. Hall
25 is already said, I didn't do it, I didn't want any surprise

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1 in this situation. That's why I filed that particular
2 motion, Your Honor. There, there are no written or oral
3 statements from the defendant.

4 MR. HALL: He was never questioned at all about it,
5 Your Honor. Just -- I think they may of told him they were
6 being, being, he was being arrested and for what. I think
7 he made the statement at that point I didn't do it, but he
8 was never interrogated, but that was --.

9 MR. HALL: All right. Then the last is the use of the
10 tape, and I understand we have to have a hearing on that.

11 SOLICITOR GRAY: Yes, sir.

12 THE COURT: All right. It was also of prior
13 allegations.

14 MR. HALL: Oh, yeah.

15 SOLICITOR GRAY: That would be under Rape Shield also.

16 MR. HALL: Yeah.

17 SOLICITOR GRAY: Okay. Yes, sir, I just wanted to let
18 the Court know, Your Honor, in my motion I referenced
19 Tabitha Webber. The actual person who interviewed the
20 victim in this case was Mr. Wiley Garrett. He's present in
21 the courtroom and is ready to be examined by the State and
22 the defense.

23 THE COURT: All right. Then let's, let's proceed if
24 you want to call Mr. Garrett.

25 SOLICITOR GRAY: Yes, sir, call -- State calls

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by Solicitor Gray

1 Mr. Wiley Garrett to the stand.

2 THE COURT: Please come up and be sworn.

3 WILEY GARRETT, being first duly
4 sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY SOLICITOR GRAY:

7 Q Here you go.

8 A Thank you.

9 Q Yes, sir.

10 Mr. Garrett, what is your present position?

11 A I am a forensic evaluator and a forensic therapist at
12 the Children's Advocacy, Advocacy Center of Spartanburg.

13 Q How long have you had that position, sir?

14 A I've been there a little over ten years.

15 Q And as a forensic evaluator, counselor, and interviewer
16 I believe also --

17 A (Witness nods affirmatively.)

18 Q -- what are your duties and responsibilities?

19 A My duties are to interview children as a forensic
20 evaluator as assigned, and I follow the guidelines from the
21 American Professional Society on the Abuse of Children and
22 the National Children Advocacy Centers.

23 Q Well, you talk about some training or guidelines, what
24 type of training have you had in this area and what's your
25 educational background?

Wiley Garrett - Direct examination
by Solicitor Gray

1 A I have a Master's Degree in Social Work from the
2 University of South Carolina. I'm a licensed independent
3 social worker in clinical practice licensed by the state.
4 I'm also a recognized and approved licensed LISWCP
5 supervisor in the State of South Carolina, and as far as
6 training I've been to national trainings across the nation,
7 and I can go into some of those places if -- I've been into
8 many, many. I've had over hundreds of hours of training
9 actually.

10 Q Particularly on, in interviewing?

11 A Specifically in forensic interviewing, forensic
12 evaluations, yes, sir.

13 Q And counseling also?

14 A And also in therapy and forensically sensitive therapy,
15 yes.

16 Q All right. And your education, educational background?

17 A Well, I have a Bachelor of Arts from High Point
18 College. I have a Master of Divinity Degree from Duke
19 University, a Master in Social Work from the University of
20 South Carolina.

21 Q Now, how long have you been doing the interviewing and
22 social work?

23 A Well, I began interviewing children in a psychiatric,
24 pediatric/psychiatric setting 24 years ago, and then
25 specifically working in the Children's Center for the last

Wiley Garrett - Direct examination
by Solicitor Gray

1 ten years, and during that time I've interviewed over a
2 thousand children.

3 Q Over a thousand children?

4 A Yes, sir.

5 Q And have you ever been to Family Court or Circuit
6 Court?

7 A I've been to Criminal Court and to Family Court
8 multiple times.

9 Q Have you ever been identified as an expert in these
10 Courts?

11 A I've been recognized as an expert in Family Court in
12 Cherokee County, York County, Spartanburg County, Oconee
13 County, and also in Criminal Court in Cherokee County and
14 Spartanburg County.

15 Q And an expert in forensic interviewing?

16 A An expert in forensic interviewing/evaluation.

17 Q All right. And exactly what is forensic interviewing
18 or forensic evaluation?

19 A Forensic interview is an opportunity, in a quiet
20 non-threatening setting, for a child to be able to say what
21 they've seen, heard, and experienced.

22 Q And have you had an opportunity to do that with Miss

23  Minor

24 A I did interview her twice.

25 Q And what were the dates of those interviews?

Wiley Garrett - Direct examination
by Solicitor Gray

1 A I interviewed her on February 7th, 2008, and February
2 the 14th, 2008.

3 Q Was an audio and visual recording made of that
4 situation, those situations?

5 A There, there, there was a recording made, yes, sir.

6 SOLICITOR GRAY: All right. And, Your Honor, I'd like
7 to just have this marked just State's Exhibit 1.

8 (WHEREUPON, the DVD was marked State's Exhibit No. 1
9 for identification purposes only at this time.)

10 Q Now, I show you a copy of a disk marked State's Exhibit
11 1 and ask you if you recognize the notations on there.

12 A It's -- yes, I notice it from the Children's Advocacy
13 Center related to Minor [REDACTED] and the date is
14 February 7th, 2008.

15 Q And that would be the audio visual recordings of the
16 sessions with Miss Minor [REDACTED]

17 A It should be.

18 Q Yes, sir.

19 A I haven't seen what's on this recording, but it should
20 be, yes.

21 Q Right.

22 But if you saw that and that would be -- you could
23 testify to that, whether or not that was you or her in this
24 session?

25 A I would recognize that, yes, sir.

Wiley Garrett - Direct examination
by Solicitor Gray

1 Q Okay. And during your interviews with her, did she
2 give a detailed account of the offense with you?

3 A She did make a disclosure and give details, yes, sir.

4 Q I'm assuming you have a copy of your report?

5 A I do have a copy, yes, sir.

6 Q Was your report based on the audio/visual

7 recording/interview sessions with Miss Minor

8 A It was actually made on my notes. I made notes during
9 the session, and, for the most part, it's, according to my
10 notes, which should be consistent with the audio/visual
11 recording, and if it is not, the audio/visual recording is
12 the authoritative source.

13 Q All right. And in your report you list basically what
14 happens during a situation, during your interviews with Miss

15 Minor

16 A My report itself are just notes to indicate what it was
17 that the child said.

18 Q And was it fairly detailed what she said to you?

19 A It was. It had -- she made her disclosure that had
20 many details, yes, sir.

21 Q All right. And was a disclosure made in the
22 non-threatening session, session, setting --

23 A Setting.

24 Q -- excuse me -- that you talked about?

25 A I'm sorry?

Wiley Garrett - Direct examination
by Solicitor Gray

1 Q Was there a disclosure made in the non-threatening
2 setting you---

3 A Yes, sir, she made a disclosure on both of those dates.

4 Q And those dates were February --?

5 A February the 7th and February the 14th, 2008.

6 Q 2008.

7 Was that -- that was after the incidents had already
8 taken place?

9 A That is correct.

10 Q Okay. And what's your -- you say it's a
11 non-threatening environment.

12 What's your normal approach to questioning a young man
13 or a young lady, a victim of any type of abuse?

14 A Well, the most important stage is the beginning, which
15 is helping that child to be comfortable in that situation
16 and understand that they are in control, and that they --
17 one of the things we do emphasize, first of all, began to
18 ask them questions that they usually know the answers to
19 like their name, their age, their school, their grade,
20 things that they know, and that helps a child to begin to,
21 you know, understand that they're gonna be, in general,
22 asked questions which they know the answer to, but also we
23 emphasize that there are three rules that we have to
24 emphasize.

25 One is that it's really important to tell the truth.

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by Solicitor Gray

1 The second is it's really important not to guess at an
2 answer, and the third is that it's perfectly okay to say I
3 don't know. So that any question I ask that they say I
4 don't know, I attempt to reinforce that response because if
5 they don't know the answer to a question, I certainly want
6 them to be able to feel free to verbalize that and to feel
7 comfortable to say to an adult that they don't know that
8 information.

9 Q Now, while you're doing this, is this some type of
10 method to determine credibility or to determine or to allow
11 the child to be free in their thinking and responses?

12 A Well, again, the first stage is going to be able to
13 help that child feel comfortable in this setting. So, those
14 are -- that's the beginning. Questions that you know and
15 then establishing the rules, which this is different from
16 school.

17 Children are normally, usually, commonly trained in
18 school that if they're asked a question they should at least
19 take, take a, take a stab at an answer or attempted answer.
20 In this setting we want them to emphasize that it's
21 perfectly okay and it's preferable to be able to say I don't
22 know if they don't know the answer to a question.

23 Q And in this situation, do you ever ask, in any of your
24 interviews, leading questions of the minor?

25 A I intend not to ask any leading question. A leading

Wiley Garrett - Direct examination
by Solicitor Gray

1 question is defined as, when I ask a question, that is then
2 the, the answer is in the question. So, parents will
3 commonly ask leading questions like you're hungry, aren't
4 you. And, so, that answer is in that question itself.

5 And the other thing we seek to do is, in asking them
6 questions, is to ask them open ended questions, and, for
7 instance, one of those questions is why are you here today,
8 what's the reason you're here today, what is happened, what
9 would you like to talk about, those sort of things because
10 the answer is not in that question.

11 Q After your interviews with Minor [REDACTED] on these two
12 dates, and after going over your notes, did you determine if
13 there was any physical abuse in this situation?

14 A She made -- well, she made a disclosure, yes, sir.

15 Q She made a disclosure.
16 was it of physical abuse or neglect?

17 A It was not physical abuse or neglect, no, sir.

18 Q What was the disclosure?

19 A She made a disclosure of sexual touching which, which,
20 in which she felt uncomfortable.

21 Q And that sexual touching and disclosure will be
22 recorded at the Children's Advocacy Center --

23 A That is correct.

24 Q -- here in Spartanburg, South Carolina --

25 A That is correct, sir.

Wiley Garrett - Direct examination
by Solicitor Gray

1 Q -- back on the dates we have, we already mentioned?

2 A That is correct, sir.

3 Q Thank you, sir. Please answer any questions Mr. Hall
4 may have.

5 CROSS-EXAMINATION

6 BY MR. HALL:

7 Q All right. Mr. Garrett, I just want to ask you a few.

8 You said you've interviewed, interviewed over a
9 thousand children?

10 A That is correct.

11 Q And that's all kinds of sexual abuse, physical abuse,
12 neglect?

13 A All variety, yes, sir.

14 Q Yes.

15 And do you know, out of that say thousand plus, you
16 determined the child was not telling the truth or was not
17 disclosing something that actually happened?

18 A I didn't quite get your question.

19 Could you ask it again?

20 Q Out of your thousand plus interviews with children, how
21 many times if you made a determination that the child was
22 not credible, was not telling the truth?

23 A There was a number of times, and in those cases, many
24 of those cases actually the children themselves told me that
25 they weren't telling the truth, their original disclosure

Wiley Garrett - Cross-examination
by Mr. Hall

1 was not true, and were able to give an explanation of, of
2 why they created that false disclosure.

3 Q But that's when the kid tells you that.

4 So, how many times, out of your thousand plus
5 interviews, have you determined, without the kid saying I
6 wasn't telling the truth before, but you determined this is
7 not a credible disclosure, this is not something that's, I
8 believe the child on?

9 A Well, let me say that disclosures are about 60 to 65
10 percent of the children that interview do make disclosures
11 that are clear and consistent and detailed. Now, the other
12 I'd say 35 to 40 percent are ones where there either isn't
13 clear or there's serious doubts about this child's
14 competency or it's just not -- there's just not enough --
15 it's not clear or there's an inconsistency or there's a,
16 really a lack of contextual detail.

17 Q Okay. That's the statistics nationally or whatever?

18 A That's nationally and the CAC, but that's also true in
19 the cases that I've looked at, and that's one of the things
20 we look at at the CAC.

21 Q All right. But if you have 35 to 40 percent you can't
22 say it's a credible disclosure, can you remember how many
23 you said I just don't think the kid's telling the truth?

24 A I don't have a number, but, yeah, that's -- I mean
25 we -- we're very sensitive to the fact that this is very

Wiley Garrett - Cross-examination
by Mr. Hall

1 serious, and, you know, anytime that a child makes a
2 disclosure, but it's not a full disclosure. It's really not
3 clear. It's not consistent. It doesn't have contextual
4 details or that child doesn't appear to be mentally
5 competent or their questions. Certainly that's something
6 we're very sensitive to.

7 Q All right. If the child tells a consistent story, you
8 basically say it's credible?

9 A Well, what we look at in for -- credibility, first of
10 all, you know, one of the things is competency. Does this
11 child know the difference between truth and lie, do they
12 have a sense of right and wrong, and then the next thing we
13 look for, you know, is, again, is this child made a
14 disclosure that's clear, that's consistent, that's detailed,
15 and emotionally compelling.

16 Also we look for is there any, are there any signs of
17 coaching. And then also if this child makes this
18 disclosure, is there some significant payoff in the process,
19 is there some significant gain for them in making this
20 disclosure. And, again, let me point out that this -- the
21 interviews that I do are part of a greater process, and
22 they're other people out there doing other things like law
23 enforcement.

24 And the other context is that, you know, here we are,
25 four years later, and, again, I -- what I would do is

Wiley Garrett - Cross-examination
by Mr. Hall

1 present, you know, the interview that I did four years ago
2 to the Court and allow the Court to make a judgment is that
3 consistent still today.

4 Q But what the State's asking is to put you and your
5 video in to bolster what presumably she's gonna testify
6 today to. So, but---

7 A Well, I wouldn't say that it's -- I mean I don't know
8 if that's -- is that a question?

9 Q I said that's, that's what they're attempting to do.
10 I'll put it as a question.

11 I mean do you understand that's what they're trying to
12 do?

13 A Well, I wouldn't say -- again, for me, I think it would
14 be an advantage to the Court to be able to look at what the
15 child said four years ago to look at what the child said
16 today. Now, in fact, if -- it may bolster, as you say, or
17 it may cause questions. But, again, that's part of the
18 greater process of which we're here today.

19 Q All right. Let's go back to where I was going with
20 about not telling the truth.

21 Can you remember how many times a child has told the
22 same story to you that you got and you just said I don't
23 think they're telling the truth, I don't think this is
24 credible?

25 A Again, I can't give you a number because I don't -- you

Wiley Garrett - Cross-examination
by Mr. Hall

1 know, I'm a social worker. We're not a mathematician. But
2 I can tell you this. Again, another way to look at this is
3 if we have a child that says exactly the same thing in
4 exactly the same words to law enforcement, to other
5 agencies, and to me in two interviews, then that would be
6 reason for question because the way that we tell about,
7 disclose, or relay what's happened to us in our lives is
8 there's a certain degree of spontaneity because what we
9 remember about a certain event that happened to us in
10 different settings with different people, we may, we may
11 bring it -- we may not tell that exactly in the same way
12 every time.

13 Like, for instance, I, I remember the day that I got
14 married, and depending on where I am, I may, made that
15 longer or shorter. Sometimes I say yeah, I'm married and
16 sometimes I may go into greater details. But sometimes I
17 may remember more details than others. But the, but the
18 core, the core consistency here is in my core details are
19 the same.

20 Now, if that included different people, different
21 places, different times, than that, that would be
22 inconsistent. I don't know if I've answered your question
23 or not.

24 Q Okay. You said you're not a mathematician, but you do
25 keep general statistics or nationally, but not of your own.

Wiley Garrett - Cross-examination
by Mr. Hall

1 A Oh, no, we see -- you know, I do -- we just see so many
2 children.

3 Q And how much information did you have before
4 interviewing Minor about reports or what she had said before
5 or anything else?

6 A I had the police incident report, and then I did an
7 interview with the mother prior to interviewing the child.

8 Q All right. Did you see anybody's statements in the
9 police report that included statements and---

10 A I, I did scan the incident report, yes.

11 Q I'm questioning other statements from people such as
12 Mr. Harrelson and Mrs. Harrelson. I think Niki and James,
13 Junior.

14 A I did read it. I did see it, yes, sir.

15 Q Okay. And since -- you do two interviews---

16 A Correct.

17 Q ---on this case, right?

18 A Yes.

19 Q Do you ever do more interviews?

20 A Yes, sir.

21 Q Okay. And do you ever just do one interview?

22 A Occasionally, yes.

23 Q Okay. And you know why you just did two on here and
24 not more, not less?

25 A Well, the, the amount that we do in I'd say 90 -- well,

Wiley Garrett - Cross-examination
by Mr. Hall

1 I don't know a percentage. I mean I would say almost all we
2 do two. They're some reason -- sometimes I have -- a child
3 comes in, and for whatever reason, we have concerns about
4 that child, their health, their mental health. We may do
5 one and refer them to someone else, and then sometimes, with
6 particularly younger children, they're times where we may
7 interview them three or four times that may involve them
8 coming in and not feeling well.

9 You know, they're all kinds of issues that have to do
10 with it, but generally, with children who are her age group,
11 we generally interview them twice. Most -- I would say more
12 than the majority of the time.

13 Q Okay. Was she a seemingly intelligent child who could
14 relate her story?

15 A She presented herself as average in her skills and
16 verbal abilities, yes.

17 Q But she didn't have any deficiencies in people that I
18 think of with any kind of, certainly not mental illness, or
19 any learning disabilities or---

20 A Although her mother said she had some speech issue, I
21 didn't really hear those speech issues myself. She did, you
22 know -- she was understandable, which I she, think she'll be
23 on the tape. She was just, you know, an average and, you
24 know, I would say unremarkable child.

25 Q All right. And you don't know any of the parties

Wiley Garrett - Cross-examination
by Mr. Hall

1 involved in this, my client---

2 A No.

3 Q ---or anybody else?

4 A No. No, I wouldn't know anyone.

5 Q Do you know who this Ricky is?

6 A I have no idea.

7 Q All right. Do you know if anything was ever done in
8 checking into that or anything?

9 A No, I do not.

10 Q All right. So, you just left it with the events of
11 December 29th, '07?

12 A She made a disclosure about the gentleman in question,
13 and I asked her if anyone else ever touched her and she said
14 no.

15 Q But then didn't she also tell you Ricky had done
16 something or---

17 A No, she did not.

18 Q Okay. I have no further questions. I guess we can see
19 your video unless you got something else.

20 THE COURT: All right.

21 SOLICITOR GRAY: You need to see the video?

22 MR. HALL: I think we need to see the video.

23 SOLICITOR GRAY: No further questions.

24 THE COURT: You may step down and watch the video.

25 (WHEREUPON, State's Exhibit No. 1 was played for the

1 Court at this time.)

2 THE COURT: Lights back on please.

3 State's position is, of course, it's to be admitted.

4 What's the defense position?

5 MR. HALL: Your Honor, we are -- I think they got the
6 child to testify. We're opposed to the, coming in. I think
7 it's just the same thing the child said on purposes. I
8 think it's to bolster what testimony she's gonna give in the
9 trial, Your Honor, and we would oppose it.

10 THE COURT: All right. I find, under Section
11 17-23-175, that the audio/visual presentation, DVD, is
12 admissible. I find, under the totality of the circumstances
13 surrounding the making of the statement and the audio and
14 visual, they provide particularized guarantee of
15 trustworthiness. The statements were not elicited by
16 leading questions. There was one question that was a little
17 toward leading, but it was not answered and another question
18 was asked, and -- but I only remember one being somewhat
19 suggestive of an answer. But, in fact, it was not answered
20 and there were no other, by my viewing of it, any other
21 leading questions, and, again, that one was not answered.
22 Another question was asked.

23 The interviewer had been immanently trained in
24 conducting investigating interviews of children, has a very
25 thorough resume and CV which supports his competency to do

1 the interviews. The statements by the victim do relate a
2 detailed account of what is alleged to have happened, and
3 they are internal coherent, and the -- we do have the sworn
4 testimony of -- I remember Wiley. I can't remember Mr. --
5 anyway.

6 MR. HALL: Mr. Garrett.

7 THE COURT: Mr. Garrett as to he was the only
8 participant in the, other than the child.

9 So, I find that the DVD and the statement of the minor
10 is admissible under Section 17-23-175, and I do find that,
11 based on my understanding, that the child will be
12 testifying, and, therefore, subject to cross-examination.
13 As to both the elements of the offense and the making of the
14 outgoing statement.

15 SOLICITOR GRAY: That's correct, Your Honor.

16 THE COURT: All right. We'll stop for the day.

17 Yes, sir.

18 MR. HALL: Just want to make -- Mr. Perry has been out
19 on bond on his own personal recognizance---

20 THE COURT: Any objection to him---

21 MR. HALL: ---for 37 months?

22 THE COURT: Any objection -- I'll allow him to stay
23 out.

24 Mr. Petty, you understand you don't have to stay in
25 jail overnight?

1 that's a good break time. If any of you need a break at
2 anytime, simply raise your right-hand, and with no questions
3 asked, we'll take a break. We want to move the case along.
4 But we're not in such a hurry that we won't take a break if
5 someone needs to, and I extend that to counsel and
6 Mr. Petty.

7 I'm gonna ask you, again, at this time, to pay close
8 attention. Again, keep in mind those admonitions of
9 yesterday. I'm not gonna repeat them about not making up
10 your mind and not discussing the case and not letting
11 yourself be exposed to any news coverage or doing any
12 research.

13 Mr. Gray.

14 SOLICITOR GRAY: Thank you, Your Honor.

15 May it please the Court.

16 Good morning, ladies and gentlemen. This case is about
17 Mr. Perry seated over there, Jefferson Perry. The
18 allegation is, December 2007, that young lady, Miss Minor
19 Minor is gonna tell you something happened to her and
20 that Mr. Perry was the perpetrator.

21 I am the solicitor in this case. My name is Abel Gray.
22 In some other places we're called prosecutors. Basically
23 all I'm here to do is lay out the case for you. You make
24 the ultimate decision based upon the credibility of
25 witnesses.

1 It's not really a CSI case because it's a lewd act.
2 It's not a criminal sexual conduct with a minor. It's a
3 lewd act meaning that you touched her to any lewd or
4 lascivious way, if he was over 16 and she was under 16, in
5 this case she was much younger than that, that's the case,
6 ladies and gentlemen.

7 We're not here telling you that he was some deep dark
8 in the basement type of person. It was a one time incident.
9 You'll hear about the location and where it, where it
10 happened and what exactly happened, and that will come from
11 Minor herself.

12 Once you hear the facts in this case, I'm confident
13 that you will find that Mr. Perry did touch her in a lewd,
14 lascivious manner in December 2007 here in Spartanburg
15 County, and you'll find him guilty of lewd act on a minor.

16 Thank you.

17 THE COURT: Mr. Hall.

18 MR. HALL: Please the Court, solicitor.

19 Mr. Foreman, members of the jury, as the judge told you
20 yesterday, my name is Robert Hall, and I represent Jeff
21 Perry. He's been accused of a crime. He's been accused of
22 a crime that I think anybody thinks is reprehensible, lewd
23 act on a minor.

24 Taking advantage, doing anything horrible to a child is
25 terrible, terrible, but the State has to bring evidence to

1 you, the jury in this case, to convince you that it
2 happened. Not only that it happened, that Jeff Perry did
3 it, and they must prove that beyond a reasonable doubt, to
4 your satisfaction beyond a reasonable doubt.

5 The only way you can do your job, as the judge of the
6 facts, is to listen, to pay attention, absorb what's being
7 done, presented from this witness stand. There's presumably
8 a video. Pay attention cause, at the end of the trial,
9 after they presented their case, and we're gonna present a
10 case, we got witnesses that we're, that will tell you what
11 they know too, at the end of the trial I'm gonna stand back
12 up in front of you and I'm gonna point out some things that
13 I want you to consider. You can not consider things unless
14 you do pay attention.

15 So, I implore you, please do pay attention. That way
16 Mr. Perry has the fair trial that he has a right to. That
17 way Miss Minor Minor has the fair trial if
18 you pay attention. You can't do your job unless you do pay
19 attention, and I ask you please do because the State has the
20 burden of proving him guilty beyond a reasonable doubt.

21 We don't have to present anything, but we are cause we
22 want to fill in some holes. But please do pay attention.
23 Sometimes these things get tedious, but this is the way our
24 system works.

25 He's on trial. Jefferson Perry's on trial, and he's

Minor [REDACTED] - Direct examination
by Solicitor Gray

1 depending on you to do your job so you can render the proper
2 verdict at the end of the trial.

3 Thank you.

4 THE COURT: Call your first witness.

5 SOLICITOR GRAY: The State calls Minor [REDACTED]
6 [REDACTED] being first duly

7 sworn, testified as follows:

8 DIRECT EXAMINATION

9 BY SOLICITOR GRAY:

10 Q Please state your full name.

11 A Minor [REDACTED]

12 Q You got to move up and speak up a little bit.

13 A Minor [REDACTED]

14 Q Thank you.

15 How old are you, Minor [REDACTED]

16 A Thirteen.

17 Q What's your birthday?

18 A [REDACTED] [REDACTED] [REDACTED].

19 Q All right. So, I guess May of this year you'll be 14?

20 A Yes.

21 Q When did this incident we're here about today, when did
22 that happen?

23 A December 29th, 2007.

24 Q Now, how can you be so sure it was on or about
25 December 29th of 2007?

Minor [REDACTED] - Direct examination
by Solicitor Gray

1 A It was around nighttime whenever it happened, and it
2 was a day or two before my real dad's birthday.

3 Q Your real dad's birthday, and when is his birthday?

4 A [REDACTED].

5 Q And then how you recall it so clearly a day or two
6 before his birthday?

7 A Yes, sir.

8 Q Now, where did this incident happen?

9 A It was at my Uncle Bryan's house.

10 Q Who lived at your Uncle Bryan's house?

11 A It was my Nana, him, my dad, his girlfriend, and my
12 Uncle Bryan's girlfriend, and this dude named Paul that he
13 knew.

14 Q All right. This night or early morning, who was in the
15 house that you remember?

16 A It was me, Bryan, Bryanne, my dad, my Nana, my dad's
17 girlfriend, and Paul.

18 Q Okay. Let me get your, your real dad's name.

19 What's his name?

20 A Jimmy.

21 Q Jimmy what?

22 A Harrelson.

23 Q And your Nana you're talking about will be his mother?

24 A Yes.

25 Q What's her name?

Minor [REDACTED] - Direct examination
by Solicitor Gray

- 1 A Veda Harrelson.
- 2 Q After -- where did you sleep that night with all these
3 people in the house?
- 4 A I slept in the living room on the floor.
- 5 Q Do you remember where this house is located?
- 6 A The only thing I really know is that it is located on
7 Hampton Road.
- 8 Q Hampton Road where?
- 9 Do you remember which city it was?
- 10 A Inman, South Carolina.
- 11 Q Inman?
- 12 A (Witness nods affirmatively.)
- 13 Q Here in Spartanburg County?
- 14 A Yes.
- 15 Q All right. Was it a house or a trailer?
- 16 A Trailer.
- 17 Q Single wide, double wide, if you know?
18 If you don't know---
- 19 A I don't know.
- 20 Q Okay. You were in the living room you say---
- 21 A Yes.
- 22 Q ---when this happened?
23 Were you sleeping in there that night?
- 24 A Yes.
- 25 Q Who was with you in the living room?

Minor [REDACTED] - Direct examination
by Solicitor Gray

- 1 A No one.
- 2 Q No one.
- 3 No friends or cousins your age?
- 4 A No.
- 5 Q Any other relatives your age---
- 6 A No.
- 7 Q ---or, or even older on the floor that night?
- 8 A Only me and a few minutes later Jeff walked in.
- 9 Q Jeff who?
- 10 A Perry.
- 11 Q Mr. Perry.
- 12 Was the television on or off?
- 13 A Off.
- 14 Q Were you fully asleep when Mr. Perry came in?
- 15 A Yes.
- 16 Q Did Mr. Perry come into the living room alone?
- 17 A No.
- 18 Q Who else came in with him?
- 19 A My Uncle Bryan.
- 20 Q Did they both stay in the living room with you?
- 21 A No.
- 22 Q Who left the living room?
- 23 A My Uncle Bryan.
- 24 Q Who was in there alone with you?
- 25 A Jeff.

Minor [REDACTED] - Direct examination
by Solicitor Gray

- 1 Q Again, is that Mr. Perry?
- 2 A Yes.
- 3 Q Now, you -- were you still on the floor when your uncle
- 4 left the living room?
- 5 A Yes, sir.
- 6 Q And how old were you at that time?
- 7 A I was nine.
- 8 Q Do you know how old Mr. Perry was at that time?
- 9 A No.
- 10 Q How old was your uncle?
- 11 A I don't know.
- 12 Q Was he over 21?
- 13 A Yes.
- 14 Q Was Mr. Perry over 21?
- 15 A Yes.
- 16 Q When Mr. Perry stayed in the living room, was he on
- 17 the -- did he stand up or sit down or was he on any kind of
- 18 furniture?
- 19 what did Mr. Perry do?
- 20 A He laid down in the floor.
- 21 Q Well, how were you dressed?
- 22 A I had my capris, brown capris on and a t-shirt on.
- 23 Q So, is that normally what you slept in?
- 24 A Yes.
- 25 Q Now, you say your real father.

Minor [REDACTED] - Direct examination
by Solicitor Gray

1 Was your -- were your mother and father, real father
2 married at this time?

3 A No.

4 Q And why were you at your father's house?

5 A He wanted to get me, and it was also his week to get
6 me.

7 Q And how often did you stay over there?

8 A Every other week.

9 Q Had you ever seen Mr. Perry before?

10 A No.

11 Q Now, when Mr. Perry stayed in there, what happened
12 between you and Mr. Perry?

13 A I was asleep, and whenever his hand up or, up my pants,
14 I felt his hand and I woke up and I moved.

15 Q Now, you say you moved.

16 Where did you move to?

17 A I moved to the couch.

18 Q Did Mr. Perry stay on the floor?

19 A No.

20 Q What did Mr. Perry do?

21 A He followed me to the couch.

22 Q Now, were you asleep -- did you fall asleep again on
23 the couch or not?

24 A No.

25 Q You stayed awake?

Minor [REDACTED] - Direct examination
by Solicitor Gray

- 1 A (Witness nods affirmatively.)
- 2 Q What did Mr. Perry do at that point?
- 3 A He -- wherever he followed me to the couch, he sat down
- 4 on the couch and asked me if he could lay his head in my
- 5 lap.
- 6 Q Did you tell him he could?
- 7 A No.
- 8 Q Did you tell him he couldn't?
- 9 A No, I didn't say anything.
- 10 Q How did you feel at that point?
- 11 A I was scared and shaking at the time.
- 12 Q Did you scream out to anybody in the house?
- 13 A No.
- 14 Q Why not?
- 15 A Because I didn't want to wake anybody up at the time.
- 16 Q But you say you were nine years old?
- 17 A Yes.
- 18 Q And you felt what?
- 19 Is that---
- 20 A Scared.
- 21 Q Scared.
- 22 Did he ever make any threats to you?
- 23 A No.
- 24 Q Did he, Mr. Perry, ever threaten your family or
- 25 anybody?

Minor [REDACTED] - Direct examination
by Solicitor Gray

- 1 A No.
- 2 Q After Mr. Perry laid his head in your lap, what
3 happened next?
- 4 A Only thing I remember is whenever he fell back asleep I
5 got up and I went to my dad's bedroom.
- 6 Q Now, you say Mr. Perry put his hands up your pants leg?
- 7 A Yes.
- 8 Q Did Mr. Perry's hand go -- how far did Mr. Perry's hand
9 go up your pants leg?
- 10 A To my private.
- 11 Q To your private?
- 12 A Yes, sir.
- 13 Q Is that your word for your female---
- 14 A Yes.
- 15 Q ---body part, your vagina?
- 16 A Yes.
- 17 Q Did he touch skin?
- 18 A No.
- 19 Q He did not?
- 20 A No.
- 21 Q So, his hand was between the pants and your panties?
- 22 A Yes.
- 23 Q You wear panties that night?
- 24 A Yes.
- 25 Q Did his hand ever go under your panties?

Minor [REDACTED] - Direct examination
by Solicitor Gray

- 1 A No.
- 2 Q But he did touch the outside of your panties?
- 3 A Yes.
- 4 Q And he touched them on your private part?
- 5 A Yes.
- 6 Q Is that when you got up and moved away?
- 7 A Yes.
- 8 Q How long did Mr. Perry's head stay in your lap before
- 9 you could move it?
- 10 A I don't remember.
- 11 Q But once he fell asleep, is that when you moved?
- 12 A Yes.
- 13 Q Now, please understand -- you're there with your
- 14 grandmother and your father, correct---
- 15 A Uh-huh. (Affirmative).
- 16 Q ---and your uncle?
- 17 Did you tell any of them what happened?
- 18 A No.
- 19 Q The next day, did Mr. Perry try this again?
- 20 A No.
- 21 Q Has Mr. Perry ever tried that, this since that point?
- 22 A No.
- 23 Q Do you recognize Mr. Perry?
- 24 A Yes.
- 25 Q Is he here in the courtroom?

Minor [REDACTED] - Direct examination
by Solicitor Gray

1 A Yes.

2 Q Could you point him out please?

3 A (Witness points.)

4 Q That's the gentleman sitting next to the Mr. Robert
5 Hall?

6 A Yes, sir.

7 Q And that's the gentleman that rubbed your private over
8 your panties?

9 A Yes.

10 SOLICITOR GRAY: Please let the record reflect that the
11 victim identified Mr. Perry as her abuser that night, Your
12 Honor.

13 The next day did you stay the entire time with your
14 father's family at the house?

15 A Yes.

16 Q When, when, when did you go back to your mother?

17 A I think it was after New Years. I don't remember.

18 Q After your father's birthday?

19 A Yes.

20 Q When you got back to your mom, did you tell her
21 immediately what happened?

22 A No.

23 Q Why not?

24 A I was still scared that something else was gonna
25 happen.

Minor [REDACTED] - Direct examination
by Solicitor Gray

- 1 Q But Mr. Perry wasn't nowhere around, correct?
- 2 A (Witness nods affirmatively.)
- 3 Q But you still felt scared?
- 4 A Yes.
- 5 Q Did you eventually tell your mother what happened?
- 6 A Yes.
- 7 Q Was that in January, February, March or --?
- 8 A January.
- 9 Q of 2008?
- 10 A Yes.
- 11 Q Was it the beginning of January or the end of January?
- 12 A In the middle.
- 13 Q In the middle maybe.
- 14 All right. And after that happened, what did, what did
- 15 you do after that?
- 16 A Whenever I told my mama we called my step-dad and told
- 17 him and asked him what we should do, and he told us to go
- 18 straight to the police office.
- 19 Q And I guess a report was made there?
- 20 A Yes.
- 21 Q Did you ever seek or did your mother seek any kind of
- 22 help for you after you told her?
- 23 A Well, I don't really know. Whenever I was at school,
- 24 when I came back home after we went to the police office,
- 25 she told me that they told us that I needed therapy.

Minor [REDACTED] - Direct examination
by Solicitor Gray

- 1 Q Therapy.
- 2 Did you go to the Children's Advocacy Center?
- 3 A Yes.
- 4 Q Is that here in Spartanburg?
- 5 A I think so.
- 6 Q All right. And who did you talk to there?
- 7 A Mr. Garrett.
- 8 Q Mr. Wiley Garrett?
- 9 A Yes.
- 10 Q All right. Did you ever tell your stepfather what
- 11 happened to you?
- 12 A Yes.
- 13 Q You told him where it happened---
- 14 A Yes.
- 15 Q ---or what happened?
- 16 And who did it to you?
- 17 A (Witness nods affirmatively.)
- 18 Q when you talked to Mr. Garrett, was that -- when --
- 19 what, what month was that in?
- 20 A February.
- 21 Q of 2008?
- 22 A Yes.
- 23 Q How many times did you talk to Mr. Garrett?
- 24 A Two times.
- 25 Q And during those two times he just -- did you tell him

Minor [REDACTED] - Direct examination
by Solicitor Gray

1 what happened?

2 A Yes.

3 Q And, again, how many times did Mr. Perry do this to
4 you?

5 A Once.

6 Q Just once?

7 A Yes.

8 Q You're positive?

9 A Yes.

10 Q At anytime did Mr. Perry put his fingers under your
11 panties?

12 A No.

13 Q Did he ever rub your breasts?

14 A No.

15 Q Did he ever try to kiss you?

16 A No.

17 Q Did he threaten you in anyway?

18 A No.

19 Q Did he threaten your family in anyway?

20 A No.

21 SOLICITOR GRAY: One moment Your Honor.

22 (Pause.)

23 Q Thank you, Minor [REDACTED] for being patient with me. Please
24 answer any questions Mr. Hall may have for you.

25 CROSS-EXAMINATION

Minor [REDACTED] - Cross-examination
by Mr. Hall

1 BY MR. HALL:

2 Q Now, Minor [REDACTED] I was having a little hard time hearing
3 some of, of what you told Mr. Gray. If we can slowly go
4 through who was at the house when you went to bed cause I, I
5 really couldn't hear. I tried to make notes, but when the,
6 when the night that you say this happened, you went to bed.
7 At some point my client, Mr. Perry, came in.

8 But before he came in, who was at the house?

9 A My dad, his girlfriend, my uncle's girlfriend, my
10 cousin Bryanne and Paul.

11 Q And Paul?

12 A (Witness nods affirmatively.)

13 Q And your cousin is Bryanne?

14 A Yes.

15 Q That's your Uncle Bryan's daughter?

16 A Yes.

17 Q Okay. Where -- was your Uncle Bryan there?

18 A No.

19 Q Okay. I thought I heard you say that Nana was there.

20 A Yes, I forgot to say Nana was there.

21 Q Okay. So, in the evening -- what, what time did you go
22 to bed?

23 A Around 9:30.

24 Q 9:30.

25 All right. So, at 9:30 you were there, your dad, who's

Minor [REDACTED] - Cross-examination
by Mr. Hall

- 1 Jimmy Harrelson?
- 2 A Yes.
- 3 Q His girlfriend.
- 4 What's her name?
- 5 A Niki.
- 6 Q Niki.
- 7 Do you know her last name?
- 8 A Warhan. Warhan.
- 9 Q Warhan.
- 10 Liz who -- Liz Blackwell who is Uncle Bryan's
- 11 girlfriend?
- 12 A Yes.
- 13 Q Now, she lives there, doesn't she, or didn't she,
- 14 didn't she at that time?
- 15 A She didn't stay. She just spent the night.
- 16 Q Okay.
- 17 A Sometimes.
- 18 Q Your cousin Bryanne?
- 19 A Bryanne.
- 20 Q Bryanne. Excuse me.
- 21 Paul.
- 22 Who is Paul?
- 23 Is he related to anybody?
- 24 A I think he is Liz's brother.
- 25 Q And your Nana?

Minor [REDACTED] - Cross-examination
by Mr. Hall

- 1 A Yes.
- 2 Q So, that's Bryan and Jimmy's mother?
- 3 A Right.
- 4 Q Okay. Had Bryan been there earlier?
- 5 A Yes.
- 6 Q Okay. Do you know when he left or why he left?
- 7 A No.
- 8 Q Okay. Now, Liz Blackwell has a daughter, does she not?
- 9 A I don't really know.
- 10 Q Do you know Brittany?
- 11 A Brittany -- I know I have a cousin named Brittany, but
- 12 I don't know any other Brittany.
- 13 Q Well, do you remember talking to Mr. Garrett, some of
- 14 us watched that yesterday, and you talked about Brittany, I
- 15 think Brittany, who just had a child?
- 16 A I don't remember.
- 17 Q You don't remember?
- 18 A No.
- 19 Q All right. So, would you stand up?
- 20 (Person complies.)
- 21 Q You see this person standing up?
- 22 That's one of my witnesses.
- 23 Have you ever seen her before?
- 24 A No.
- 25 Q You never have?

Minor [REDACTED] - Cross-examination
by Mr. Hall

- 1 A No.
- 2 Q All right. All right. When you went to bed, do you
- 3 know where your Nana was?
- 4 A She was in her bedroom.
- 5 Q In her bedroom.
- 6 where was her bedroom?
- 7 A It was at the back of the house.
- 8 Q The back.
- 9 was there something added on to this trailer, some
- 10 rooms or something?
- 11 A I don't remember.
- 12 Q Okay. Let me get the little bit of layout.
- 13 The living room you're talking about, is it like most
- 14 mobile homes, you come into a door---
- 15 A Yes.
- 16 Q ---and you're in a living room?
- 17 A Yes.
- 18 Q Okay. And I think, from some of the things we had, you
- 19 said as soon as you came in, there's a bedroom to the right?
- 20 A Yes.
- 21 Q All right. If you go in and go to the left, what's
- 22 over on that side of the trailer?
- 23 A The kitchen and my Nana's bedroom and bathroom.
- 24 Q Okay. And there's something in the back?
- 25 A There's two bedrooms.

Minor [REDACTED] - Cross-examination
by Mr. Hall

- 1 Q Two bedrooms in the back.
2 I thought you said Nana's bedroom was in the back?
3 A On the left.
4 Q Oh, her bedroom's on the left, that side.
5 Okay. Now -- all right. Nana's in her bedroom.
6 Do you know where your dad was?
7 A He was in one of the rooms that's in the very back
8 right there at the living room.
9 Q Okay. Now, after -- who put -- did somebody put you to
10 bed or did you just go to bed on the floor?
11 A I was just laying on the floor watching TV --
12 Q Okay.
13 A -- and I fell asleep.
14 Q Do you know where Niki was?
15 A She was in there with my dad.
16 Q Where was Bryanne?
17 A She was in her bedroom.
18 Q Where was her bedroom?
19 A The door right after you walk in beside the---
20 Q That would be to the right?
21 A Yes.
22 MR. HALL: Okay. Beg the Court's indulgence, Your
23 Honor.
24 (Pause.)
25 Q Now, let's talk about the living room.

Minor [REDACTED] - Cross-examination
by Mr. Hall

1 I know it's hard to get the space and the relations,
2 but if you walk into the door, you say there's a bedroom to
3 your right?

4 A Yes.

5 Q I remember looking through the stuff, something about a
6 sofa.

7 where was the sofa?

8 If you're standing, just step in the door, the
9 bedroom's right here, where is the sofa?

10 A Well, if you shut the door it's right there beside it.

11 Q To your left, there's---

12 A Yes.

13 Q ---a sofa?

14 Okay. And that's the sofa or the couch you're talking
15 about you sat on?

16 A Yes.

17 Q Okay. Is there a table there?

18 A Yes.

19 Q Okay. Is there any other furniture in there?

20 A There is a computer desk and a chair.

21 Q If that -- if I'm still standing at the front door, the
22 bedroom's here, the couch is here, the table's in front of
23 the couch, where's the computer?

24 Just in front of me?

25 A Yes.

Minor [REDACTED] - Cross-examination
by Mr. Hall

1 Q A desk and chair.

2 All right. Where was the TV you were watching?

3 A It was right in front of one of the bedrooms that is in
4 front of the living room.

5 Q So, if I'm still standing at the door, the computer
6 desk is here, the TV's kind of in front of me to my left,
7 but in front of me?

8 A It's a little bit to the left.

9 Q Little bit to the left in front.

10 Okay. And, excuse me, did you fall asleep watching TV
11 or---

12 A No.

13 Q All right. So, you cut the TV off, you go to sleep?

14 A I cut the -- once we fell asleep I turned off the TV
15 and I went into my dad's bedroom.

16 Q Okay. And I thought you were sleeping in the living
17 room?

18 A I slept -- I fell asleep in the living room, and then
19 whenever I woke up I moved to the couch and then after he
20 fell asleep I got up, turned off the TV, and walked into my
21 dad's bedroom.

22 Q Okay. Well, I'm talking about -- this is early in the
23 evening. About 9:30 you said you went to sleep. I said you
24 cut off the TV and you were asleep on the floor?

25 A No, everybody else was in the living room. They were

Minor [REDACTED] - Cross-examination
by Mr. Hall

- 1 watching TV and I fell asleep.
- 2 Q Okay.
- 3 A Whenever they got ready to go to bed they turned off
- 4 the TV and went into their room and laid down.
- 5 Q All right. Now, who were the others that were watching
- 6 TV?
- 7 A It was my cousin, Bryanne, and my dad and Niki and I
- 8 think Paul.
- 9 Q And you think Paul?
- 10 A Yes.
- 11 Q Your Nana wasn't in there?
- 12 A No, she was in the shower.
- 13 Q Okay. Now, you told that, Mr. Gray that Mr. Perry, you
- 14 didn't know him before this?
- 15 A No.
- 16 Q You've not seen him after this?
- 17 A No.
- 18 Q This is the one time you had any contact with
- 19 Mr. Perry?
- 20 A Yes.
- 21 Q You've told him, me that he put his hands up your
- 22 pants?
- 23 A Yes.
- 24 Q Did you have -- I didn't hear what kind of pants you
- 25 said you had on.

Minor [REDACTED] - Cross-examination
by Mr. Hall

- 1 A I had my capris on.
- 2 Q Capris. Okay. I'm sorry. I couldn't understand you.
- 3 Do you remember what color they were?
- 4 A They were brown and they had a pink, I don't know
- 5 what's it called, but I guess around the waist. That part
- 6 that goes around my waist --
- 7 Q Uh-huh. (Affirmative).
- 8 A -- that part was pink.
- 9 Q Okay. And I think -- and some other things we've
- 10 had -- you've described the hand as smooth.
- 11 You remember that?
- 12 A Hu huh. (Negative).
- 13 Q Remember watching the video yesterday?
- 14 A Yes.
- 15 Q Okay. But you don't remember saying that?
- 16 A No.
- 17 Q Now -- okay. This was, this was over a weekend or
- 18 during the week or---
- 19 A It was over Christmas break.
- 20 Q Okay. But you don't remember if it was Friday,
- 21 Saturday, or Sunday, or what day of the week?
- 22 A (Witness nods negatively.)
- 23 Q But it was before your dad's birthday?
- 24 A Yes.
- 25 Q And his birthday is?

Minor [REDACTED] - Cross-examination
by Mr. Hall

1 A [REDACTED] [REDACTED] [REDACTED].

2 Q [REDACTED] [REDACTED].

3 Okay. Now, let me see. You, you remember talking to
4 Mr. Garrett those two times, right?

5 A Yes.

6 Q All right. And you've had opportunity -- you've seen
7 the video?

8 A Yes.

9 Q You told Mr. Gray that, after this happened, you moved
10 to the sofa?

11 A Yes.

12 Q And he followed you to the sofa?

13 A Yes.

14 Q Did you tell Mr. Garrett there?

15 A I don't remember if I did or not.

16 Q Okay. We got the video.

17 And, so, you -- if you didn't tell him that he followed
18 you to the sofa, you didn't tell him about putting his head
19 in your lap and falling asleep, did you?

20 A I don't remember if I told him that or not.

21 Q Okay. But you were absolutely certain this is the one
22 time you've seen Mr. Perry?

23 A Yes.

24 Q One time he was at your uncle's house?

25 A Yes.

Minor - Cross-examination
by Mr. Hall

1 Q And no other time he was around you?

2 A No.

3 MR. HALL: Beg the Court's indulgence.

4 (Pause.)

5 MR. HALL: Your Honor, we have no further questions at
6 this time, Your Honor.

7 THE COURT: All right. Mr. Gray.

8 SOLICITOR GRAY: No redirect, Your Honor.

9 THE COURT: All right. You can step down. Thank you.
10 You may have a seat back there.

11 We need a break?

12 JUROR: I just need to go to the restroom.

13 THE COURT: All right. Well, that's a break. We'll
14 take a break. We'll all take a break. Yes, sir. That's
15 why I tell you that.

16 Okay. We'll take about a ten minute break.

17 (WHEREUPON, a short recess was taken at this time.)

18 THE COURT: All right. We'll take about a ten minute
19 break.

20 SOLICITOR GRAY: Yes, sir.

21 (WHEREUPON, a short recess was taken at this time.)

22 THE COURT: State ready?

23 SOLICITOR GRAY: Yes, sir, Your Honor.

24 THE COURT: Defense ready?

25 MR. HALL: Yes, sir.

Stacy Gregory - Direct examination
by Solicitor Gray

1 THE COURT: Bring the jury.

2 (WHEREUPON, the following takes place within the
3 presence of the jury.)

4 THE COURT: Call your next witness.

5 SOLICITOR GRAY: Thank you, Your Honor.

6 The State calls Stacy Gregory.

7 STACY GREGORY, being first duly sworn,
8 testified as follows:

9 DIRECT EXAMINATION

10 BY SOLICITOR GRAY:

11 Q Please state your full name, ma'am.

12 A Stacy Lee Gregory.

13 Q Mrs. Gregory, are you the mother of

Minor [REDACTED]

14 A Yes, sir.

15 Q Do you know Mr. Perry?

16 A No, sir, I've never met him.

17 Q December of 2007, did you allow your daughter to go
18 stay with her father?

19 A Yes, sir.

20 Q When was that?

21 A It was the week of Christmas.

22 Q So, was it after Christmas, before?

23 A It was before Christmas. He had her the whole week.

24 Q So, how long did she stay at her uncle's house?

25 A For about a week.

Stacy Gregory - Direct examination
by Solicitor Gray

- 1 Q About a week.
2 was it after New Years?
3 A I got her back after New Years, yes, sir.
4 Q So, be January of 2008?
5 A Yes, sir.
6 Q Now, when she came home, did she immediately tell you
7 what happened?
8 A No, sir.
9 Q When did she tell you what happened?
10 A She told me on January, January the 29th.
11 Q That was about a month after it?
12 A Yes, sir.
13 Q All right. Did she tell you where this happened?
14 A Yes, sir.
15 Q What, what did she say about that?
16 A Sir?
17 Q What did she say about that, where it happened?
18 A She said that it happened at her daddy and uncle's
19 house.
20 Q Do you know that address?
21 A It's [REDACTED] in Inman, South Carolina.
22 Q And here in Spartanburg County?
23 A Yes, sir.
24 Q After she told you what happened, what did you do?
25 A I called and -- I called my husband and we called Jimmy

Stacy Gregory - Direct examination
by Solicitor Gray

1 and Veda. We met up with them.

2 Q Okay. Slow down.

3 You called your husband.

4 That's Mr. Christopher Gregory?

5 A Yes, sir.

6 Q And you called Veda.

7 who's Veda?

8 A Veda is [Minor] grandmother and Jimmy's mom.

9 Q Okay. So, that would be your grandmother on her
10 father's side?

11 A Yes, sir.

12 Q You talked to her and her father?

13 A Yes, sir.

14 Q Did you tell them what [Minor] had alleged?

15 A Yes, sir, we told them.

16 Q At that point did you go to the police officer, police?

17 A Yes, sir, we did.

18 Q All right. After you talked to the police, did you
19 give them a report?

20 A Yes, sir.

21 Q A report was taken out for Mr. Perry?

22 A The report was -- yes, we told the police and they did
23 a report.

24 Q All right. Did you ever take [Minor] to see anybody at
25 the Children's Advocacy Center?

Stacy Gregory - Direct examination
by Solicitor Gray

- 1 A Yes, sir.
- 2 Q And who was that?
- 3 A Gary.
- 4 Q Gary?
- 5 A The -- I don't know his last name.
- 6 Q All right. But you did take her there at least twice
- 7 --
- 8 A Yes, sir.
- 9 Q -- to be interviewed?
- 10 A Yes, sir.
- 11 Q Has she had any further counseling?
- 12 A She had counseling at school.
- 13 Q Okay. Immediately after she told you or even before
- 14 she told you, did you notice any changes in her behavior?
- 15 A Yes, sir.
- 16 Q Like what?
- 17 A She, she didn't want to play with, go out and play.
- 18 She wanted to be to herself. She didn't want to be around
- 19 nobody.
- 20 Q Anything -- any other changes?
- 21 A She just -- when we went out like shopping or whatever
- 22 she just kept looking behind her making sure nobody was
- 23 following her.
- 24 Q Now, this is a few years ago.
- 25 How's she doing now?

Stacy Gregory - Direct examination
by Solicitor Gray

1 A She's doing better.

2 Q Any problems in school?

3 A She's just has a little problem with her, with her
4 grades and stuff.

5 Q Any behavior problems?

6 A No, sir.

7 Q Thank you, ma'am. Please answer any questions Mr. Hall
8 may have for you.

9 A Yes, sir.

10 CROSS-EXAMINATION

11 BY MR. HALL:

12 Q Now, Mrs. Gregory, let me get clear, when did she go --
13 when did Minor go to her father's?

14 A The week of, of December. Christmas week.

15 Q Okay. Did she go before Christmas or---

16 A Yes, sir.

17 Q ---after the Christmas day, Christmas Eve, when?

18 A Before Christmas.

19 Q Was it a---

20 A Like on a Monday. I'm not exactly sure---

21 Q Okay.

22 A ---which day she went.

23 Q Okay. So, she went to Jimmy Harrelson's on a Monday --

24 A Yes, sir.

25 Q -- before Christmas?

Stacy Gregory - Cross-examination
by Mr. Hall

- 1 A Yes.
- 2 Q And she came back to you --?
- 3 A New Years Day.
- 4 Q New Years Day.
- 5 January 1st?
- 6 A Yes, sir.
- 7 Q Okay. I couldn't hear that.
- 8 Okay. Now, December 2008, I mean 2007, who lived at
- 9 that address in Inman on--
- 10 A As far as I know it was Veda, Jimmy---
- 11 Q All right. What's her name?
- 12 A Veda.
- 13 Q Veda.
- 14 That's Nana?
- 15 A Yes, sir.
- 16 Q All right. All right.
- 17 A Jimmy, Niki.
- 18 Q Niki.
- 19 A Bryan.
- 20 Q Bryan.
- 21 A Liz.
- 22 Q Liz.
- 23 A And Paul. Paul.
- 24 Q Paul?
- 25 A Paul is Liz's son.

Stacy Gregory - Cross-examination
by Mr. Hall

1 Q He what?

2 A Paul is Liz's son.

3 Q Okay. Do you know Brittany?

4 A I met her one time.

5 Q Okay. Do you know if, whether or not she was living
6 there at that time?

7 A No, sir.

8 Q You don't know?

9 A I don't know if she was living there at the time---

10 Q Okay.

11 A ---it happened or not.

12 Q Okay. Now, if my memory of the calendar's right,
13 January 1st is about a week after Christmas, seven days
14 after Christmas.

15 So, if she went on a Monday, do you remember when
16 Christmas was that year---

17 A No, sir, I do not remember.

18 Q ---what day?

19 All right. But you know she did not spend Christmas
20 Eve and Christmas with you?

21 A No, I did not have her.

22 Q Excuse me. For 2007.

23 Beg the Court's indulgence, Your Honor.

24 (Pause.)

25 MR. HALL: I have no further questions, Your Honor.

Christopher Gregory - Direct examination
by Solicitor Gray

1 THE COURT: Redirect.

2 SOLICITOR GRAY: No, sir, Your Honor.

3 THE COURT: You can step down. Thank you. We
4 appreciate your time.

5 WITNESS: Yes, sir.

6 THE COURT: Call your next witness.

7 SOLICITOR GRAY: Thank you.

8 State calls Christopher Gregory.

9 CHRISTOPHER GREGORY, being first duly
10 sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY SOLICITOR GRAY:

13 Q Please state your full name, sir.

14 A Christopher Andrew Gregory.

15 Q Are you're married to [Minor] mother?

16 A Yes, I've been married to her for almost six years.

17 Q And did you date before that?

18 A Yes, I been with her since [Minor] was almost turned one
19 years old.

20 Q All right. And you know this situation we're here for
21 today, correct?

22 A Yes.

23 Q Did you know Mr. Perry at all?

24 A No, sir, and I had got around my uncle and he had---

25 Q That's, that's fine.

Christopher Gregory - Direct examination
by Solicitor Gray

1 A Okay.

2 Q After you -- did [Minor] tell you what happened to her?

3 A I got a phone call from my wife and she had, she had
4 called me and I was at my cousin's house, and she had told
5 me what had happened. So---

6 Q Did [Minor] ever tell you what happened?

7 A Well, that's what I'm getting to.

8 Q Well, I'm just asking if [Minor] told you.

9 A Well, yeah, she told she, she told me what happened.

10 Q Did she tell you where it happened?

11 A Yes, sir.

12 Q Where did she say it happened?

13 A Say again.

14 Q Where did she say it happened?

15 A She said it happened at her daddy's house.

16 Q And when did she say it happened?

17 A It happened some, on December, back in December. I, I
18 didn't recall what day cause I'm not good with dates, but---

19 Q All right. Now, do you know where her daddy lived at
20 that time?

21 A Yes, I did.

22 Q Where did he live?

23 A Lived at [REDACTED] in Inman, South Carolina.

24 Q In Inman.

25 All right. Again, that's in Spartanburg County,

Christopher Gregory - Direct examination
by Solicitor Gray

1 correct?

2 A Yes.

3 Q After you found out what happened to her, did you take
4 [Minor] to the police or did her mother take her?

5 A Well, first when I found out, I took and I, we'd
6 took -- we both, we both found out. I took and called Veda
7 and Jimmy. We got in touch with them and told them they
8 needed to meet us as soon as possible, and we had -- I was
9 at my cousin's house and we was out at the road at my
10 cousin's. And, so, we took and met up right there.

11 I asked -- I specifically asked [Minor] I said, [Minor] I
12 said are you sure this happened to you because I told her if
13 we pushed forward with this we're gonna have to find out the
14 truth and she told me yes. We called the police, we called
15 the Sheriff's Office as soon as we left from there. Veda
16 and Jimmy both followed us to the Sheriff's Office, and we
17 took out an incident report.

18 Q And this is been [Minor] story since 2008?

19 A Yes.

20 Q All right. Thank you. Answer any questions Mr. Hall
21 may have.

22 MR. HALL: Your Honor, may we approach?

23 THE COURT: Yes.

24 (WHEREUPON, a bench conference was held out of the
25 hearing of the jury at this time.)

Christopher Gregory - Cross-examination
by Mr. Hall

1 CROSS-EXAMINATION

2 BY MR. HALL:

3 Q Now, Mr., Mr. Gregory, before I ask you any other
4 questions, you've been convicted of a couple of crimes,
5 contributing to the delinquency of a minor and assault and
6 battery of a high and aggravated nature?

7 A Yes, sir.

8 Q You paid your debt, but you've been convicted of those,
9 right?

10 A Yes, sir.

11 Q All right. Now, assuming -- with that in mind, you
12 wanted to make sure she said this happened?

13 A Right.

14 Q All right. And you -- did you just say are you sure
15 one time or did you say it---

16 A No, I said it numerous of times.

17 Q Okay.

18 A I wanted to make sure before we went down to the
19 Sheriff's Office, proceed to get the police involved, that
20 this did happen. And once she told me yeah quite a few
21 times, you know, and even -- she sat down and she talked to
22 her grandma in her vehicle by herself.

23 Q Uh-huh. (Affirmative).

24 A Even, even -- when we was standing outside the vehicle,
25 and she got in there cause she wanted to talk to her

Christopher Gregory - Cross-examination
by Mr. Hall

1 privately---

2 Q Okay.

3 A ---and she said yes.

4 Q Now, was it the -- were you here yesterday when we
5 played the video?

6 A Yes, I was.

7 Q Was it that story or this additions that she gave
8 today?

9 A Well, just what she's told -- I mean basically what
10 she's told on that, and, you know, she's told us, you know,
11 what she basically remembered, you know, and that's about
12 it.

13 Q Had you ever heard that he put his head in her lap and
14 fell asleep before?

15 A Well, she, she had made, you know, that accusation
16 about that, but I didn't -- I mean as far as, you know, what
17 had happened or anything like that, no, but she, she didn't
18 tell me until well after that that he actually laid his head
19 in her lap there.

20 Q All right. What does after that mean?

21 When does that mean?

22 Recently or---

23 A No, it's when we, when we had found out, you know, what
24 was going on, and when we made the report and everything
25 like that because we wanted to find out what was going on

Christopher Gregory - Cross-examination
by Mr. Hall

1 before we come up to -- when we got the call about how the
2 solicitor was taking it over, we come up here and we talked
3 to him, she was telling us about, you know, him laying his
4 head in her lap and all this other stuff. But we didn't
5 know all that until afterwards.

6 Q Was this after he was arrested or--

7 A I think it was before.

8 Q Okay. Was it -- you made the report in January, end of
9 January?

10 A Uh-huh. (Affirmative).

11 Q She went to see Wiley Garrett in, at the center,
12 Children's Advocacy Center in February?

13 A Right.

14 Q I believe into the summer they were investigating?

15 A Yes, sir.

16 Q All right. So, at some point during the investigation
17 she added that part or do you recall?

18 A Well, she -- I mean that I don't know cause I didn't,
19 you know, I worked all the time. I just went, you know,
20 went to periodically, you know, with her to her, whatever
21 she had to do, and Stacy took care of most of going to where
22 she needed to go and stuff like because I was doing other
23 stuff, you know, at that point in time because I worked, you
24 know.

25 Q Yeah.

Christopher Gregory - Cross-examination
by Mr. Hall

1 Beg the Court's indulgence.

2 (Pause.)

3 Q But the -- you said you heard that part, that addition
4 about the sofa and the head in the lap when y'all went to
5 talk to the Solicitor's Office?

6 A Yes. Well, no. It's -- it was like, like after that,
7 you know. When we, when we left from down there at that
8 place where we had met up, we went straight to the Sheriff's
9 office, we told them what went on, and they said they would
10 be in contact with us.

11 All right. When we got the phone call from the
12 solicitor's Office, you know, cause we -- after that we was
13 trying to figure out what was going on ourself to make sure
14 everything was, you know, the truth, and then, you know, she
15 started, she started telling us what had happened, how she
16 was laying in the floor. You know, she, she even told us to
17 the points where, the way he was laying and the way that,
18 you know, she was laying and all this other stuff.

19 Q All right. Mr. Gregory, but when she added that part,
20 was it -- obviously -- was it -- it's during the
21 investigation.

22 I'm just wanting to know was it in February of '08 or
23 into the Summer of '08 or can you say?

24 A I can't say. I don't remember.

25 Q All right. Thank you. No further questions.

Wiley Garrett - Direct examination
by Solicitor Gray

1 THE COURT: Redirect.

2 SOLICITOR GRAY: No, sir, Your Honor.

3 THE COURT: You can step down. We appreciate your
4 time. Thank you.

5 WITNESS: All right.

6 THE COURT: Call your next witness.

7 SOLICITOR GRAY: May we approach, Your Honor?

8 THE COURT: Yes, sir.

9 (WHEREUPON, a bench conference was held out of the
10 hearing of the jury at this time.)

11 THE COURT: All right. The, the next witness is on the
12 way and should be here. He's only about ten minutes away.
13 So, we'll take another short break, and so you won't just be
14 sitting in here for ten minutes.

15 Well, actually here he is now. Cancel that quick ten
16 minutes.

17 You may proceed.

18 SOLICITOR GRAY: Thank you, Your Honor.

19 State calls Mr. Wiley Garrett.

20 WILEY GARRETT, being first duly
21 sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY SOLICITOR GRAY:

24 Q Please state your name, sir.

25 A My name is Wiley Garrett.

Wiley Garrett - Direct examination
by Solicitor Gray

1 Q where do you work, Mr. Garrett?

2 A I work at the Children's Advocacy Center in
3 Spartanburg.

4 Q And what do you do there?

5 A I'm a forensic interviewer/evaluator which basically
6 mean the same thing. But I'm a forensic interview/evaluator
7 and also forensic therapist as well.

8 Q what's a forensic interviewer do?

9 A A forensic interviewer meets with children of, of all
10 ages to give them the opportunity to say what they've seen,
11 heard, and experienced.

12 Q A forensic evaluator's the same thing you're saying?

13 A They are the same, yes, sir.

14 Q Now, do you do only child sex cases or do you involve,
15 involve children that have been molested or abused or
16 neglected also?

17 A we, we -- yes, sir, we do a wide range. In fact, the
18 one I just came from this morning was a case in which some
19 first graders are, are acting out at school, and we're
20 unsure of what that behavior means or where, where it came
21 from or how they learned it all the way to children who've
22 been neglected or abandoned or taken hostage or physically
23 abused or sexually abused. All -- it's just anything that
24 could happen to a child that might be bad.

25 Q And what do you do as physical, excuse me, as a

Wiley Garrett - Direct examination
by Solicitor Gray

1 forensic therapist?

2 A As a forensic therapist, these are children that I did
3 not interview, but interviewed by others, and I'm meeting
4 with them to assess their level, any symptoms of
5 posttraumatic stress that they may have, anxiety,
6 depression, sleep problems, behavioral problems, and then to
7 help them with those problems so they have less anxiety,
8 less depression, less acting, less anger or whatever,
9 whatever their symptoms are and talk about it.

10 Q How many children have you interviewed?

11 A Since -- I've, I've been interviewing children for 24
12 years. I've been at the Children's Center for a little over
13 ten years, and during that ten years I've, as far as
14 forensic evaluations, interviews, I've done a little bit
15 over a thousand interviews, a little over a thousand
16 different children.

17 Q And have you had training in this area specifically?

18 A Extensive training, yes, sir.

19 Q Some of it please.

20 A Well, just to give you some of the locations, I've been
21 to forensic training actually in Spartanburg several times,
22 Columbia, South Carolina several times, Columbia,
23 Charleston, South Carolina several times. I've taken the
24 North Carolina training in forensic interviewing in
25 Greensboro, North Carolina. I've been to Huntsville,

Wiley Garrett - Direct examination
by Solicitor Gray

1 Alabama two different years for their week long forensic
2 interview/evaluation trainings, Dallas, Texas for a week
3 long training, San Diego, California, week long training.
4 It was -- Philadelphia, Pennsylvania for their week long
5 training, and that's just some of them.

6 Q And I've seen your resume, has a lot of alphabet
7 letters behind it.

8 A Yes, sir.

9 Q Could you explain some of that formal education please?

10 A Well, I have a undergraduate degree, Bachelor's of Arts
11 from High Point College. Also have a Master in Divinity
12 Degree from Duke University. I have a Master's in Social
13 work from the University of South Carolina. I'm a licensed
14 independent social worker in clinical practice in South
15 Carolina, a licensed clinical social worker in practice,
16 licensed by the State of North Carolina.

17 In South Carolina I'm also an approved social work
18 supervisor, which means I can, I supervise the people who
19 would like to become licensed as social workers. I'm also a
20 member of the National Association of Social Workers. Also
21 a member of the American Professional Society on the Abuse
22 of Children and also a member of the Association of Play
23 Therapist.

24 Q Have you ever testified in Court before about your
25 forensic interviews?

Wiley Garrett - Direct examination
by Solicitor Gray

1 A I've testified in different courts many different
2 times.

3 Q How many times?

4 A You know -- and that's something I've never counted.
5 Sometimes I'll say it's 30 plus. I have no idea, but I know
6 I've enter, I've been -- I've testified in Cherokee County,
7 York County, Spartanburg County, Oconee County. I've
8 testified in Criminal Court. I've testified in Family
9 Court.

10 Q Have you ever been qualified as an expert?

11 A Every time I've gone to the court I've been qualified
12 as an expert witness, yes, sir.

13 Q Yes, sir.

14 Your Honor, we submit Mr. Garrett as an expert in
15 forensic interviewing, Your Honor.

16 MR. HALL: Your Honor, I think---

17 THE COURT: Any voir dire?

18 Any voir dire?

19 MR. HALL: No, sir, Your Honor. I think we kind of
20 went through that yesterday and---

21 THE COURT: I find he is qualified in that area of
22 being an expert in forensic interviewing.

23 SOLICITOR GRAY: Thank you, Your Honor.

24 Are you familiar with the case involving Minor

25 Minor

Wiley Garrett - Direct examination
by Solicitor Gray

1 A Yes, I am familiar with it, yes, sir.

2 Q were you the person that interviewed Minor [REDACTED]

3 A I did interview Minor [REDACTED] yes, sir.

4 Q when did you do this?

5 A I interviewed her on February the 7th, 2008, and then
6 also on February 14th, 2008.

7 Q were these interviews recorded in some fashion?

8 A They were recorded at the Children's Advocacy Center,
9 yes, sir.

10 Q There's an audio recording and a video, visual
11 recording also?

12 A There's a recording that has the audio and also the
13 video, yes, sir.

14 Q Thank you.

15 I want to show you what has been marked as State's
16 Exhibit No. 1, and ask if you recognize that.

17 A Yes, sir, I certainly do. I saw this yesterday.

18 Q Is that a recording of your, of your interview sessions
19 with Minor [REDACTED]

20 A Yes, it is.

21 Q Is that a complete representation of you, your
22 interview with her in February of 2008?

23 A It is complete, yes, sir.

24 Q Thank you.

25 At this time I'd move this in evidence, Your Honor.

Wiley Garrett - Direct examination
by Solicitor Gray

1 MR. HALL: No addition or objections, Your Honor.

2 THE COURT: All right.

3 SOLICITOR GRAY: Thank you.

4 (WHEREUPON, State's Exhibit No. 1 was received into
5 evidence at this time.)

6 Q Now Mr. Garrett, during your interviews with Minor
7 Minor what do you do during these, during these
8 sessions?

9 A And I'm, I'm thinking you want it outlined?
10 You're asking about the procedure or, or the---

11 Q Yes, sir.

12 A ---or how I go about it?

13 The first, the first thing I do is---

14 THE COURT: For the record, I might -- since I -- over
15 the objection yesterday and based on the ruling yesterday,
16 I'll allow it in.

17 MR. HALL: Yes, sir.

18 THE COURT: It's in evidence.

19 SOLICITOR GRAY: Yes, sir.

20 THE COURT: Go ahead.

21 A The first thing I do is I begin to ask the child some
22 questions we already know the answers to. For instance,
23 their name, birthday, grade, what school they go to, basic
24 questions, and that has two purposes.

25 One purpose is begin to make sure that I can understand

Wiley Garrett - Direct examination
by Solicitor Gray

1 the child's speech, and the second one is to also let them
2 begin the process of remembering and speaking and talking
3 about themselves. And, so, as with anyone, if you ask them
4 questions that are easy, and that they know, and they're not
5 threatened, then it helps them begin to relax and feel
6 comfortable.

7 Q Do you ask them specific questions about a neglect
8 incident or a sexual incident or a, in a physical abuse
9 incident?

10 A Well, what we -- well, let me -- may I continue that
11 answer?

12 Q Yes, sir.

13 A Okay. And then the next thing I want to do is
14 ascertain and ask them some questions to understand that
15 they know the difference between truth and lie, and their
16 sense of right and wrong, and then some other questions like
17 for, you know, can they, can they count usually one to ten.
18 We just want to know where they, where they have the
19 capacity to be able to count. So, we're judging their
20 abilities at that point, and then also ask them questions
21 again about who lives in their house, who's in their family,
22 and usually at that point I'll ask them, to be able to see
23 if they know, what's the reason you're here.

24 In, in most cases children have some idea of something
25 that's going on in their life or I might say what has

Wiley Garrett - Direct examination
by Solicitor Gray

1 happened or what's the reason you're here or just a general
2 open ended question like that, and that then begins the
3 interview, and usually they then will say something, and
4 then we begin to unpack what they mean by those particular
5 words.

6 Q And Minor [REDACTED] followed that, your interview,
7 followed that track with Minor [REDACTED] is that correct?

8 A Yes, sir, it did.

9 Q And open ended question and---

10 A What's the reason you're here.

11 Q Pretty much. All right. Thank you.

12 Did you determine whether or not Minor [REDACTED] had
13 any difficulty understanding you?

14 A When I asked her questions she was able to give the
15 answers, and did not display or demonstrate any difficulty,
16 barriers, or obstacles to hearing me and understanding the
17 simple words I said.

18 Q All right. And that entire -- well, both interviews
19 went along that same track, is that correct?

20 A That is correct.

21 Q And that interview, those interviews are on that DVD,
22 is that correct?

23 A They are, yes, sir.

24 Q Did she make a disclosure to you?

25 A She did make a disclosure, yes, sir.

Wiley Garrett - Direct examination
by Solicitor Gray

1 Q was it of a neglectful nature?

2 A It was not neglect, no, sir.

3 Q Physical abuse?

4 A It was not physical abuse.

5 Q what was the nature of the disclosure?

6 A She made a disclosure of sexual touching.

7 Q Did she tell you when it happened?

8 A She, she did, in general. She did not have the
9 specific date, but she was able to say when it happened and
10 in general. For instance, she mentioned a Friday, Saturday,
11 Sunday. She mentioned a time frame, you know, after, for
12 instance, Christmas and after I think it was somebody's
13 birthday. And, so, she said it was after that.

14 Q All right. Did she tell you where it happened?

15 A She did tell me where. She was not -- she did not know
16 the address, but she said that she, she was able to tell me
17 whose house it was.

18 Q whose house was it?

19 A She said it was Uncle Bryan's.

20 Q Now, how old was Minor at the time of these interviews?

21 A During the time of these interviews she was nine years
22 old, and her birthday was [REDACTED], and she was interviewed in
23 2008.

24 Q Thank you, Mr. Garrett.

25 Your Honor, at the appropriate time I would like to

Wiley Garrett - Direct examination
by Solicitor Gray

1 publish the video to the jury. But right now I have no
2 further questions of Mr. Garrett.

3 THE COURT: All right.

4 MR. HALL: Your Honor, I prefer to wait for my
5 cross-examination till after the video.

6 THE COURT: Okay. You may publish the video at this
7 time then.

8 (Pause.)

9 THE COURT: We'll take a short break while you get that
10 cued up.

11 SOLICITOR GRAY: Yes, sir.

12 THE COURT: We'll just take a short refresher break
13 before we -- this is, will be fairly lengthy and we'll take
14 a minute for him to get it cued up.

15 (WHEREUPON, the following takes place outside the
16 presence of the jury.)

17 THE COURT: You got it under control or you got a
18 glitch?

19 SOLICITOR GRAY: I think this computer has a glitch.

20 (WHEREUPON, a short recess was taken at this time.)

21 THE COURT: Mr. Gray, you want to try the TV to see if
22 that works?

23 SOLICITOR GRAY: Yes, sir.

24 (Pause.)

25 THE COURT: You got it cued up where you want it,

Wiley Garrett - Direct examination
by Solicitor Gray

1 Mr. Gray?

2 You ready?

3 All right. Ready, Mr. Gray?

4 SOLICITOR GRAY: Yes, sir.

5 THE COURT: All right. Bring in the jury.

6 (WHEREUPON, the following takes place within the
7 presence of the jury.)

8 THE COURT: We've been through three laptops and a TV,
9 but I think we've gotten it where we want.

10 All right.

11 (WHEREUPON, State's Exhibit No. 1 was published to the
12 jury at this time.)

13 THE COURT: Mr. Hall.

14 CROSS-EXAMINATION

15 BY MR. HALL:

16 Q Mr. Garrett, you've seen the video. You've got your
17 notes and all.

18 This first time you met with her was on February 7th,
19 2008, is that correct?

20 A Correct.

21 Q One of the first things you said to her was do you
22 remember what my job is?

23 A Uh-huh. (Affirmative).

24 Q Can you explain how, if you met the first time just
25 then, how you asked do you remember what my job is?

Wiley Garrett - Cross-examination
by Mr. Hall

1 A Because the first thing that happens is the greeting in
2 the lobby with everyone in the lobby, and the standard thing
3 I say to all parents/guardians/children is that hello, my
4 name is Wiley, and my job is to, number one, figure out
5 what's going on, and, number two, figure out what you need
6 to be happy and safe. That's my standard greeting for
7 everyone. So --.

8 Q Now, in your report that you provided, when you're
9 talking about the people who were there, you never mentioned
10 that I saw Bryanne or Bryanne, Bryan's daughter.

11 Do you have your report so you can, can---

12 A I do, sure.

13 Q Okay. And do you, do you mention Bryan -- I know you
14 mentioned several people in this, I think the
15 February 7th interview, but---

16 A That was the interview with the mother and the mother's
17 partner.

18 Q well, the one with Minor the same day.

19 A I don't -- Bryanne, I don't remember that name, no.

20 Q Okay.

21 A I don't remember hearing it in here.

22 Q You don't remember saying Bryanne, my Uncle Bryan's
23 daughter?

24 A I, I missed that part.

25 Q You missed that.

Wiley Garrett - Cross-examination
by Mr. Hall

1 But you did say Brittany, who just had a baby, was
2 there?

3 A She did say that, yes.

4 Q Okay. And now, Veda or Veda said that use to be her
5 house, but she wasn't there?

6 A That's what she said.

7 Q Okay. And your report clearly says she told you he put
8 his hand down her pants?

9 A It is as she said, that he -- just what she said in
10 that interview right there.

11 Q And that the hand was smooth?

12 A That's what she said.

13 Q Now, I couldn't, in the video when she described her
14 pants, I know you probably have more notes than, just in the
15 report, she said they were brown pants, but I couldn't
16 understand what else she said about them?

17 A That's about all she said, that they were brown and
18 they were new.

19 Q Okay. And that she had on some kind of short sleeve
20 Super 10 shirt?

21 A Again, I don't know exactly what that means either, but
22 that's how she described it.

23 Q Now, in the first interview with you I think she said
24 he talked to her some the next morning and then the second
25 interview she says he never said anything else.

Wiley Garrett - Cross-examination
by Mr. Hall

1 Is that -- did I hear that right?

2 A In the first interview I asked her did he say or do
3 anything in the morning and she said no, sir, is what she
4 said.

5 Q Okay. I apologize.

6 A Then she described a lot of different activities that
7 happened, and in the second interview she, she didn't say
8 what happened---

9 Q Okay.

10 A ---the next morning.

11 Q Did she ever relate anything to you about her sitting
12 on the couch and him sitting down and putting his head in
13 her lap or anything like that?

14 A No.

15 Q But it's clear that it happened, from your interview
16 with her, she told you it happened at Uncle Bryan's house
17 where Nana/Vita use to live?

18 A That's what she said.

19 Q And she never told you that her grandmother named Veda
20 was there?

21 A No.

22 Q But she did talk about Brittany who just, who had just
23 had a child I think was the way it---

24 A Let me go back to that list. She gave a number of
25 people or quite a few people. She said -- yeah, she said

Wiley Garrett - Cross-examination
by Mr. Hall

1 herself, Liz, Uncle Bryan's girlfriend, a guy Jeff, Brittany
2 that, she just had a baby, Jeff's buddy, Uncle Bryan, Paul
3 in a wheelchair, Daddy Jimmy, and her stepmother, Niki.
4 Those were the people she mentioned.

5 Q But when you were, we were going through the video, did
6 you -- after Paul in a wheelchair, did you not hear her and
7 Bryanne or Bryanne, Uncle Bryan's daughter?

8 A I didn't take note of that, no, sir.

9 Q All right. The jury will have that.
10 Nothing further of this witness, Your Honor.

11 THE COURT: Redirect?

12 SOLICITOR GRAY: No, sir, Your Honor.

13 THE COURT: You can step down and be excused.

14 Appreciate your time. Thank you.

15 WITNESS: Thank you, Your Honor.

16 THE COURT: All right. Members of the jury, we'll
17 break for lunch till 2:45. Have a pleasant lunch and we'll
18 see you back at 2:45.

19 (WHEREUPON, the following takes place outside the
20 presence of the jury.)

21 THE COURT: I understand that's the State's case.

22 SOLICITOR GRAY: Yes, sir, Your Honor. State rest.

23 THE COURT: All right.

24 MR. HALL: Your Honor, we'd make a---

25 THE COURT: All right. I'll let you rest on the record

1 do arguments and charge in the morning because it's gonna in
2 push us way after 4:00. If -- we sent a jury out about
3 5:00 last Thursday, and didn't come back till quarter of
4 2:00 in the morning. We don't want to do that.

5 MR. HALL: No, sir. No, sir.

6 THE COURT: All right. Bring in the jury.

7 MR. HALL: I'm having trouble sleeping at night, and
8 I'd rather have trouble at home.

9 THE COURT: Okay. Bring in the jury.

10 (WHEREUPON, the following takes place within the
11 presence of the jury.)

12 THE COURT: All right. Mr. Gray, I understand the
13 State's resting?

14 SOLICITOR GRAY: That is correct, Your Honor. State
15 presented their case and we rest.

16 THE COURT: The State has rested. That means they've
17 presented their evidence, and now the defense has a right,
18 but no obligation, to move forward and present witnesses if
19 they wish.

20 Mr. Hall.

21 MR. HALL: Your Honor, please the Court.

22 At this -- the defense calls Jeff Perry.

23 JEFF PERRY, being first duly sworn,
24 testified as follows:

25 DIRECT EXAMINATION

Jeff Perry - Direct examination
by Mr. Hall

1 BY MR. HALL:

2 Q All right. Jeff, if you will, give us your name and
3 where you live?

4 A I'm Jefferson Lee Perry, Junior. [REDACTED],

5 Spartanburg, South Carolina.

6 Q And how old are you?

7 A Forty.

8 Q You married?

9 A No, sir.

10 Q Children?

11 A Yes, sir.

12 Q How many children you got?

13 A I have two children.

14 Q And age, gender?

15 A I got a son 20 and a daughter 18 who lives with me.

16 Q Okay. And what kind of work do you do?

17 A Construction. I cut trees and roof houses.

18 Q All right. And how long have you been doing that kind
19 of work?

20 A All my life. Since I was probably 15 years old and
21 started roofing houses.

22 Q Okay. Kind of rough labor work, right?

23 A Yes, sir, very rough.

24 Q And -- now, you've been charged with this crime of lewd
25 act on a minor, is that correct?

Jeff Perry - Direct examination
by Mr. Hall

1 A Yes, sir.

2 Q All right. Let me just ask you.

3 Were you ever at Liz and Bryan's trailer?

4 A I was.

5 Q All right. Were you ever at their trailer when **Minor**

6 **Minor** was there?

7 A I was.

8 Q How many times?

9 A Only once.

10 Q Once.

11 And how long were you there?

12 A Just overnight.

13 Q Okay. And I'm gonna ask the question.

14 A Yes, sir.

15 Q Did you do anything to **Minor** **Minor**

16 A No, sir.

17 Q All right. Now, are you related to Liz Blackwell?

18 A Cousin, yes, sir.

19 Q Okay. And, so, have you been to her house where or
20 places where she lives other than this one night?

21 A Yes, sir, I lived with them numerous of times, you
22 know, off and on, stayed with them.

23 Q And you say them, who, who do you mean them?

24 A Her and her daughter and her kids.

25 Q Okay. And is -- do you know if she's in a relationship

Jeff Perry - Direct examination
by Mr. Hall

1 with anybody?

2 A With Bryan, yes, sir.

3 Q And that's Bryan Harrelson?

4 A Yes, sir.

5 Q Okay. That's Bryan we've heard testimony about?

6 A Right, Bryan Harrelson, yes, sir.

7 Q And Liz is -- can you tell us what Liz's full name is?

8 A Elizabeth Ann Blackwell. Fowler. Not Blackwell.

9 Q All right. And do you know how long Liz and Bryan have
10 been in a relationship?

11 A A bunch of years off and on.

12 Q Okay. Now, are you related to anybody that's testified
13 so far in this case?

14 A No, sir.

15 Q All right. Back in December of 2007, January 2008,
16 when this all comes up, where were you living?

17 A At the time we'd just moved to Pacolet.

18 Q Okay. And you say we, that's you and your---

19 A My mother. I moved down there with my mother, yes,
20 sir.

21 Q Okay.

22 A Actually it was me, and my mother, and my sister.

23 Q Okay.

24 A My brother.

25 Q And were you working at that time?

Jeff Perry - Direct examination
by Mr. Hall

1 A Yes, sir.

2 Q where were you working?

3 A I was working at Ogles Tree Service and -- well, I was
4 bouncing between Ogles Tree Service and Triple A Tree
5 Service.

6 Q Okay. And for everyone's edification, they might not
7 know what a service means.

8 what kind of work do you do with a tree service?

9 A We remove trees, cut them down, haul them off

10 Q Does that include climbing up in trees?

11 A Yes, sir. Yes, sir.

12 Q Okay. That, I assume, working with chain saws?

13 A Yes, sir.

14 Q All right. Now, the one night you were around Minor

15 Minor how did you get to that house?

16 A Elizabeth and Bryan come picked me up that night
17 probably about ten or eleven o'clock, asked me to go home
18 and, you know, asked me if I could got spend the night with
19 them and do some yard work the next morning. I agreed. Me
20 and Bryan's been friends for years. Liz is my cousin.

21 So, I went and spent the night with them. We got up
22 the next morning, cleaned the yard, everything was fine.
23 Two months later I get a disturbing phone call.

24 Q Okay. Let's stick back to the, when they brought you
25 over to the house.

Jeff Perry - Direct examination
by Mr. Hall

1 Do you know -- that was the trailer or house or what?

2 A A trailer, yes, sir.

3 Q Trailer.

4 And as far as you know Bryan and Liz had been living
5 there?

6 A Right.

7 Q Do you know who use to live there?

8 A I believe it was Bryan's mother.

9 Q Okay. Now, was Bryan and then presumably Jimmy the
10 same, have the same mother?

11 A Yes, sir.

12 Q Was she there, Nana or Veda, whatever her name is?

13 A No, sir, she done moved out when they moved in. She
14 moved out and gave them the home. They moved in it.

15 Q All right. When you got there, did you stay up or what
16 did you do?

17 A Actually, when we got there, everybody went in,
18 conversated a few minutes, and everybody started laying
19 down.

20 Q Okay. Describe the trailer from when you go in.

21 A As you was saying earlier, when you go in the front
22 door, there's a bedroom to the right, a couch to the left,
23 an addition built on straight ahead with two rooms, and the
24 hallway, you know, goes down the trailer. There's a back
25 room and a bedroom and all. The kitchen's right to the left

Jeff Perry - Direct examination
by Mr. Hall

1 here.

2 Q Okay. When you got there at ten or eleven o'clock, did
3 you see Minor

4 A There were two kids in the floor, sir.

5 Q All right. Was one of them Minor

6 A I suppose so.

7 Q Okay. Do you know who the other kid was?

8 A I believe it was Bryan's daughter, Bryanne.

9 Q Bryanne.

10 Okay. How long did y'all stay up talking?

11 A I -- forty-five minutes tops.

12 Q Okay. So---

13 A Everybody was tired, ready to get some rest for the
14 next morning.

15 Q All right. So, we're getting close to 11:30 or
16 midnight?

17 A Yes, sir.

18 Q All right. So, you're with Bryan and Liz.

19 Was -- who else was up when you got there?

20 A I believe everybody was already laid when we got there.

21 Me and Bryan and Liz was talking about what, you know, we
22 gonna do tomorrow --

23 Q Okay.

24 A -- or the next day.

25 Q Let me just ask.

Jeff Perry - Direct examination
by Mr. Hall

1 were you getting paid to do this?

2 A No, sir, I was doing a favor.

3 Q Okay. Now, you've heard me ask questions about
4 Brittany.

5 Do you know a Brittany?

6 A Yes, sir.

7 Q All right. who, who is Brittany?

8 A She's my cousin. That would be Elizabeth's daughter.

9 Q All right. And was she there or not there that night?

10 A She was there.

11 Q All right. And where was she?

12 A She was in her room right to the right there watching
13 TV.

14 Q Now, you're certain about that?

15 A I'm positive.

16 Q All right. Did you say anything to her?

17 A Oh, yeah, I spoke to her. You know, she was laying in
18 the bed. She didn't get up and talk with us, but naturally
19 I spoke to her hey, how you doing, love you, this, that, and
20 the other, you know. Just spoke to her.

21 Q And the bed, was it where she could see out the door
22 into the living room?

23 A Yes, sir, you can see straight through the living room
24 all the way to the kitchen.

25 Q All right. Do you know where Bryan and Liz went to lie

Jeff Perry - Direct examination
by Mr. Hall

1 down when they laid down?

2 A They went to one of the back bedrooms straight ahead.

3 Q Okay. And what -- where did you lie down?

4 A As soon as you go in the front door the couch is to the
5 left. I laid at the end of the couch at the front door
6 right in front of Brittany's room.

7 Q Okay. If this is the front door --

8 A Yes, sir.

9 Q -- and the couch is there --

10 A Right.

11 Q -- are you lying this way --

12 A That way.

13 Q -- or this way?

14 This way?

15 A With my head at the front door. My feet straight out.

16 Q So, your feet are pointing towards the addition?

17 A Right, yes, sir.

18 Q Okay. And the two kids you saw lying on the floor,
19 where were they?

20 A They were over close to the kitchen in front of the TV.

21 Q All right. Is that kind of in front of the sofa too?

22 A Well, actually it's kind of offset. The TV was over to
23 the left and the sofa was here and the TV was like over in
24 this corner toward the wall or the kitchen.

25 Q All right. Was there like a coffee table for the sofa?

Jeff Perry - Direct examination
by Mr. Hall

1 A Yes, sir, there was a coffee table there.

2 Q All right. Were they between the couch and the coffee
3 table or the other side of the coffee table?

4 A They were right in front of the TV.

5 Q Okay. There on the other side---

6 A Yes, sir.

7 Q ---of the coffee table?

8 A Yes, sir.

9 Q All right. Do you recall if you got up in the night?

10 A I got up one time about two o'clock and went to use the
11 restroom, and that was in Brittany's room.

12 Q All right.

13 A There's a bathroom in there.

14 Q And when you went in there was Brittany still watching
15 movies or whatever?

16 A Yes, sir, we spoke. I used the restroom, went straight
17 back and laid back down.

18 Q All right. Had something recently happened in
19 Brittany's life?

20 A She had a child.

21 Q All right. Was this a newborn within days or weeks of
22 the birth?

23 A Yes, sir, within days.

24 Q All right. And do you recall if there was any problem
25 with that child?

Jeff Perry - Direct examination
by Mr. Hall

1 A I believe the child was sick is why she was up all
2 night. I think it had colic and she was up all night
3 tending to the kid and watching TV, you know.

4 Q Did you get up any other time?

5 A No, sir, not till the next morning around 7:30.

6 Q All right. And when you got up at 7:30, do you recall
7 if it was already light or still dark?

8 A It was light outside.

9 Q Okay. Did you go over and do anything to the kids?

10 A No, sir.

11 Q I'm talking about the two that were lying there.

12 A No, sir.

13 Q Okay. What did you do?

14 A I'm, I'm no stranger to eating. So, I went straight in
15 the kitchen. I said this is my family's house, I'm hungry,
16 I went and fixed me something to eat. When I got up there
17 was a kid on the couch. I was fixing me something to eat.
18 I asked the kid if she wanted something to eat, she said
19 yes. I scrambled some eggs. As I was fixing some eggs to
20 eat, everyone started getting up. I give the kid her eggs.
21 She sit there and eat and everybody just went on
22 conversating, you know, talking about what we had to go out
23 in the yard to do, what kind of work they wanted to do.
24 Q And you were actually cooking eggs and other things,
25 making aromas through the house?

Jeff Perry - Direct examination
by Mr. Hall

- 1 A Right.
- 2 Q Kind of waking everybody up?
- 3 A Yes, sir.
- 4 Q All right. When did y'all start doing the yard work?
- 5 A Probably around 8:30.
- 6 Q All right.
- 7 A Maybe 9:00.
- 8 Q And what kind were you doing?
- 9 Just picking up trash or---
- 10 A Yes, sir, he had a lot of debris in the yard we needed
- 11 to clean up, get straightened out before -- D.H.E.C. give
- 12 them a fine or whatever and he had to get it all cleaned up.
- 13 Q Okay.
- 14 A So, they needed a helping hand. I volunteered.
- 15 Q Okay. And how long did y'all do that work?
- 16 A Probably about -- we worked in the yard probably, maybe
- 17 four hours.
- 18 Q Okay. Did you eat lunch with them?
- 19 A No, sir, we never eat lunch.
- 20 Q Okay. Did you eventually leave?
- 21 A Yes, sir.
- 22 Q All right. How did you leave?
- 23 A It was Jimmy Harrelson and a friend of his that had
- 24 came over that morning and those two took me home.
- 25 Q Okay.

Jeff Perry - Direct examination
by Mr. Hall

- 1 A Bryan asked if they'd give me a ride so he wouldn't
2 have to go. He stayed there and finished up doing what he
3 was doing.
- 4 Q Okay. Did Jimmy help with the yard work?
- 5 A Yes, sir, he did.
- 6 Q Did his friend help with the yard work?
- 7 A Yes, sir, he did.
- 8 Q When did that friend get there?
- 9 Do you know?
- 10 A Oh, probably around ten, eleven o'clock maybe.
- 11 Q Okay. Excuse me.
- 12 Now, let's go back.
- 13 When you slept there, when you went to sleep, the two
14 kids were on the floor --
- 15 A Correct.
- 16 Q -- in front of the TV?
- 17 A Yes, sir.
- 18 Q When you got up at two o'clock were they on the floor?
- 19 A Yes, sir.
- 20 Q All right. And when -- you woke up 7:30 or so?
- 21 A Right.
- 22 Q Were they both on the floor?
- 23 A No, sir, one was on the couch and the other was still
24 in the floor.
- 25 Q Okay. Do you know which was which?

Jeff Perry - Direct examination
by Mr. Hall

1 A I was supposing -- I'm guessing -- I don't know the
2 kids apart, but I'm guessing it was the **Minor** that was on
3 the couch.

4 Q All right. That's from what she said there---

5 A Right.

6 Q ---today?

7 But do you know Bryanne versus **Minor** to tell me---

8 A No, sir.

9 Q Okay. From your observation -- were the kids covered
10 up with blankets or anything?

11 A They were.

12 Q Okay. Did they appear to be about the same size?

13 A Yes, sir.

14 Q were they side-by-side?

15 A Yes, sir.

16 Q All right. Jeff, did you go over to either one of
17 these kids and stick your hands down their pants?

18 A No, sir.

19 Q Did you go over to either one of these kids and stick
20 your hands up the pants leg?

21 A No, sir.

22 Q All right. When did you find out about an
23 investigation?

24 A It was probably nearly two months later. I come in
25 from work and my mother told me we had a disturbing phone

Jeff Perry - Direct examination
by Mr. Hall

1 call --

2 Q Uh-huh. (Affirmative).

3 A -- and I believe it was her step dad had contacted me
4 and asked me about it. I told him this is not happened,
5 dah, dah, dah, dah, dah. You know, we just discussed it a
6 few minutes and that was the end of that---

7 Q Okay.

8 A ---you know.

9 Q When's the next time you heard anything about any
10 allegation or investigation?

11 A Well, I had left and went out of state and done some
12 work for a while.

13 Q Where did you go to work?

14 A Kentucky.

15 Q And what kind of work were you doing?

16 A Tree work.

17 Q Tree work?

18 A Yes, sir, it's up there during the ice storm.

19 Q Okay. And during that time frame, do you remember when
20 you, what month you left?

21 Well, let me ask you first, was it in 2008---

22 A Yes, sir.

23 Q ---when you went to Kentucky?

24 A Yes, sir.

25 Q Okay. And do you remember when you came back from

Jeff Perry - Direct examination
by Mr. Hall

1 Kentucky?

2 A Yes, sir.

3 Q When was that?

4 A It was probably around September or October maybe.

5 Q Okay. And did you go stay here or go back or---

6 A I stayed here.

7 Q Okay. So, about how many months were you gone?

8 A Probably around seven months or so.

9 Q Okay.

10 A Seven, eights months maybe.

11 Q All right. Did you ever talk to an investigator about
12 this?

13 A No, sir. Well, I had called home from Kentucky. My
14 mother told me about an investigator calling. So, I had
15 called this investigator and talked with her, and she
16 explained to me the situation. I told her where I was at,
17 what was going on. She said as soon as you get back into
18 the state you need to contact me so we can have a meeting
19 and get to the bottom of this. I said yes, ma'am, as soon
20 as I get there I will contact you, and I contacted her at
21 least two or three more times before I came home.

22 Q While you were still in Kentucky?

23 A Yes, sir.

24 Q Okay.

25 A I contacted her at least two or three times.

Jeff Perry - Direct examination
by Mr. Hall

1 MR. HALL: And if I may approach the witness, Your
2 Honor?

3 THE COURT: Yes, sir.

4 Q Now, this is a copy of your warrant I have.

5 A Okay.

6 Q Now, it says it was -- this is your service date.

7 Do you see what that date is?

8 A Yes, sir.

9 Q What date is that?

10 A That's May 9th, '09.

11 Q 3/9/09?

12 A 3/9/09.

13 Q Is that March 9th?

14 A Uh-huh. (Affirmative).

15 Q Okay. Is that when you got back from Kentucky about
16 that time or were you back here for a while before?

17 A I'm thinking it was later cause honestly I don't
18 remember.

19 Q But you were arrested on March 9th, weren't you?

20 A Yes, sir.

21 Q Okay.

22 A Yes, sir, I was.

23 Q How long had you been back from Kentucky before you got
24 arrested?

25 A One day.

Jeff Perry - Direct examination
by Mr. Hall

1 Q One day.

2 Did you try to call the investigator, Ms. Arlidge, at
3 that time?

4 A When I got in that evening it was real late. So, the
5 next morning I went to my cousin's house and there the
6 police was. They arrested me.

7 Q Okay. Where did your cousin live?

8 A Spartanburg, Dakota Street.

9 Q Okay. Did -- after you got arrested, did anybody try
10 to talk to you or talk to you or---

11 A No, sir.

12 Q ---ask your side of anything?

13 A No, sir, I was never asked anything.

14 Q And as far as in the legal system, this is the first
15 chance you've had to tell what happened?

16 A Yes, sir.

17 Q All right. Let me -- if you can, we'll go back to the
18 evening you were there, and the kids were on the floor.

19 who do you recall being there?

20 Just we -- go through with the list of people.

21 A It was those two kids that were on the floor, Liz,
22 Brittany, Paul, Bryan, Jimmy, and his wife, and myself---

23 Q All right.

24 A ---and Brittany and her baby.

25 Q All right. You say Paul.

Jeff Perry - Direct examination
by Mr. Hall

- 1 who's Paul?
- 2 A That's Brittany's son.
- 3 Q Okay. Brittany's son?
- 4 A I mean Liz's son. I'm sorry.
- 5 Q All right. And I think he is since passed away?
- 6 A Yes, sir.
- 7 Q All right. But Bryan and Jimmy's mother was not there?
- 8 A No, sir.
- 9 Q All right.
- 10 A She had moved out and gave them the home.
- 11 Q If one of the kids, girls on the floor under the cover
- 12 was Minor did you just assume the other one was Bryanne?
- 13 A Correct.
- 14 Q And the bedroom to the right --
- 15 A Uh-huh. (Affirmative).
- 16 Q -- who was in there?
- 17 A Brittany and her child.
- 18 Q All right. Did you have a friend with you that came
- 19 over?
- 20 A It was my little cousin Brad.
- 21 Q Brad.
- 22 Okay. And where did he -- do you know where he was
- 23 that night?
- 24 A I believe he went to the back bedroom where the
- 25 grandmother use to sleep. I believe he went to the back

Jeff Perry - Direct examination
by Mr. Hall

1 bedroom---

2 Q All right. So, there's two back bedrooms?

3 A ---down the hall. There's two rooms straight ahead and
4 a room down the hall.

5 Q All right. So, there's a bedroom to the right, bedroom
6 over to the left on the other side of the kitchen---

7 A That's right.

8 Q ---and two bedrooms straight ahead to the back?

9 A Yes, sir.

10 Q Okay. Oh, do you remember if it was cool outside,
11 warm?

12 A Well, it wasn't, it wasn't cool.

13 Q Okay.

14 A It was, it was kind of a fairly nice day.

15 Q Did you have any covers where you were sleeping?

16 A Yes, sir, I did.

17 Q What did you do?

18 A I had a blanket and a pillow Liz got me when I went in.

19 Q All right. Let me ask you.

20 The man that works on roofs and works in trees and
21 stuff often's gonna wear a hat to shade him from the sun and
22 other things.

23 A Yes, sir.

24 Q Do you wear a hat usually?

25 A Yes, sir, I've always, I've always wore a hat.

Jeff Perry - Direct examination
by Mr. Hall

1 Q Did you have a hat that night when you came over?

2 A I did.

3 Q All right. Now, you're in somebody else's house?

4 A Yes, sir.

5 Q Did you take your clothes off and put on pajamas or
6 what?

7 A No, sir, never. I've never been to a strange place and
8 emptied my pockets, took my shoes and hat off. I usually
9 sleep with my hat on.

10 Q Okay. So, you---

11 A If it's a strange place I sleep with my stuff in my
12 pockets and my shoes on. That was a strange place to me.

13 Q Sleeping right beside the front door?

14 A Yes, sir.

15 Q All right. And this was -- did you have any contact
16 with any, either one of those children before you asked do
17 you want something to eat?

18 A No, sir, never.

19 Q The one that was on the sofa when you got up, was --
20 did she say anything to you when you got up?

21 A No, sir, not a thing.

22 Q All right. Was she asleep on the sofa or---

23 A No, sir, she was sitting watching TV.

24 Q Okay. So, the TV's back on?

25 A The TV was on all night.

Jeff Perry - Cross-examination
by Solicitor Gray

1 Q All right. Okay. Please answer any questions the
2 solicitor might have.

3 A Yes, sir.

4 CROSS-EXAMINATION

5 BY SOLICITOR GRAY:

6 Q Mr. Perry, do you remember what day it was that you
7 went over to this house?

8 A I can't honestly remember the exact date.

9 Q You don't remember December 29th or 30th?

10 A That's what this incident occurred, that day.

11 Q Okay.

12 A It might of been around that time, yes, sir.

13 Q Was it on a weekend, sir?

14 A Yes, sir, it was.

15 Q All right. You went over there you said about ten
16 o'clock, 10:30?

17 A It was -- yeah, around -- between ten and eleven
18 o'clock maybe.

19 Q And you stayed up for another hour to around midnight?

20 A Right.

21 Q You say there's another back bedroom down the hall?

22 A Yes, sir.

23 Q And your testimony is that two little girls in the
24 living room with you?

25 A Correct.

Jeff Perry - Cross-examination
by Solicitor Gray

- 1 Q why didn't you take the back bedroom and leave the
2 little boy---
- 3 A That's where---
- 4 Q ---out front?
- 5 A That's where they asked me to sleep on the couch. I
6 said I wasn't gonna sleep on the couch in case people got up
7 before I did, they'd have a place to sit. I said I lay
8 right here in this corner and that's exactly what I done.
- 9 Q But the little boy came with you, correct?
- 10 A Correct.
- 11 Q And what's his relationship to you?
- 12 A That's my little cousin.
- 13 Q Okay. I'm gonna ask you why again -- why the little --
14 how old was he?
- 15 A He's maybe 18 or 19 at the time.
- 16 Q Eighteen or nineteen.
- 17 A Yes, sir.
- 18 Q So, he wasn't a little cousin?
- 19 He was 18 or 19?
- 20 He's a man?
- 21 A Right. Yeah, he's a pretty good size kid at the time.
- 22 Q Okay. How old were you at the time?
- 23 A Mid 30's maybe.
- 24 Q And, so, for you it made more sense to sleep on the
25 couch than a bed?

Jeff Perry - Cross-examination
by Solicitor Gray

1 A Well, this is where Bryan had sent him to. Said you
2 sleep here, and you just sleep here, and that's the way that
3 went.

4 Q All right. Now, you said the television was on all
5 night?

6 A Correct.

7 Q How do you know?

8 A Well, when I got up around two o'clock to go use the
9 restroom, there's two bathrooms, and I went in the one in
10 Brittany's room to use the restroom, the TV was still on.

11 Q All right. And did you ever go to sleep?

12 A Yes, sir.

13 Q How long did you sleep?

14 A I come back from the restroom. I laid down and slept
15 till about 7:30 that morning.

16 Q So, you don't know if the television was really on all
17 night, do you?

18 A Well, I mean Liz explained when I got up it was still
19 on.

20 Q Somebody else told you?

21 A Well, Liz said they keep the TV on all night every
22 night, you know. So---

23 Q Yes, sir.

24 A ---it was on when we got there. It was on when I got
25 up in the middle of the night and it was still on the next

Jeff Perry - Cross-examination
by Solicitor Gray

1 morning.

2 Q Yes, sir, I'm just asking what, what you know.

3 A Right.

4 Q Do you know for sure the television was on all night?

5 A No, not for sure.

6 Q All right.

7 A It was on when I woke up.

8 Q All right. The bathroom that you went in, whose room
9 was that?

10 A That was in Brittany's room.

11 Q Does that bathroom have a shower in it?

12 A I don't even recall.

13 Q Do they have a bathtub in it?

14 A I don't even recall. I went in to use the toilet and
15 that was it. I mean I didn't look around to examine it or
16 nothing.

17 Q Well, you gave Mr. Hall a pretty good description of
18 this mobile home where---

19 A Yes, sir.

20 Q ---everybody slept and what was a add-on, what was a
21 bedroom, what was a bathroom.

22 You don't know if there was a shower right next to you
23 when you---

24 A No, sir, I wasn't examining the place that well when I
25 went to the bathroom. I was not.

Jeff Perry - Cross-examination
by Solicitor Gray

- 1 Q You weren't examining it that well?
- 2 A No, sir, I just went in to use the rest room and come
- 3 out.
- 4 Q But you knew where Brittany was sleeping?
- 5 A Correct.
- 6 Q You knew she had a baby?
- 7 A Right.
- 8 Q You knew the baby was sick?
- 9 A Right.
- 10 Q But you don't know if there was a shower in the
- 11 bathroom?
- 12 A No, sir.
- 13 Q All right. Did you turn the light on?
- 14 A Yes, sir.
- 15 Q Okay. Was Brittany asleep all night long or awake all
- 16 night long?
- 17 A I assume she was awake all night.
- 18 Q You assumed.
- 19 A Yes, sir, I mean she tells me she was awake all night
- 20 you know.
- 21 Q Oh, she told you that?
- 22 A She was awake when I went in there.
- 23 Q She told you that?
- 24 A Well, she was awake when I went in there.
- 25 Q Okay. So, she didn't---

Jeff Perry - Cross-examination
by Solicitor Gray

- 1 A she had a sick child she was up with all night.
- 2 Q Yes, sir.
- 3 Did she tell you she was awake all night long?
- 4 A Yes, sir.
- 5 Q She did?
- 6 A Uh-huh. (Affirmative).
- 7 Q why would you ask her that question?
- 8 A I didn't ask her that question. After all this came
- 9 out she said that you, she -- you know, she explained to me
- 10 and everyone else that she was awake all night long, and she
- 11 seen me and knows better. You know, this is just unreal.
- 12 Q Okay. But you went to sleep for sometime, and when you
- 13 woke up Minor was on the couch?
- 14 A She was.
- 15 Q How far away from you on the couch was she?
- 16 A I was laying at this end of the couch. She was sitting
- 17 at the other end toward the kitchen.
- 18 Q All right. Did she ever go into her father's old room?
- 19 A I never seen her go.
- 20 Q Did you see her get up at all?
- 21 A No, sir.
- 22 Q But she was on the floor when you got there?
- 23 A Yes, sir.
- 24 Q But before you woke up, again, you say she was on the
- 25 couch with you?

Jeff Perry - Cross-examination
by Solicitor Gray

1 A When I woke up the morning, in the morning she was on
2 the couch. When I woke up in the middle of the night they
3 were still in the floor.

4 Q All right. Had you been drinking that night?

5 A I probably drank about four years.

6 Q About what time?

7 A It was probably around eight or nine o'clock before Liz
8 and Bryan came and got me.

9 Q What kind of beer?

10 A Bud Lite's what I drink.

11 Q All right. This is in 2007?

12 A Uh-huh. (Affirmative).

13 Q And I'm assuming that right after Christmas, before New
14 Years?

15 A Uh-huh. (Affirmative).

16 Q And you remember specifically that you had four Bud
17 Lites?

18 A Well, around four or five maybe. I mean I didn't drink
19 many at all.

20 Q All right. Now, you say you were living in Pacolet at
21 the time?

22 A I was.

23 Q And where was Bryan living?

24 A I thought it was Greer, but they say Inman. I thought
25 it was Greer.

Jeff Perry - Cross-examination
by Solicitor Gray

- 1 Q Did you fall asleep on the way from your house to---
- 2 A No, sir.
- 3 Q ---their house?
- 4 A I wasn't paying a bit of attention to where we were
- 5 going.
- 6 Q You weren't paying a bit of attention to where you were
- 7 going?
- 8 A No, sir.
- 9 Q How long had you known Bryan?
- 10 A I've known Bryan for 20 something years.
- 11 Q How long have you known Liz?
- 12 A All my life.
- 13 Q And this is the first time you been to their house?
- 14 A It was.
- 15 Q And you weren't paying attention at all---
- 16 A No, sir.
- 17 Q ---where you were going?
- 18 A They haven't lived there maybe a month or so prior to
- 19 this.
- 20 Q And you were gonna do them a favor by cleaning the yard
- 21 for them?
- 22 A That's correct.
- 23 Q Uh-huh. (Affirmative).
- 24 when you first got there, did you look around the yard
- 25 and see what had to be done?

Jeff Perry - Cross-examination
by Solicitor Gray

1 A No, sir, it was dark.

2 Q Okay. When did you see what needed to be done around
3 the yard?

4 A The next morning when we all got together and went
5 outside.

6 Q All right. And you say you had some kind of
7 landscaping or tree service business or something like that?

8 A Yes, sir, I was cutting trees at the time.

9 Q So, you were gonna do, do this for free?

10 A Right.

11 Q Not for beers or anything like that?

12 A No, sir.

13 Q Are these four beers you had---

14 A Family friends and I was trying to do them a favor.

15 Q Friends who you've known for 20 years who never invited
16 you---

17 A Right.

18 Q ---over to their house?

19 A Well, I been to their house several times, but not
20 there.

21 Q Not there?

22 A No, sir.

23 Q Okay.

24 A Like I said, they've not been there maybe a month or
25 so.

Jeff Perry - Cross-examination
by Solicitor Gray

1 Q well, that's, that's my question.

2 You been there one time?

3 A Yes, sir.

4 Q How do you have such a detailed recollection of this
5 house?

6 A I mean as you go in you can see it I mean.

7 Q This happened December 29th or 30th, 2007. You'd
8 been there one time.

9 A Yes, sir.

10 Q And you know what all the beds were, where all the
11 bedrooms were, how the couch was situated?

12 A We came in and out of the trailer several times getting
13 something to drink the next morning. You know, we were in
14 the yard. We came in and out and got, you know, got us
15 something to drink and all.

16 Q what did you get to drunk?

17 A Beg your pardon?

18 Q what did you get to drink?

19 A Oh, I don't remember what it was. We went in, you
20 know, we all got us something to drink.

21 Q All right. Several times in and out of the yard?

22 A A couple times, yes, sir.

23 Q That was the next day?

24 A Yes, sir.

25 Q Okay. You worked up a sweat that day?

Jeff Perry - Cross-examination
by Solicitor Gray

- 1 A Pretty much, got tired, thirsty.
- 2 Q On December 29th or 30th?
- 3 A Yes, sir.
- 4 Q Okay. You said you didn't know which one was [Minor] and
5 which was Bryanne?
- 6 A Uh-huh. (Affirmative).
- 7 Q Did you come to find out later, later which was which?
- 8 A Yes, I did.
- 9 Q Do you remember which one was on the couch that next
10 morning?
- 11 A No, sir, I'm just assuming it was [Minor].
- 12 Q But you still -- you're saying you still don't know?
- 13 A No, sir, I didn't know the kids apart. No, sir, I
14 didn't know. I never met them before.
- 15 Q Is there any reason that you know of that -- well, do
16 you know Mr. and Mrs. Gregory?
- 17 A No, sir.
- 18 Q You ever met them before?
- 19 A No, sir.
- 20 Q You never met [Minor] before?
- 21 A No, sir.
- 22 Q Ever talked to [Minor] since this incident?
- 23 A No, sir.
- 24 Q And you'd been drinking that night, and you, you don't
25 know really what you did or didn't do, do you?

Jeff Perry - Cross-examination
by Solicitor Gray

1 A I know what I didn't do.

2 Q Okay. What time did you get up to use the bathroom?

3 A It was around -- maybe around two o'clock or so I
4 suppose.

5 Q How do you know?

6 A Well, I hadn't been laying down just a couple of hours.

7 Q All right. Did you look at a clock?

8 A No, sir.

9 Q So, you don't know what time that you---

10 A No, sir.

11 Q ---go up and---

12 A No, sir, but I wasn't down but just a couple of hours
13 before I got back up.

14 Q Well, how do you know you got up at 7:30?

15 A I mean it was daylight outside. It was just getting
16 daylight. So, I'm assuming it was around 7:30 or so.

17 Q You assume quite a lot, don't you?

18 A Uh-huh. (Affirmative).

19 SOLICITOR GRAY: No further questions.

20 THE COURT: Redirect.

21 MR. HALL: Just a couple, Your Honor.

22 REDIRECT EXAMINATION

23 BY MR. HALL:

24 Q You had had four or five beers earlier that evening?

25 A Yes, sir.

Jeff Perry - Redirect examination
by Mr. Hall

1 Q Did, did you feel like you could drive a car when they
2 came and picked you up?

3 A Yes, sir.

4 Q Do you feel like you were drunk?

5 A No, sir, not at all.

6 Q Now, the only reason -- let me ask you.

7 Do you know for certain what date this was?

8 A No, sir, not honestly.

9 Q All right. But the warrant and the indictments says
10 29th, 30th, December?

11 A Yes, sir, it does. So, I'm assuming it was that day.

12 Q Do you -- but you, you don't have anything written down
13 on this date---

14 A No, sir.

15 Q ---I went to Liz's house---

16 A No, sir.

17 Q ---and helped them clean-up or anything?

18 A No, sir.

19 Q It's just based on the, the warrant that you got over a
20 year later?

21 A Yes, sir.

22 Q All right. Thank you. No further questions.

23 SOLICITOR GRAY: Nothing further, Your Honor.

24 THE COURT: All right. You can step down and have a
25 seat back down at the table.

Elizabeth Blackwell - Direct examination
by Mr. Hall

1 MR. HALL: Defense calls Elizabeth Blackwell.

2 ELIZABETH BLACKWELL, being first duly
3 sworn, testified as follows:

4 DIRECT EXAMINATION

5 BY MR. HALL:

6 Q All right. Mrs. Blackwell, if you will, tell us your
7 full name and where you live.

8 A Elizabeth Ann Powell Blackwell. I live at [REDACTED]
9 [REDACTED], Spartanburg, South Carolina.

10 Q Now, Jefferson Perry's your cousin, right?

11 A Yes, sir.

12 Q And you understand what he's charged with?

13 A Yes, sir.

14 Q would you agree that it's, that that's a horrible
15 thing?

16 A Very.

17 Q Do you remember anytime that Jefferson Perry was at
18 your house at the same time [REDACTED] was at your
19 house?

20 A Yes, sir.

21 Q All right. Is that the time that you went and got him?

22 A Yes, sir.

23 Q All right. Tell the jury what happened at that time,
24 that your, that you went to get him.

25 A We left about nine or 9:30.

Elizabeth Blackwell - Direct examination
by Mr. Hall

1 Q First them, them, tell them who all left, who went to
2 get him.

3 A Me, Bryan Harrelson, Paul Fowler, we went and picked up
4 Jeff and Brad from my sister's house in Spartanburg.

5 Q Okay.

6 A We got back about eleven o'clock.

7 Q Okay. And what did y'all do when you got back?

8 A We sat around for a few minutes, let everybody know
9 where they were gonna sleep at, and then me and Bryan goes
10 off to our room.

11 Q Okay. Was there any alcohol consumed when y'all got
12 back?

13 A No, sir.

14 Q All right. Who made the sleeping assignments?

15 A Bryan.

16 Q Bryan.

17 All right. Who, the best you can remember, who was
18 staying at the house -- we know you came back with Bryan and
19 Jeff and Brad?

20 A Bradley.

21 Q Who else was there when y'all got back?

22 A Jimmy, Niki,  Bryan, Brittany, and the baby.

23 Q All right. Now, do you -- who is Brittany to you?

24 A My daughter.

25 Q All right. So, her baby is your --?

Elizabeth Blackwell - Direct examination
by Mr. Hall

- 1 A Grandson.
- 2 Q Grandson.
- 3 Do you recall how old that grandson was when this night
- 4 occurred?
- 5 weeks old, days old, months old?
- 6 A He was born [REDACTED] [REDACTED].
- 7 Q Okay. What year?
- 8 A 2008.
- 9 Q All right. Where were -- where was [REDACTED] when y'all
- 10 got back?
- 11 A [REDACTED] and Bryanne were in the floor---
- 12 Q All right.
- 13 A ---watching TV.
- 14 Q It's hard to understand.
- 15 Bryanne---
- 16 A Bryanne.
- 17 Q ---is---
- 18 A Bryan's daughter.
- 19 Q Bryan's daughter.
- 20 How do you spell Bryanne?
- 21 Do you know?
- 22 A B-R-Y-A-N-N-E.
- 23 Q Okay. All right. And those two girls were where?
- 24 A Laying in front of the TV watching TV.
- 25 Q All right. Were they go through -- like this is the

Elizabeth Blackwell - Direct examination
by Mr. Hall

1 door there, right?

2 There's a sofa here, a table---

3 A (Witness nods affirmatively.)

4 Q ---and the girls were beyond the table towards the TV?

5 A They were facing the TV.

6 Q So, their heads were back towards the table?

7 A Yep.

8 Q Laid out across the room watching the TV?

9 A Uh-huh. (Affirmative).

10 Q Okay. All right. When you got back, was Brittany
11 asleep?

12 A No.

13 Q All right. Where was Brittany?

14 A She was sitting on the bed with the baby cause he was
15 sick.

16 Q Where's the -- what bedroom was she in?

17 A Right there coming in the front door on the right.

18 Q Come in, there's a door right there, that's where she
19 was?

20 A Yes.

21 Q All right. Now, you, you don't still live at that
22 house, do you?

23 A No, we moved.

24 Q How long did you live there?

25 A We moved out in 2010. We got our own place.

Elizabeth Blackwell - Direct examination
by Mr. Hall

1 Q All right. And whose house -- whose mobile home was
2 that?

3 A It was Veda's, Bryan's mother, and she give it to
4 Bryan.

5 Q Okay. Did y'all sell it or---

6 A No, somebody else is living in it.

7 Q All right. So, you, you lived there for at least a
8 couple years?

9 A Oh, yeah.

10 Q All right. How long had y'all been here before you had
11 to clean up the yard when Jeff was there?

12 A I started staying up there in October of 2007.

13 Q Okay. And to your recollection, was this the first
14 time Jefferson had before there?

15 A Yeah.

16 Q All right. And Bryanne, I'm trying to say it
17 differently cause I have a tendency to slur things
18 sometimes, did she always live with Bryan and you?

19 A Not always.

20 Q Okay.

21 A She'd go to her grandmothers on the weekends.

22 Q Okay. Do you recall if clean-up was on the weekend or
23 not?

24 A I can't remember.

25 Q All right. And when did you learn there was some issue

Elizabeth Blackwell - Direct examination
by Mr. Hall

1 from this, this time?

2 A I -- Veda had called me and Bryan and was asking us
3 about it, and we told her there was no way possible.

4 Q But was that a week later, two weeks later, a month
5 later, a day later?

6 A A month later---

7 Q Okay.

8 A ---if not more.

9 Q All right. Now, we got girls lying there like people
10 do, facing the TV, go to sleep, where was Jefferson?

11 where did he---

12 A As you come in the front door at the edge of the couch
13 they was a table right there. Jeff was laying right down,
14 right down beside that right there.

15 Q So, his legs are sticking back---

16 A Sticking back towards---

17 Q ---the room too?

18 A ---where me and Bryan slept at.

19 Q Okay. Did you see him lie down or---

20 A Yeah, cause I took him his blanket and pillow.

21 Q Okay. Now -- in relation between where the girls were
22 and Jefferson, how -- were they close or further from us?

23 How -- what's the distance?

24 A Probably a little bit further than us.

25 Q A little further?

Elizabeth Blackwell - Direct examination
by Mr. Hall

- 1 A Uh-huh. (Affirmative).
2 They wasn't -- they was not that close.
3 Q Okay. And where -- I just ask you, you're a new
4 grandmother, was this your first grandchild?
5 A Yeah.
6 Q Okay.
7 A Well, with my daughter. Not with my son.
8 Q Okay. But your first grandchild.
9 How long had Brittany lived with you?
10 A Brittany moved in probably right at the first of
11 November --
12 Q Okay.
13 A -- of 2007.
14 Q And she was pregnant at the time?
15 A Uh-huh. (Affirmative).
16 Q And she was living with you when she had the baby?
17 A Uh-huh. (Affirmative).
18 Q All right. And she'd got out of the hospital and came
19 back?
20 A Uh-huh. (Affirmative).
21 Q Is that when she started---
22 THE COURT: Try, try to say yes or no rather than---
23 WITNESS: Oh, I'm sorry.
24 Yes, sir.
25 Q All right. Did -- when she moved in, did she always

Elizabeth Blackwell - Direct examination
by Mr. Hall

- 1 stay in that bedroom to the right?
- 2 A Yes, sir.
- 3 Q Let me ask, did you get up at all during the night?
- 4 A Yes, sir, I did, went to the bathroom.
- 5 Q All right. And in the bedroom you were in was there a
- 6 bathroom?
- 7 A No, sir.
- 8 Q where did you go to the bathroom?
- 9 A I had to step over Jefferson and go into Brittany's
- 10 room to go in the bathroom.
- 11 Q Okay. Now, which bedroom were you in?
- 12 we got the one Brittany's in.
- 13 A There's two additions built on the back.
- 14 Q Uh-huh. (Affirmative).
- 15 A I was in the first room. Jimmy and Niki was in the
- 16 second one.
- 17 Q Okay. Was there anybody in that---
- 18 A Bradley was.
- 19 Q Bradley was in that bedroom?
- 20 A In Veda's.
- 21 Q On the other side of the kitchen?
- 22 A Uh-huh. (Affirmative).
- 23 Q Now, did you look at the clock to see what time you got
- 24 up?
- 25 A No, sir.

Elizabeth Blackwell - Direct examination
by Mr. Hall

- 1 Q How many times did you get up during the night?
- 2 A I might of got up twice.
- 3 Q All right. Did you check on your daughter and
- 4 grandson?
- 5 A I spoke to them as I went through to the bathroom.
- 6 Q All right. In the two times or so you went through,
- 7 was Brittany awake?
- 8 A Yes, sir.
- 9 Q All right. When you got up -- what time did you get up
- 10 the next morning?
- 11 A It might of been around 9:00.
- 12 Q All right.
- 13 A Cause I had to give my son his medicine.
- 14 Q All right. This is Paul?
- 15 A Paul.
- 16 Q Where was Paul staying?
- 17 A Paul slept in my room.
- 18 Q Okay. And he had special needs?
- 19 A He has cerebral palsy.
- 20 Q All right. And I believe he passed away that same
- 21 year?
- 22 A Yes, sir, 2008.
- 23 Q All right. The times you were up, did you -- you said
- 24 you stepped over him?
- 25 A Yes, sir.

Elizabeth Blackwell - Direct examination
by Mr. Hall

- 1 Q was he in the same position he was in?
2 A Yes, sir.
3 Q was he covered up completely or---
4 A well, one time he was. The other time no, he wasn't.
5 Q He said he slept with his hat on.
6 Did you see his hat?
7 A Yes, sir, he keeps everything in his pockets.
8 Q So, there's nothing on the floor, table?
9 A No, sir.
10 Q Keys or money or wallet?
11 A No, sir.
12 Q The times you got up, did you have to go around and
13 step over the girls too?
14 A No, sir, I never went through the kitchen.
15 Q Okay. So, if I'm standing at the front door again,
16 you're back there, Jeff's here, and the girls are over
17 there?
18 A Yes, sir.
19 Q So, you just came through, and where he was, I guess at
20 the front door, you had to step over him?
21 A Yes.
22 Q You did?
23 Okay. Now, Bryanne, does she ever live with her mother
24 or anybody else for extended periods of time?
25 A Yeah, some she did.

Elizabeth Blackwell - Direct examination
by Mr. Hall

- 1 Q Okay. How old is she?
- 2 A Now, 14.
- 3 Q And at the time she'd be about ten?
- 4 A Uh-huh. (Affirmative).
- 5 Yes, sir.
- 6 Q Have -- how many years have you been around Bryanne,
- 7 Bryanne?
- 8 Excuse me.
- 9 A Ever since she was seven.
- 10 Q Seven.
- 11 So, at this point you'd been around her two or three
- 12 years at least---
- 13 A Uh-huh. (Affirmative).
- 14 Q ---from the events that's alleged here?
- 15 Did -- is her mother alive?
- 16 A Yes, sir.
- 17 Q Okay. But when she's with you, do you assume the
- 18 mother role?
- 19 A Yes, sir.
- 20 Q Do you ever have to discipline her?
- 21 A I have.
- 22 Q Have you ever comforted her?
- 23 A Yes, sir.
- 24 Q She's like most kids, nightmares, scared of this, seen
- 25 a movie, those type of things?

Elizabeth Blackwell - Direct examination
by Mr. Hall

- 1 A Yes, sir.
- 2 Q Actually had she ever slept in the bed with you?
- 3 A Oh, yes, sir.
- 4 Q Many times?
- 5 A Many many times.
- 6 Q All right. What kind of sleeper is she?
- 7 A Oh, she's a kicker.
- 8 Q All right. Back when she was ten years old, was that
- 9 the way she was?
- 10 A Yes, sir.
- 11 Q And you can tell this jury that around those times you
- 12 had her in bed with you and Bryan in bed with you too?
- 13 A Yes, sir.
- 14 Q King size bed?
- 15 A Queen.
- 16 Q Queen.
- 17 But she moved, moves and kicks?
- 18 A Really bad.
- 19 Q All right. Now -- okay. Vita, is it V-I-T-A or
- 20 V-I-D-A?
- 21 A V-E-D-A.
- 22 Q V-E-E-A. Veea. Okay.
- 23 A V-E-D-A.
- 24 Q V-E-D-A.
- 25 Was -- she had moved out?

Elizabeth Blackwell - Direct examination
by Mr. Hall

1 A She had been moved out --

2 Q Okay.

3 A -- a long time.

4 Q And who was she living with?

5 A Her boyfriend, Ted.

6 Q Okay. So, it sounds like y'all kind of just took over
7 the place and cleaned it up --

8 A Uh-huh. (Affirmative).

9 We sure did.

10 Q -- lived there for a few years and then moved?

11 All right. Beg the Court's indulgence.

12 (Pause.)

13 Q All right. Please answer any questions the solicitor
14 may have.

15 CROSS-EXAMINATION

16 BY SOLICITOR GRAY:

17 Q Ma'am, where's Bryan?

18 A Where's Bryan?

19 Q Yes, ma'am.

20 A At work.

21 Q Where is that?

22 A He hauls cars.

23 Q So, where is he right now?

24 A At work. Probably in North Carolina.

25 Q Probably North Carolina.

Elizabeth Blackwell - Cross-examination
by Solicitor Gray

- 1 You don't really know where he is?
- 2 A He drives from North Carolina to Gaffney delivering
- 3 cars.
- 4 Q Okay. That night, did Bryanne come into your room?
- 5 A who?
- 6 Q Bryanne.
- 7 A Bryan?
- 8 Q Not Bryan. The little girl. Not Minor The other
- 9 little girl.
- 10 A That night?
- 11 Q Yes.
- 12 A (Witness nods negatively.)
- 13 Q December 29th or 30th?
- 14 A She came to my room?
- 15 Q I'm asking.
- 16 A No.
- 17 Q She didn't?
- 18 A No.
- 19 Q So, why do you care about her kicking habits?
- 20 A (Witness shrugs shoulders.)
- 21 Q All right. Did Minor come into your room?
- 22 A No.
- 23 Q You sure about that?
- 24 A I'm positive.
- 25 Q All right. Now, as far as the situation with the

Elizabeth Blackwell - Cross-examination
by Solicitor Gray

- 1 defendant, he was sleeping on the couch, right, Mr. Perry?
- 2 A No, was in the floor.
- 3 Q He was in the floor?
- 4 A (Witness nods affirmatively.)
- 5 Q That's why you had to step over him, is that correct?
- 6 A Uh-huh. (Affirmative).
- 7 Q So, he wasn't on the couch the entire night?
- 8 He was on the floor the entire night?
- 9 A I never knew he was on the couch, sir.
- 10 Q Okay.
- 11 A He was in the floor the whole time.
- 12 Q The floor the whole time and you say you stepped over
- 13 him, went into your daughter's bedroom on December 29th or
- 14 30th, and talked to her and the baby?
- 15 A Yes, sir.
- 16 Q And the baby was just a few days old?
- 17 A Yes, sir.
- 18 Q You said the baby was born [REDACTED] [REDACTED]?
- 19 A Yes, sir.
- 20 Q That would be about four days after this happened.
- 21 A Okay.
- 22 SOLICITOR GRAY: Nothing further, Your Honor.
- 23 THE COURT: Redirect.
- 24 MR. HALL: Just briefly.
- 25 REDIRECT EXAMINATION

Elizabeth Blackwell - Redirect examination
by Mr. Hall

1 BY MR. HALL:

2 Q Did you write down on any calendar Jefferson came over
3 on this date and helped us clean up?

4 A No, sir, cause I didn't think it would be a big deal.

5 Q When he came and helped you clean up, you had a
6 grandson by your daughter, Brittany?

7 A Yes, sir.

8 Q A few days old?

9 A Yes, sir.

10 Q And that baby was born when?

11 A  .

12 Q What year?

13 A 2008.

14 Q Thank you.

15 THE COURT: Mr. Gray.

16 SOLICITOR GRAY: Nothing further, Your Honor.

17 THE COURT: You can step down and have a seat. Thank
18 you. We appreciate your time or you can be excused.

19 Call your next witness.

20 MR. HALL: Brittany Fowler.

21 BRITTANY FOWLER, being first duly
22 sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. HALL:

25 Q All right. Brittany, if you'll tell the jury your name

Brittany Fowler - Direct examination
by Mr. Hall

1 and where you live.

2 A Brittany Nicole Fowler. [REDACTED], Chesnee,
3 South Carolina.

4 Q All right. And Liz or Elizabeth that just testified is
5 who to you?

6 A My mother.

7 Q All right. And we've heard that you have at least one
8 child.

9 Do you have any children?

10 A I have two other ones.

11 Q Okay. Give us your ages of your children, names and
12 ages.

13 A My first son is four, my little girl's one, and my last
14 son is a month and some weeks.

15 Q All right. And your first son, what's his name?

16 A Bryson Blackwell.

17 Q And when was Bryson born?

18 A [REDACTED] [REDACTED] [REDACTED].

19 Q And at that time where were you living?

20 A With my mother at [REDACTED].

21 Q All right. And that was also with Bryan?

22 A Yes.

23 Q And that's the trailer we been hearing about?

24 A Yes.

25 Q Have the edition on the back?

Brittany Fowler - Direct examination
by Mr. Hall

1 A Yes, sir.

2 Q where were you living in that home?

3 A when you walk in, the first bedroom to the right.

4 Q Okay. Now, I've, I've made reference like this is the
5 front door, but the front door is not this wide, is it?

6 A No, sir.

7 Q It's like -- it's a regular trailer door, isn't it?

8 A Uh-huh. (Affirmative).

9 Q Kind of narrow.

10 And your bedroom is immediately to the right?

11 A Yes.

12 Q The, the doors were, I assume, had to swing different
13 ways so they didn't hit?

14 A Yes.

15 Q Okay. And how long had you been living with your
16 mother and Bryan?

17 A I started staying there when I was about seven and a
18 half to eight months pregnant.

19 Q Okay. Now, did I ask you to -- if you had any kind of
20 birth certificate or record of your son's birth?

21 A Yes.

22 Q All right. And did you bring that today?

23 A I did.

24 MR. HALL: All right. May I approach the witness, Your
25 Honor?

Brittany Fowler - Direct examination
by Mr. Hall

1 THE COURT: Want to sub---

2 MR. HALL: Your Honor, I think we move without
3 objection. I'm gonna submit a photocopy of the D.H.E.C.
4 record. That way she can keep them.

5 SOLICITOR GRAY: There is no objection, Your Honor.

6 THE COURT: All right. In without objection.

7 (WHEREUPON, the birth certificate was marked as
8 Defendant's Exhibit No. 1 and received into evidence at this
9 time.)

10 Q Now, Jefferson Lee Perry is your cousin?

11 A Yes, sir.

12 Q I believe your mother's first cousin?

13 A Yes, sir.

14 Q Okay. While you were staying there, did he come over
15 one night to help clean up the yard?

16 A Yes, sir.

17 Q Did your mother go get him?

18 A Yes, sir, her and Bryan Harrelson.

19 Q All right. Were you there when they left?

20 A Yes, sir.

21 Q Were you there---

22 A I stayed---

23 Q Were you there when they got back?

24 A Yes, sir.

25 Q All right. Had you already had your baby?

Brittany Fowler - Direct examination
by Mr. Hall

1 A Yes, sir.

2 Q And when you had your baby, how long did you stay in
3 the hospital?

4 A A day.

5 Q A day.

6 Do you know how long you'd been out of the hospital
7 when this, when he came over?

8 A I'm not positive.

9 Q All right. There's been some testimony that your son
10 wasn't feeling well, is that correct?

11 A Yes, sir, he had colic.

12 Q He had colic.

13 Now, were you sleeping that night or what were you
14 doing?

15 A I didn't sleep at all that night.

16 Q All right. Was your son fussing all night?

17 A Yes, sir.

18 Q And, now, here I am at the door, your bedroom door is
19 here, where is your bed?

20 Is it against that wall, this wall, or that wall?

21 Where was it?

22 A It's up against the, that wall and then I could see
23 straight out---

24 Q So, the---

25 A ---into the living room.

Brittany Fowler - Direct examination
by Mr. Hall

- 1 Q ---head of the bed is against the front of the house?
- 2 A Yes.
- 3 Q All right. And you -- where -- was the baby in bed
- 4 with you?
- 5 A Yes, sir, I was holding him on the side of the bed.
- 6 Q All right. Did he cry less when you held him?
- 7 A No.
- 8 Q All right. From where you were could you see Jefferson
- 9 Perry?
- 10 A Yes, sir, I could see just about the whole living room
- 11 or at least half of it.
- 12 Q Okay. Let me ask you, did you go to the bathroom
- 13 during the night?
- 14 A I did one time.
- 15 Q All right. Do you recall what time that was?
- 16 A No, sir.
- 17 Q All right. Did you, did you have a crib or a basinet
- 18 that you put Bryson in ever?
- 19 A I had a crib.
- 20 Q All right. Where was the crib?
- 21 A It was in the bedroom with me.
- 22 Q All right.
- 23 A It was on the---
- 24 Q Your bed's on this wall.
- 25 where was the crib?

Brittany Fowler - Direct examination
by Mr. Hall

1 A It was on the other side of the wall up against it.

2 Q Against the side?

3 A The side of the trailer.

4 Q But next to the bed?

5 A Yes.

6 Q All right. So, if you put him in, did you get off on
7 this side, walk around, or get off on that side of the bed?

8 A I got off on this side and walked around.

9 Q Okay. You're not telling this jury that you watched
10 him all night, did you?

11 A No, I didn't watch him all night.

12 Q All right. But did you ever look out that door and he
13 wasn't lying there?

14 A No, sir, he was there.

15 THE COURT: When you say he---

16 MR. HALL: I'm saying Jefferson Perry.

17 A Every time I looked out he was still laying in the same
18 spot.

19 Q All right. And let me ask you.

20 When your mother got back with Bryan, including them,
21 who all was in that house?

22 A Before they got there?

23 Q No, when they got back---

24 A It was me, my son, Elizabeth, Bryan Harrelson,

25 Jefferson Perry, my cousin, Brad, Bryanne, Minor Jimmy, and

Brittany Fowler - Direct examination
by Mr. Hall

1 Niki.

2 Q All right. Do you know where -- when they got back, do
3 you know where Jimmy and Niki were?

4 A They went straight to the bedroom.

5 Q So, they were back in the bed.

6 That's one of the bedrooms on the back?

7 A Yes.

8 Q Were -- do you know where Minor and I'm gonna say
9 Bryanne, so it -- do you know where they were?

10 A Yes, they were laying in the floor watching TV towards
11 the kitchen. They was near the kitchen.

12 Q All right. From where you were on the bed --

13 A Uh-huh. (Affirmative).

14 Q -- could you see them too?

15 A Yes, sir.

16 Q All right. All right. Did you -- were you still awake
17 when Jefferson got up?

18 A Yes, sir.

19 Q All right. Did he ever get up during the night?

20 A He got up one time to use the bathroom.

21 Q All right. Let me ask you, did Bryson cry all night or
22 did he just not sleep?

23 A No, he cried all night.

24 Q All right. Sorry.

25 And -- now, when you saw -- you said you saw Jefferson

Brittany Fowler - Direct examination
by Mr. Hall

1 get up?

2 A Yes, sir.

3 Q All right. what did he do when he got up?

4 A He come straight to the bathroom --

5 Q All right.

6 A -- into my room -- there were two bathrooms, but it was
7 quicker just to come to mine because the other one was at
8 the other end of the trailer.

9 Q Okay. The bedrooms in the back don't have a bathroom?

10 A It had one in-between the bathroom and the hallway.

11 Q Okay. He got up.

12 Do you remember what time that was?

13 A I'm not sure.

14 Q Okay. Was it daylight yet?

15 A No, sir.

16 Q All right. He got up in the morning and went to the
17 bathroom.

18 Did you see what he did after that?

19 A He went and laid back down.

20 Q Okay. But when he finally got up and didn't lie back
21 down, that's after -- you're talking when he got up some
22 time in the middle of the night and went to the bathroom?

23 A Yes, sir.

24 Q Okay. But I'm talking about when he got up in the
25 morning.

Brittany Fowler - Direct examination
by Mr. Hall

- 1 A when he got up he went straight to the kitchen and
2 fixed breakfast.
- 3 Q Was it daylight when he got up and went to the kitchen?
- 4 A Yes, sir.
- 5 Q All right. Did he presumably went by the girls to go
6 into the kitchen?
- 7 A Yes, sir.
- 8 Q Did he stop at the girls?
- 9 A No, sir.
- 10 Q Now, you'd been up all night with this baby?
- 11 A Yes, sir.
- 12 Q But you're sure what you saw?
- 13 A Yes, sir.
- 14 Q Did you ever see **Minor** get up and get on the sofa?
- 15 A Yes, sir.
- 16 Q When did she do that?
- 17 A It was some time during the middle of the night. She
18 got on the couch and started watching TV.
- 19 Q And did you speak to her?
- 20 A No, sir.
- 21 Q All right. Did you -- the, the time you lived there,
22 did **Minor** come there much?
- 23 A No, sir, not when I was there.
- 24 Q But she had been there for a week or so at this point,
25 is that true?

Brittany Fowler - Direct examination
by Mr. Hall

- 1 A I know she was there before Christmas.
- 2 Q okay. She was there before your baby was born?
- 3 A Yes, sir.
- 4 Q Did you talk with her?
- 5 A No, sir.
- 6 Q okay. You were due, weren't you?
- 7 A Yes, sir.
- 8 Q okay. But y'all saw each other that week or so she was
- 9 there, didn't you?
- 10 A Yes, sir.
- 11 Q All right. Now, presumably some of that you were at
- 12 the hospital for a day or so?
- 13 A Yes.
- 14 Q okay. So, you were aware of her?
- 15 A Yes, sir.
- 16 Q And as far as you knew she was aware of you?
- 17 A Yes, sir.
- 18 Q All right. And I assume she'd seen you bring your baby
- 19 in the house?
- 20 A Yes, sir.
- 21 Q And was there anybody in that house that didn't know
- 22 you had a baby in there?
- 23 A No, sir, everybody knew.
- 24 Q Bryson was crying a lot?
- 25 A Yeah, they should of heard him.

Brittany Fowler - Direct examination
by Mr. Hall

1 Q All right. Now, Jefferson Perry, did you ever see him
2 go anywhere near [Minor] or Bryanne?

3 A Just when he went to cook breakfast, but you have to
4 walk around them to get to the kitchen.

5 Q But you could see him clearly?

6 A No, sir.

7 Q Did he touch her?

8 A No, sir.

9 Q Was -- when he got up, was [Minor] on the sofa or
10 Bryanne?

11 A [Minor]

12 Q Okay.

13 A Bryanne was laying in the floor.

14 Q Okay. Did he go near the sofa when he got up other
15 than to stand up?

16 A No, sir, he walked around the table and went the other
17 way.

18 Q Okay. Ridiculous question, but did you -- was he still
19 wearing his hat?

20 A Yes, sir, he always sleeps in his hat.

21 Q Did he get up and put things back in his pockets?

22 A No, sir.

23 Q Okay. Did you see anything laying on the table or
24 floor of his---

25 A No, sir.

Brittany Fowler - Direct examination
by Mr. Hall

1 Q ---after he got up?

2 Now, your child, Bryson, was born [REDACTED] [REDACTED] [REDACTED]?

3 A Yes, sir.

4 Q You're certain it wasn't in December of 2007?

5 A No, sir, I'm positive it was [REDACTED] [REDACTED] [REDACTED].

6 Q Please answer any questions the State may have.

7 SOLICITOR GRAY: Thank you.

8 CROSS-EXAMINATION

9 BY SOLICITOR GRAY:

10 Q Ma'am, again, as Mr. Hall said, you did not watch
11 Mr. Perry like a hawk that night, correct

12 A No, sir, I didn't.

13 Q You had your own sick baby to deal with?

14 A Uh-huh. (Affirmative).

15 Q Did the baby have colic that night?

16 A Yes, sir.

17 Q So, I guess there's a lot of coughing?

18 A Yes.

19 Q A lot of crying?

20 A Very winey.

21 Q And someone on the baby's part too, right?

22 A Yes.

23 Q You stayed up all night, didn't you?

24 A Yes, sir.

25 Q Did you have one of those little nose things for your

Brittany Fowler - Cross-examination
by Solicitor Gray

- 1 baby?
- 2 A I did.
- 3 Q Uh-huh. (Affirmative).
- 4 So, for colicky baby, you didn't get up -- you only got
- 5 up one time?
- 6 A One time --
- 7 Q One time.
- 8 A -- besides fixing the bottles --
- 9 Q Okay.
- 10 A -- to feed them and that was walking through the
- 11 kitchen.
- 12 Q Not to get more wipes or tissues or anything for the
- 13 baby?
- 14 A No, sir, it was right there beside the bed where I was
- 15 sitting.
- 16 Q All right. So, again, you didn't watch Mr. Perry from
- 17 the time you got to the house till the time he left?
- 18 A No, sir.
- 19 Q All right. Did you know that December 29th was a
- 20 weekend, a Saturday?
- 21 A I didn't.
- 22 Q December 30th, 2007 is a Sunday.
- 23 Did you know that?
- 24 A No, sir.
- 25 Q Okay. Did you know what day your baby was born?

Brittany Fowler - Cross-examination
by Solicitor Gray

- 1 Not the date, but the day of the week.
- 2 A A Thursday.
- 3 Q My wife knows that too.
- 4 See, my question is did you see him on the floor all
- 5 night long?
- 6 A From when the time I was sitting on the side of the
- 7 bed, yes, I did.
- 8 Q Not on the couch?
- 9 A No, sir, he never got on the couch.
- 10 Q And you could see the television from your room --
- 11 A Yes, sir.
- 12 Q -- in the living room?
- 13 A Yes, sir.
- 14 Q Was there another television in the back bedroom with
- 15 Brad?
- 16 A No, sir.
- 17 Q There wasn't?
- 18 A No, sir.
- 19 Q But you could see clearly the one --
- 20 A In the living room.
- 21 Q -- in the living room?
- 22 A Yes, sir.
- 23 Q What channel was it on?
- 24 A It was on a Disney Channel.
- 25 Q A Disney Channel?

Brittany Fowler - Cross-examination
by Solicitor Gray

1 A Yes, sir.

2 Q All night long?

3 A Yes, sir.

4 Q And that's where that grown man slept with Disney in
5 one ear, and your -- well, your baby in the other ear all
6 night long without moving except once to go to the bathroom?

7 A Yes, sir.

8 Q All right.

9 A And I had a TV in my room.

10 Q Oh, thank you.

11 THE COURT: All right.

12 MR. HALL: Nothing further, Your Honor.

13 THE COURT: You can step down. Thank you. Appreciate
14 your time.

15 MR. HALL: Defense rests, Your Honor.

16 THE COURT: All right. State have anything in reply?

17 SOLICITOR GRAY: No, sir, Your Honor.

18 THE COURT: All right. Members of the jury panel,
19 you've now received all the evidence, and the next parts of
20 the trial would be the closing arguments and my charge on
21 the law, and that will take us well after 4:00, which means
22 we will not get the case in your hands till probably around
23 5:00. So, we're not gonna do that. We're gonna wait and
24 start in the morning at 9:30 to do arguments and charge, and
25 put the case in your hands. We're gonna start back at 9:30

1 and we should have it in your hands by around 11:00.

2 You're not yet in a position to make up your mind
3 because you haven't heard my charge and you haven't heard
4 the closing arguments of the attorneys. So, do not try yet
5 to make up your mind, do not discuss the case yet, and
6 remember what I told you about not letting anyone discuss
7 the case or receive any information about the case outside
8 the courtroom.

9 Have a pleasant evening and we'll see you at 9:30 in
10 the morning.

11 (WHEREUPON, the following takes place outside the
12 presence of the jury.)

13 THE COURT: Anything from the State?

14 SOLICITOR GRAY: No, sir, Your Honor.

15 THE COURT: Anything from the defense?

16 MR. HALL: Yes, sir, I just have my motions at this
17 point, Your Honor. Renew my motion for directed verdict on
18 the evidence is now -- all the evidence is in, and there's
19 some conflicting evidence, but we have the additional
20 testimony from both sides that the child was born on

21 [REDACTED], and the child was there that was born on

22 [REDACTED].

23 The indictment says, doesn't say on or about. It says
24 between the dates of December 29th, 2007, and
25 December 30th, 2007. We have a record that, the birth of

1 the child several days later. There has been testimony the
2 child was there in the CAC video at least and in my, the
3 defense witnesses, Your Honor.

4 It's physically an impossibility that it could of
5 happened then and this indictment alleges specific dates and
6 not on or about, and we would ask for a directed verdict of
7 not guilty based on that and all the other evidence that's
8 been presented, Your Honor.

9 THE COURT: All right. Mr. Gray.

10 SOLICITOR GRAY: Your Honor, I don't think there's any
11 contradictory evidence in this case except for whether or
12 not Mr. Gregory did it. Understandably this is not a time
13 specific incident, but the indictment does allege the
14 29th and, and the 30th of December 2007. The only
15 impossibility, physically or otherwise, is that there was a
16 baby in that home on December 29th or December 30th of
17 2007, Your Honor.

18 For that reason, we think there's now here for the jury
19 to make a decision on. They're the trier of fact. Let them
20 decide.

21 THE COURT: Well, anything else, Mr. Hall?

22 MR. HALL: Yes, sir, Your Honor. The CAC video, the --
23  in her interview, said Brittany who just had the
24 baby, had a baby. They -- Mr. Garrett repeated that. She
25 had some trouble remembering that today in her testimony,

1 but clearly said it there. We've got the birth record. We
2 got the mother, the grandmother all testifying that the
3 child---

4 THE COURT: Well, she said, she said if -- later in
5 January. Brittany, who just had a baby was there. That,
6 that event, the having the baby would of occurred before
7 then, and she doesn't -- that does not necessarily -- it's
8 up to the jury to decide whether the jury can determine she
9 was saying that Brittany had just had a baby. Not that she
10 had just had a baby at the time this occurred.

11 MR. HALL: All right, Your Honor. But I still ask for
12 a directed verdict based on all the evidence now viewed
13 by---

14 THE COURT: I deny the motion. I think there's a
15 credibility issue. That does put an interesting wrinkle,
16 but I don't know every word that, from the video, but I, I
17 deny the motion.

18 Any request to charge?

19 SOLICITOR GRAY: Yes, sir, Your Honor.

20 I just gave Mr. Hall my request for charge. I have two
21 requests, Your Honor. One is for time is not a material
22 element. That's pretty standard there in the charge.
23 That's fine -- I understand Mr. Hall's argument. Otherwise,
24 we clearly have request number two. We ask Section Code
25 16-3-657, the victim, testimony of the victim need not be

1 corroborated, Your Honor.

2 MR. HALL: Your honor, as far as the Code Section, you
3 know it says what it says, and they got the -- under the
4 other statute, they got the video in, and, quite frankly, I
5 don't, I don't think it really hurts us. Probably helps us.
6 So, I guess I don't have any objection to that.

7 I do, in this case, we have a specific date alleged.
8 They presented it several times. The child testified, if
9 I'm not mistaken, that it occurred the weekend before my
10 daddy's birthday. Daddy's birthday was December 31st.
11 Very specific and I think to do that is giving, carving out
12 another special consideration for a child victim that cuts
13 into the rights of my client.

14 So, Your Honor, I would oppose that.

15 THE COURT: I will charge it, but you know the other
16 interesting wrinkle about this particular issue is that the
17 mother, Mrs. Gregory, testified that she picked the child
18 up, Minor on New Years Day. So --.

19 MR. HALL: That -- picked Minor up, yes, sir.

20 THE COURT: Right. which is before Brittany had her
21 baby.

22 MR. HALL: This -- yes, sir, that's another thing that
23 I believe, on my side, is physically impossible for it to
24 have happened beforehand, yes, sir.

25 THE COURT: well, that's your argument to the jury.

1 MR. HALL: Yes, sir.

2 THE COURT: All right. Well, I'm gonna charge both of
3 them.

4 Do you have any request to charge?

5 MR. HALL: No, sir.

6 THE COURT: Any lesser included?

7 I don't think there are.

8 SOLICITOR GRAY: No, sir, I don't believe so.

9 MR. HALL: No, sir, they're not.

10 THE COURT: All right. Then we'll reconvene at 9:30 in
11 the morning.

12 SOLICITOR GRAY: Yes, sir, Your Honor.

13 THE COURT: If you need me I'll probably be here no
14 later than 9:15.

15 MR. HALL: Okay.

16 THE COURT: Not here. In the office.

17 MR. HALL: Thank you.

18 SOLICITOR GRAY: Thank you, Your Honor.

19

20 (WHEREUPON, Court was in recess for the evening.)

21

22

23

24

25

1 tell them. You represent him.

2 MR. HALL: I think generally 20, 25 minutes.

3 THE COURT: By the way, Mr. Perry, I'm sorry I called
4 you Petty the other day when talking to the jury. I served
5 in the Legislature with a guy named Joe Petty from here in
6 Spartanburg, and it just---

7 DEFENDANT: Yes, sir.

8 THE COURT: ---came in my mind and I apologize for
9 calling you Petty.

10 DEFENDANT: That's okay.

11 THE COURT: That was a mistake.

12 All right. Bring in the jury.

13 (WHEREUPON, the following takes place within the
14 presence of the jury.)

15 THE COURT: Good morning, members of the jury, and now
16 I'll turn it over to the attorneys for their closing
17 statements.

18 MR. HALL: Please the Court.

19 Solicitor.

20 Mr. Foreman, ladies and gentlemen of the jury, we're at
21 the point, point where each side gets to summarize things
22 that we feel are important for you to consider. When we
23 do -- before I do that I want to thank you for your service.
24 As I told you when we began this that your job is dependent
25 upon you being able to pay attention and listen to what's

1 presented because you have to make your decision on whether
2 or not the State has carried its burden of proof beyond a
3 reasonable doubt in this case for Mr. Perry based on what is
4 been presented.

5 Now, after our closing statements, our summations, the
6 judge is gonna tell you what the law is, and you'll
7 determine, among yourselves at the appropriate time, what
8 facts have been proven beyond a reasonable doubt, while
9 taking the law, and determine your verdict in the case.

10 As I said, the burden of proof is always on the State
11 to prove a defendant guilty beyond a reasonable doubt.
12 That's the way our system is set up. The fear in our
13 system, I would tell you, isn't that somebody would get away
14 with something, but the bigger fears is that somebody who
15 shouldn't be convicted gets convicted, and they get
16 convicted and they get punished. The burden is on the State
17 to prove the defendant guilty of each and every element of
18 the offense charged beyond a reasonable doubt.

19 we've had testimony from several people in this case, a
20 therapist, expert interviewer, [Minor] the child, step,
21 stepfather, mother, and then Jeff testified. He didn't have
22 to testify. Jeff also called witnesses to testify. He
23 doesn't have to do that, but he did.

24 Based on all that, what do we absolutely know?

25 [Minor] the child in this case, at some point after

1 visiting with her father, was acting differently. So, her
2 mother, stepfather, family was asking what's wrong, what's
3 wrong, and several weeks later or a few weeks later or a
4 week, whatever, depending on dates, she said Mr. Perry had
5 done something to her.

6 After the presentation of the State's case we also know
7 that that story that she told for what happened has changed.
8 We know that Jeff was there one time when [Minor] was there.
9 No, no conflict in that. Everybody knows that. Everybody
10 that testified testified about that.

11 We know that Liz or Elizabeth and Bryan, Bryan who
12 owned the house was there, Jimmy, [Minor] father, Niki,
13 stepmother, were there, we know Paul was there, we know Jeff
14 was there, and we know Jeff's buddy, as he was referred to
15 several times, was there whose name was Brad. We know Chris
16 Gregory, the stepfather, he told you -- I want to be
17 certain. So, I know how this system, thing works. I want
18 to be certain.

19 So, he says you have to be absolutely certain when you
20 do this. He put pressure on her about the story, and there
21 was a lot of things that we don't know that are in conflict.

22 I asked questions of Mr. Garrett about Bryanne, a child
23 named Bryanne, about the same age as [Minor] when he went
24 through, and you'll have the video, he went through the
25 video, [Minor] clearly says Bryan was there, and Mr. Garrett

1 turned that into Brittany or Bryanne.

2 Now, there's some people who would say a man whose name
3 is Bryan naming his daughter Bryanne is looking for
4 confusion in life, but it's a little unclear, but the expert
5 interviewer, forensic interviewer I think you looked at, he
6 messed it up. He doesn't remember Bryanne, but it's clearly
7 on the tape.

8 Bryanne was there.

9 Question on Bryanne.

10 where was Bryanne sleeping that night?

11 The lady of the house, if you will, Liz says she's on
12 the floor with **Minor** Brittany, who just had a baby and was
13 there and was up all night, and those of you who had
14 newborns and had colic, you know what that is. You're up
15 all night. She's looking at him all night. She's with that
16 child. She says Bryanne, Bryanne, excuse me, was on the
17 floor with **Minor**

18 was Brittany there?

19 February of 2008, the video, she was there. She just
20 had a baby. From this witness stand, **Minor** said she doesn't
21 even know Brittany. Never seen her before. But you'll have
22 it. You look at that, listen to it.

23 Now, Veda, the grandmother, the mother of Jimmy and
24 Bryan, from the witness stand **Minor** told you she was there.
25 It's her house. Again, listen to the video. Within several

1 weeks of the, a few weeks of the report of the events, and
2 I'll get to the date in a minute, she said use to be Nana's
3 house. Never said Nana was there. Use to be Nana's house.

4 She told you Nana was there, in here. Back in 2008,
5 four years ago, use to be named Nana's house.

6 Now, we get to the date of the event. They told you
7 on, between the dates of December 29th, 2007, and
8 December 30th, 2007, the events occurred. Brittany's
9 baby, which we say was there when Jeff was there for that
10 one night when [Minor] was there, had been born.

11 This has a date, date of birth, or birthday,
12 [redacted] [redacted] [redacted]. It couldn't of happened then. It had
13 to have happened after that. Whatever happened, the only
14 time Jeff Perry was there with [Minor] was after the
15 birth of that child. The date's completely wrong. There's
16 no indication that may of happened happened.

17 Jeff Perry got up here and testified. He told you
18 about what work he had been doing since he was a 18 year
19 old. He's been climbing trees, cutting trees, putting roofs
20 on houses, and I asked [Minor] do you remember describing
21 that hand that touched you as smooth?

22 Nope.

23 Again, we got the video. I think it's in the second
24 video on February the 14th. She clearly says it was
25 smooth.

1 A man who does tree work and a roof with a smooth hand?
2 I suggest to you that doesn't happen.

3 Now, even the way she says it happened has changed.
4 We've got two different ways it supposedly happened that
5 somebody touched her. The video's within two months. Let's
6 just say two months of the event. She said down my pants,
7 down my pants, on top, under my pants, over my panties, and
8 over my panties, down by pants. From here she told you she
9 had on -- she was sleeping in a pair of capris type pants,
10 brown capris type pants and the hand went up the leg.

11 Two totally different stories of the way it happened,
12 and I don't know how it would be to get a hand up a pants
13 leg to the private spot of somebody.

14 we also had Minor testifying that after things, this
15 happened that she got up and got on the sofa, and then Jeff
16 got up on the sofa and put his head in her lap and went to
17 sleep. She didn't tell the expert Mr. Garrett that. She
18 left that out, but she added it here.

19 Brittany said -- excuse me. Minor said that Bryanne
20 was sleeping in that bedroom to the right where Brittany
21 told you she was in there not sleeping with her child all
22 night.

23 where was she?

24 well, we got Minor saying she was in the bedroom, from
25 the witness stand, to the right. We have Brittany and Liz

1 and Jeff saying she was lying on the floor next to her, next
2 to [Minor] she told Mr. Garrett, [Minor] told Mr. Garrett that
3 the hand just went down and didn't move, but she also said
4 the hand went over, in, and under, which is moving. It's
5 not -- there's not consistency in her story even in the
6 beginning, but between that 2007 or 2008, depending on where
7 you want to put the date, this story changed.

8 It changed to start with. Different versions of it
9 within the original telling of Mr. Garrett, and then it
10 changes here. And I understand people remember things that
11 they forgot, but details like he got on the sofa to put his
12 head in my lap.

13 Now, as I said, Jeff didn't have to testify or call
14 witnesses, but he did. We had a new mother, a first child,
15 not long home from the hospital, came back to the house
16 where she was living with her mother, Elizabeth, Liz, and
17 Liz's boyfriend, Bryan. Back to her bedroom. You walk in
18 the door, I stood here, the door immediately to the right.

19 We know, back in, in 2008, when [Minor] talked to the
20 expert, she said Brittany was there. Brittany just had a
21 baby. Brittany told you she was there. She just had a
22 baby. Jeff said Brittany was there. She just had a baby.
23 Liz told you the same thing.

24 It's very consistent from this side. Brittany's in
25 that bedroom. Brittany's watched all night. Liz came

1 through. He didn't move. I did not see Jeff. He was still
2 in the same position he was in when I gave him his blanket
3 and he laid down and went to sleep.

4 A mother, grandmother, and a new mother, related
5 cousins to Mr. Perry, but parents, that he couldn't have
6 done it. Brittany told you I'm looking in there all night I
7 can see Jeff lying there. The only time he moved before he
8 got up was when he came in and went to the bathroom, spoke
9 to her, went to the bathroom, went back, laid back down, and
10 then at some point he got up, he walked around the sofa, the
11 table, Brittany, Bryanne, and started cooking breakfast.

12 The TV was on all night. So, there's some light in
13 that room. Disney Channel or whatever. It's casting light.
14 She can see. When Liz got up and went to the bathroom she
15 saw him there. The TV's on all night. At some point Minor
16 got up and got on the sofa early, started watching TV again,
17 and she was on the sofa.

18 Jeff was never on the sofa. The story the State has
19 put forward just doesn't make sense.

20 If a man sticks his hand, tries to stick his hand up
21 the pants leg of a girl, does it make sense that he then
22 gets on the sofa, puts his head in her lap and goes to
23 sleep?

24 He just done some horrible thing or tried to do some
25 horrible thing and go to sleep in their lap?

1 Mr. Perry was there to help a friend and his cousin
2 clean up the yard. They've taken over the house from Veda.
3 It has to be cleaned up. The county or government saying
4 you got to clean this yard up. He's there to help. He had
5 four or five beers that evening. He gets over there, stays
6 up for about a hour maybe, 45 minutes or an hour, no other
7 alcohol. They know what they're gonna do the next day.
8 It's time to go to sleep. He lies down, cover with a
9 blanket, and doesn't empty his pockets, and sleep -- and I
10 find it kind of strange, sleep with your hat on, but I guess
11 some people do it. Get attached to those things. Got up.
12 Did not have to put things back in his pocket, did not have
13 to put his hat on because it was already there. Brittany
14 testified to that. His said yeah, he was sleeping with his
15 hat on.

16 What it comes down to, Mr. Foreman, ladies and
17 gentlemen of the jury, have they presented credible evidence
18 to convict, convince you, beyond a reasonable doubt, that
19 Mr. Perry did anything to that child?

20 Liz Blackwell, Elizabeth Blackwell, who is basically in
21 a position of stepmother to Bryanne, says I've slept with
22 that child. She's what I would call a wrestler. My
23 mother-in-law use to say one of those children that wrestles
24 with angels at night. They move around, kick, their hand's
25 flying.

1 I don't know what happened. I know what story's been
2 told, stories have been told by [Minor] But what Liz told
3 you, what Brittany told you, what Jeff told you is Bryanne
4 was sleeping next to [Minor] Bryanne, the child who moves
5 and kicks and flails around at night. Maybe that's why
6 [Minor] got up, sat on the sofa or the couch. Then Jeff gets
7 up. The only stranger there, she basically knew everybody
8 else except Jeff and his buddy, Brad.

9 Later, you're acting different, what's wrong, and
10 sometimes -- and parents do that all the time, and sometimes
11 kids don't know what's wrong, why they're upset. But didn't
12 sleep well the other night. I don't know how the story came
13 out, but something disturbed her sleep. She says it was
14 Jeff. She didn't tell you Bryanne was sleeping next to her,
15 the wrestler.

16 Bryanne flails around, upsets her, she gets up, she's
17 groggy, TV's on. At some point Jeff gets up, that stranger.
18 She associates that uncomfortable feeling I guess with hey,
19 that stranger. Later on she gets his story. Her story
20 changed from when she first told it to here. She added
21 things. She changed details. Just not credible.

22 We've got two mothers, a grandmother, two women
23 testifying where the people were. Consistent. I don't know
24 what happened with the investigation of this, why the people
25 weren't talked to, why it took so long. But what we have

1 here is a change in story by the victim that the State is
2 asking you believe some version that it happened in December
3 or January or whatever in 2007, 2008, that the hand went
4 down the pants, didn't move, but did move, went up the
5 pants, didn't move, but did move. That, that's a laborer.

6 His hands are smooth?

7 when you consider all this, what is the State proven
8 beyond a reasonable doubt, and apply it to the law, they're
9 gonna come up short. There's not credible evidence that you
10 can determine the State has proved, beyond a reasonable
11 doubt, sufficient to convict Jeff Perry and live with that.

12 I ask you to consider all these things, the
13 inconsistencies, the changes in the stories, who was there,
14 who was not there, when did it happen, how it happened.
15 Consider those things, apply it to the law, do the right
16 thing, come back with a verdict of not guilty.

17 Thank you.

18 THE COURT: Mr. Gray.

19 SOLICITOR GRAY: Thank you, Your Honor.

20 Mr. Hall.

21 Your Honor.

22 Ladies and gentlemen, I, I don't see the discrepancies
23 here, ladies and gentlemen, with Minor testimony. This
24 is, sad to say it, it's stranger/danger situation. She had
25 never seen this man before in her life.

1 So, she told the arresting officers, told Mr. Garrett,
2 told you, December 29th or 30th of 2007, that man, who she
3 pointed out, touched her on her privates. She was nine
4 years old. He was over 30. That's lewd act plain and
5 simple.

6 He went under her pants, over her pants, I don't care.
7 A grown man touched her on her private. She's nine years
8 old.

9 You heard Mr. Hall talk about his relatives and getting
10 up here to testify. The judge's gonna tell you about
11 witnesses, how you can believe them, who you can believe,
12 one against the other, whatever.

13 What was their motivation in this situation?

14 What was his motivation to get up there and lie to you
15 about where he slept, what he did, how many times he got up.
16 He said I assume more than I don't know in his testimony. I
17 assume.

18 Well, he was there. He didn't have to assume anything.
19 But I assume. Not yes, not no, but, or I don't know. I
20 assume this, I assume that.

21 You heard his -- you heard Brittany get on the stand
22 and say her baby had colic. Well, we have the evidence here
23 the baby was born on the Thursday after the event.

24 Mr. Hall talks about Minor at nine years old saying,
25 you know Brittany, just had a baby. Well, in February, when

1 she was interviewed, Brittany had just had a baby in
2 January. She didn't say the baby was there in the house on
3 December 29th or December 30th. He never asked her that
4 question. Mr. Garrett never asked her that question. She
5 said truthfully, to Mr. Garrett, on, in February 2008, when
6 she was interviewed twice, yeah, Brittany who just had a
7 baby, which is the truth.

8 From nine years old to almost four years later she got
9 up here and told complete strangers what happened to her.

10 where's the motivation?

11 we know his motivation a lot, his family members'
12 motivation a lot.

13 what's her motivation?

14 Plain and simple. Oh, I know. She's gonna lose her
15 dad who didn't show up for this, her uncle who was there
16 that night, husband of Elizabeth, who didn't show up here,
17 her grandmother, her father's mother, who didn't show up
18 here. There's a possibility of her losing half her family.
19 But yet this little girl got up here and told you what
20 happened. That's her pay out, losing half her family.

21 I guess the man she doesn't even know. She didn't
22 accuse her father. She didn't accuse her stepfather or an
23 uncle or an aunt. Stranger. Danger.

24 This man tells you he had four to six beers that day at
25 six o'clock. He had almost a blueprint knowledge of that

1 place, but he couldn't remember if there's a shower in the
2 bathroom or not. What he had on, what he was wearing, and a
3 strange place that I keep my hat on, I got my shoes on. If
4 the place was so strange, yet the next morning he got up and
5 fixed breakfast for everybody. He went to a strange place,
6 into a strange kitchen, and made breakfast for everybody.

7 I don't care if his hat was on, his shoes were on. I
8 don't care that there was a colicky baby. That night or,
9 five seconds, ten seconds, one second, he put his hand on
10 that little girl's privates, and for four years she's had to
11 live with that.

12 She didn't get a gold star. She's not getting any
13 money. She doesn't get a cookie. She gets to live with
14 this. As you heard from Mr. Gregory, she changed. She
15 changed.

16 He changed her. Plain and simple. They had all this
17 time to get their stories together and they still didn't
18 match. That little girl was consistent. She told
19 Mr. Garrett, she told her mother, she told her stepfather,
20 and she told you what happened to her that weekend. Even
21 her mother says yeah, I went to get her on New Years Day,
22 January the 1st, right around then, before the baby was
23 born.

24 we have proof this entire story isn't a complete
25 fabrication. That's what they're trying to do. Discredit

1 this young lady who has nothing to gain by this, and they
2 still couldn't get the story together correctly.

3 Ladies and gentlemen, I submit to you maybe he did have
4 some beers that night. It's probably more than four. They
5 stayed up late talking. No drinking involved.

6 The next day he tells you good, go cut down trees, in
7 and out of the door, drinking.

8 what did you drink?

9 Don't remember.

10 In and out the door all day cutting down trees. I
11 don't remember what I had to drink. He remembers the story
12 he rehearsed, that it was four beers at six o'clock on
13 Saturday. But the parts he didn't remember, unrehearsed,
14 stuff I asked him. Simple questions. But the only answer
15 he could give to those are I assume. You know, she, Minor
16 the nine year old is not on trial.

17 I, I don't know how to express this deeply enough about
18 this situation why she wouldn't lie, how her story is
19 consistent all this time. He's had four years to get his
20 story together and didn't get it right.

21 who's lying?

22 who's telling the truth?

23 And Mr. Hall said something about the State coming up
24 short on evidence. Well, see, here's the thing. In this
25 state, that little girl's testimony, that nine year old,

1 that 13 year old, that doesn't need to be corroborated in
2 this state to convict that man of stranger/danger, of
3 molestations, of a lewd act on a minor, which is what he
4 did. She told, and by my count, at least 30 people by now
5 what happened to her that night.

6 Ladies and gentlemen, that man is guilty. It took one
7 second or it took five seconds, whatever. Based upon the
8 laws of this state and instructions the judge is gonna give
9 you, that man is guilty of lewd act upon a minor.

10 Thank you.

11 THE COURT: All right. Members of the jury panel, I'm
12 gonna ask you now to give me your attention. I'm gonna
13 charge you the law which you are to apply to the facts as
14 you determine them to be in this case.

15 Now, the fact that Mr. Perry has been charged, the fact
16 that he was indicted, the fact that he was arrested, the
17 fact he is on charge, on trial is not evidence that he
18 committed this offense. That's simply the way our system
19 works. If the State believes someone has committed a, an
20 offense, that's what happened. They are arrested, charged,
21 indicted, and can be brought to trial.

22 In the jury room, you'll have with you the indictment,
23 and it contains the charges, not evidence, against
24 Mr. Perry. The indictment, again, you'll have with you.
25 I'll talk to you maybe a little bit more about that when I

1 talk to you about the verdict form at the end of my charge.
2 But the fact that he is on trial is of no, is no evidence
3 that he committed the offense, and the charges in the
4 indictment are simply that, what the State says happened.
5 The State must prove what happened beyond a reasonable doubt
6 before you could convict Mr. Perry.

7 Mr. Perry is presumed innocent. Anyone charged with
8 any offense in our system, no matter how serious the charge,
9 is presumed innocent of that charge until the State is able,
10 if it can, to prove that person's guilt beyond a reasonable
11 doubt.

12 This presumption of innocence is not just a mere legal
13 theory or mere legal phrase. It is a substantial right.
14 Presumption of innocence attached to Mr. Perry at the time
15 he was arrested, remains with him as this case is processed
16 through our Court system, remains with him at this moment.
17 In fact, the presumption of innocence in his favor remains,
18 as you deliberate. The presumption of innocence in
19 Mr. Perry's favor is removed if and when, and only if and
20 when you determine the State has proven his guilt beyond a
21 reasonable doubt.

22 Now, the State is not required to prove his guilt
23 beyond all or beyond every doubt. We understand that
24 they're very few things that can be known in our world with
25 absolute certainty, and absolute certainty is not required.

1 Our Court's have defined a reasonable doubt as the kind of
2 doubt that would cause a reasonable person to hesitate to
3 act.

4 Proof beyond a reasonable doubt is proof that leaves
5 you firmly convinced of someone's guilt. If, based on your
6 consideration of the evidence, you're firmly convinced that
7 Mr. Perry is guilty of the crime charged, you would find him
8 so. If, on the other hand, you think there's a real
9 possibility that he is not guilty, you would give him the
10 benefit of that doubt and find him not guilty. He has the
11 right to a reasonable doubt -- he has the right as to any
12 reasonable doubt you have as to any element in this case.

13 I remind you that I am the sole judge of the law in
14 this case, and you must take, accept, and apply the law as I
15 charge it even if you think the law should be different or
16 even if you think the law, as I charge it, is done in error.
17 Your oath requires you to take, accept, and apply the law as
18 I charge it.

19 You're not to infer from anything I have said or done
20 or anything I now say or do as indicating an opinion of mine
21 on the facts. Our law does not allow a trial judge to
22 formulate or express to a jury any opinion on the facts.
23 It's simply, solely up to you to examine the evidence and to
24 give to the evidence the effect, the value, the weight, and
25 the truth you believe it should have.

1 In doing this, you may believe one witness as opposed
2 to several, several witnesses as opposed to one. You may
3 believe all, part, or none of a witness' testimony. In
4 analyzing the evidence, use your common sense, your sense of
5 logic, your sense of reasoning, and your experiences in
6 life.

7 As judges of the facts, you must necessarily judge the
8 credibility, that is the believability, of the witnesses who
9 have testified. In assessing credibility, use the things I
10 just talked about. Use the things that you find in your
11 day-to-day life as being indicative of truthfulness in an,
12 in an individual, and you can use certain evaluators, a
13 witness' demeanor, how they act on the stand, are they
14 hesitant or straightforward, is their testimony consistent
15 or inconsistent. Consider the opportunity a witness had to
16 know the things to which the witness testified to.

17 You can consider any bias or prejudice a witness may
18 have. That is, a witness would wish to help or hurt one
19 side or the other, and you can consider whether or not
20 someone has a criminal record in regard to their
21 believability.

22 Now, in these cases, generally two types of evidence
23 are presented, direct and circumstantial evidence. Direct
24 evidence is testimony by someone who claims to have actual
25 knowledge of a fact such as an eye witness. Direct evidence

1 is evidence which immediately establishes the main facts
2 sought to proven.

3 Circumstantial evidence is proof of a chain of facts
4 and circumstances which indicate the existence of a fact.
5 Circumstantial evidence is evidence which immediately
6 establishes collateral facts from which the main fact may be
7 inferred. Circumstantial evidence is based on inference and
8 not on personal knowledge or personal observation.

9 Our law makes absolutely no distinction between the
10 weight or value to be given either to direct or
11 circumstantial evidence. Our law does not require a greater
12 degree of certainty for circumstantial evidence as opposed
13 to direct evidence. What you should do, in this case, is
14 weigh all of the evidence. If, after weighing all of the
15 evidence, you're not convinced of Mr. Perry's guilt beyond a
16 reasonable doubt, you would find him not guilty.

17 In this case, we've had testimony from an individual
18 who was qualified, we qualified as what we call an expert
19 witness. Generally an individual can only testify as to
20 something they've seen, heard, tasted, touched, or smelled.
21 That is something they've actually physically or mentally
22 observed.

23 However, where an individual has certain skill,
24 training, experience, knowledge, and education in a certain
25 area, that person can be qualified by the Court as an expert

1 and render opinions. Take these facts that you and I can
2 testify to, and from those facts, reach an opinion.

3 Now, opinions are allowed into evidence to assist you.
4 Expert opinions are not binding on you. You may take,
5 accept, or reject, in whole or in part, the expert's
6 testimony. Again, expert testimony is in evidence, is
7 allowed into evidence only to assist you. Not to make up
8 your mind for you. That is, not binding on you.

9 Now, you look at the expert's testimony just as you
10 look at the testimony of any witness. However, as to an
11 expert, you also, even though I qualified them as an expert,
12 you determine whether the witness had the expertise to reach
13 the opinion they reached. Look at the qualifications of the
14 expert, and you also determine what value to give, if any,
15 the opinion of the expert. Look at the reasons the expert
16 reached the opinion they reached.

17 Again, expert testimony is allowed in to assist you.
18 It's not binding on you.

19 In this case, you've heard testimony from a child.
20 Where a witness is a child, you must determine, as with any
21 witness, whether the testimony is believable. In deciding
22 believability, you may consider not only matters that I've
23 already discussed with you, but as to a child, you may also
24 consider the age, the child's ability to observe and
25 remember facts, the child's ability to understand and answer

1 questions.

2 Young children may not fully understand what is
3 happening. It is up to you to decide whether the child
4 understood the seriousness of appearing as a witness in this
5 criminal trial. Whether the child understood the questions,
6 whether the child has a good memory, whether the child
7 understands the difference between lying and telling the
8 truth, all of this you can consider.

9 In addition, young children may be influenced by the
10 way the questions are asked. It is up to you to decide
11 whether the child understood the questions asked and
12 determine what weight to be given the child's testimony.

13 Mr. Perry is charged with committing a lewd act on a
14 minor. That is a statutory offense. That is, that is a law
15 our Legislature has enacted and put in our code books, our
16 Codes of Laws.

17 The charge is committing a lewd act with a minor. A
18 minor is a person under the age of 18. The State must
19 prove, beyond a reasonable doubt, that Mr. Perry, if you
20 determine that he committed this offense, was over the age
21 of 14.

22 Next, you must prove, must well -- the State must prove
23 that Mr. Perry willfully and lewdly committed or attempted a
24 lewd or lascivious act on or upon the body or parts of it,
25 of a child under the age of 16, and this must be proven that

1 he did this with the intent to arouse, appeal to, or gratify
2 the lust, passions, or sexual desires of himself or of the
3 child.

4 The word willfully, as used in this charge, means
5 voluntarily. Not intentionally. I'm sorry. Willfully
6 means voluntarily and intentionally, not accidentally, with
7 a specific intent to do something that the law forbids.

8 The word lewd means something is obscene, lustful,
9 indecent, or lecherous. Lascivious means something tending
10 to incite lust, lewd, indecent, obscene, or something that
11 is tending to deprave the morals and respect to sexual
12 relations.

13 Additionally, time is not a material element of the
14 offense of criminal sexual conduct with a minor. Finally,
15 in the case of a criminal sexual conduct with a minor, the
16 testimony of the victim need not be corroborated.

17 Now, your verdict in this case must be unanimous. All
18 12 jurors agree.

19 Mr. Foreman, you will preside and ultimately write the
20 unanimous verdict of the jury. If you have questions while
21 you're deliberating, please write them down, knock on the
22 door, give them to the bailiff. The bailiff will bring them
23 to me and I will consult with the attorneys. It may be that
24 I can write an answer on the note and send it back in. If I
25 do that, just keep the note. It has to be part of the

1 record.

2 So, return it with the evidence, Mr. Foreman.

3 It may be that I'll have to bring you back here in open
4 court and answer any questions you may have. We can have
5 testimony replayed if you wish. In South Carolina we do not
6 send a written charge on the law in, but if you wish me to
7 go over any part or all of the law, my charge on the law,
8 let me know and I'll bring you back here in open court and
9 recharge you any part or all of my charge on the law if you
10 desire.

11 We'll make arrangements for you to have the ability to
12 play the DVD. We'll make sure you can play that, and, of
13 course, you can play it, and stop it, and watch whatever
14 parts you deem if you need to.

15 Your verdict can not be based on sympathy, passion,
16 prejudice, public matter, public opinion or matters outside
17 of the record. Your -- once you've reached a verdict, knock
18 on the door and tell the bailiff and the bailiff will come
19 and get us. I have some other work to do for you, but I
20 will send for you. We're not starting another trial. So, I
21 should be able to send for you promptly.

22 When you go into the jury room in just a minute do not
23 start deliberating because I have to go over my charge with
24 the attorneys. If I have made an error, I'll have to bring
25 you back in and correct it because you have to follow

1 exactly what I say. If I've not made an error I will send
2 in the exhibits, and I will send in the indictment with the
3 verdict form.

4 Ms. Treon, you will stay in as the alternate and not
5 participate further. So, when they leave this time, you,
6 you stay in.

7 Remember when you go in, don't start deliberating yet.

8 Now, attached to the indictment is a verdict form. On
9 the verdict form are two options. The order the options are
10 in is no importance. I have been doing this for 20 years,
11 and I always put the choices in this, this order.
12 They don't -- the fact that one precedes the other does not
13 make that any more important or any more of value. It's up
14 to you to determine what verdict you should unanimously
15 return.

16 The first line says we find the defendant guilty of
17 committing a lewd act on a minor. If you find the State has
18 proven Mr. Perry guilty of that offense beyond a reasonable
19 doubt you would put a check or an X in front of that. If
20 you find, on the other hand, the State is failed to prove
21 Mr. Perry guilty of this charge beyond a reasonable doubt,
22 you would use the second line which says we find the
23 defendant not guilty. Simply put a check or an X mark in
24 front of that.

25 It's already got a date on it and a place for you to

1 sign, Mr. Foreman.

2 Now, I'm gonna let you go to the jury room. Everyone,
3 but Ms. Treon, and then you don't start deliberating until
4 you hear from me. Just follow the bailiff.

5 (WHEREUPON, the following takes place outside the
6 presence of the jury.)

7 THE COURT: Any---

8 SOLICITOR GRAY: No objections, no additions, Your
9 Honor.

10 MR. HALL: No objections or additions from the defense,
11 Your Honor.

12 THE COURT: All right. I'm gonna bring the jury back
13 in in just a minute. I used from another charge. I think I
14 said time is not a material element of the offense of
15 criminal sexual conduct. I need to correct that and say
16 lewd act.

17 MR. HALL: I didn't catch that.

18 THE COURT: All right. Ms. Treon, if you'll just
19 continue to have a seat. I'll be with you in just a minute.
20 Bring the jury back in.

21 (WHEREUPON, the following takes place within the
22 presence of the jury.)

23 THE COURT: I, I did make one -- well, one error, but I
24 made it twice. When I was talking to you right at the very
25 end of the charge I used a term criminal sexual conduct with

1 a minor. He's not charged -- Mr. Perry is not charged with
2 that. He's charged with committing a lewd act.

3 So, when I, what I told you I'm going to correct, and
4 that correct charge is that time is not a material element
5 of the offense of committing a lewd act on a minor nor is
6 the testimony, nor does the testimony of the victim in a,
7 committing of a lewd act charge need be corroborated,
8 need -- let me rephrase that.

9 In the case of the commission of a lewd act on a minor,
10 the testimony of the victim need not be corroborated. So, I
11 told you I used the wrong phrase, criminal sexual conduct
12 with a minor. That's not what he's charged with. I want to
13 emphasize that. He's charged with and the indictment spells
14 it out very clearly, committing a lewd act under, a child
15 under the age of 16.

16 So, I'll let you go back, but don't start deliberating
17 until you hear from me.

18 (WHEREUPON, the following takes place outside the
19 presence of the jury.)

20 THE COURT: Anything further from the State?

21 SOLICITOR GRAY: No, sir, Your Honor.

22 THE COURT: Defense?

23 MR. HALL: No, sir, Your Honor.

24 THE COURT: All right. Check the exhibits, the
25 indictment, and the verdict form, and we'll have the bailiff

1 send back and tell them to start deliberating.

2 (WHEREUPON, the alternate juror was dismissed at this
3 time.)

4 SOLICITOR GRAY: Your Honor, do you want the lap top to
5 go back or stay here?

6 THE COURT: I want -- however -- whatever arrangements
7 need to be made I want to be made.

8 MR. HALL: The two exhibits. I don't think there's any
9 issue with the verdict form, Your Honor, either.

10 THE COURT: All right. We'll be at ease for a few
11 minutes.

12 (WHEREUPON, the jury began deliberations at 10:25AM and
13 reached a verdict at 10:45AM.)

14 THE COURT: I've been told the jury has reached a
15 verdict.

16 Anything from the State before we bring the jury in?

17 SOLICITOR GRAY: No, sir, Your Honor.

18 THE COURT: Anything from the defense before we bring
19 the jury in?

20 MR. HALL: No, sir, Your Honor.

21 THE COURT: All right. Bring in the jury.

22 (WHEREUPON, the following takes place within the
23 presence of the jury.)

24 THE COURT: Have a seat.

25 I understand the jury's reached a verdict.

1 FOREMAN: Yes, Your Honor.

2 THE COURT: All right. If you'll hand it to the
3 bailiff, and he'll hand it up to me. Thank you.

4 CLERK: In the General Sessions Court, Case Number
5 2009-GS-42-416, the State of South Carolina versus Jefferson
6 Perry. Indictment for lewd act on a minor. We find the
7 defendant guilty of committing a lewd act on a minor. This
8 is signed by the foreperson and today's date.

9 Ladies and gentlemen of the jury, if this is your
10 verdict and still your verdict, please raise your
11 right-hand.

12 (WHEREUPON, all jurors raise their hands at this time.)

13 CLERK: So say you-all.

14 THE COURT: All right. Anything from the State before
15 the jury's dismissed?

16 SOLICITOR GRAY: No, sir, Your Honor.

17 THE COURT: Anything from the defense?

18 MR. HALL: Your Honor, I think we need to request
19 polling of the jury.

20 THE COURT: All right. Members of the jury panel,
21 the -- we're gonna confirm your verdict by way of questions
22 asked from the clerk. She'll tell you how to go through
23 this process.

24 (WHEREUPON, all members of the jury panel were polled
25 and all members of the jury answered in the affirmative that

1 this was and is still their verdict at this time.)

2 THE COURT: All right.

3 (WHEREUPON, the jury panel was dismissed at this time.)

4 THE COURT: While the clerk's getting that signed, any
5 further motions -- anything from the State?

6 SOLICITOR GRAY: No, sir, Your Honor. I believe---

7 THE COURT: Defense.

8 MR. HALL: Your Honor, we move for a new trial based on
9 the evidence presented, the fact the jury I think was out
10 ten to, ten to fifteen minutes. There's video that
11 obviously they did not look at that -- they seemingly went
12 on emotion instead of looking at the evidence, and we ask
13 for a new trial.

14 THE COURT: Motions denied. They saw the video here in
15 the courtroom, and it was lengthy, and they watched it here,
16 and they heard the evidence, they heard the law, they heard
17 the closing arguments. I find that the -- it's a
18 credibility question, and I find that the verdict is fully
19 supported by the evidence, and you can bring Mr. Perry
20 around for sentencing.

21 MR. HALL: Finishing filling out the sentence sheet.
22 There is an issue, Your Honor.

23 The -- at the time this was charged, lewd act on a
24 minor I don't believe was considered a violent offense. I
25 think, since then, the law is changed, and, Your Honor, that

1 would have some great impact on any of sentence. I don't
2 think there's any mandatory minimum type thing, and it's
3 not, doesn't carry 20 years or more. So, it doesn't, I
4 don't think, affect the parole eligibility, ability, the no
5 parole.

6 THE COURT: I have -- it does not. He is eligible for
7 parole if I give him time. I have it as a violent, but
8 you're telling me it was not at the time.

9 SOLICITOR GRAY: I think it was at the time, Your
10 Honor. I don't have it with me, but I think that Jessica's
11 Law, I believe, was passed in 2006.

12 MR. HALL: Okay. Well, I was thinking it was after
13 2007.

14 THE COURT: All right. It does require sex offender
15 registry?

16 MR. HALL: Yes, sir, it's -- unfortunately it's
17 lifetime electronic monitoring I believe.

18 THE COURT: He doesn't have any record?

19 SOLICITOR GRAY: He has a record, Your Honor, but we
20 chose not to go into it. It doesn't involve anything
21 sexual. There was an assault and battery from 2001 which
22 was over the ten year limit, and it did not involve anything
23 of a sexual nature.

24 MR. HALL: Please the Court.

25 THE COURT: I'll be glad to hear from you, Mr. Hall,

1 and then---

2 MR. HALL: Please the Court, Your Honor.

3 He basically has nothing as far as his criminal record.
4 He has that old assault and battery. Very limited contact
5 with law enforcement.

6 He's always worked. He raised children. He, you know,
7 Your Honor, we presented what we had. He still -- this
8 isn't a situation where he's gonna get up and say I'm sorry
9 he did it because he still denies that he did it. Sorry
10 that we've had to go through this, and, Your Honor, we ask
11 that you consider his lack of record, the time frame.

12 He was released on personal recognizance. He's always
13 showed up, always cooperated. He showed up for trial. He
14 showed up for trial the second day and the third day. When
15 the jury went out he still stayed and showed up, Your Honor.

16 I don't think he is a person who needs incarceration.
17 If, if -- the jury has spoken and found him guilty, but,
18 Your Honor, we ask that you consider all the factors, what
19 has been presented here, and give him a probationary
20 sentence. The fact that he's gonna have to be a lifetime
21 register and lifetime monitoring I think is a great
22 punishment. He's gonna have to be very careful about where
23 he lives, where he works, who he's around. He's gonna be
24 paying for this for the rest of his life.

25 THE COURT: All right. Any of his family members want

1 to say anything before---

2 MR. HALL: No, sir.

3 THE COURT: You want to say anything?

4 DEFENDANT: Your Honor, I've raised kids all my life.
5 Nothing like this never occurred. This did not occur. I'm
6 wrongfully accused of this, Your Honor.

7 THE COURT: I understand.

8 Well, I -- the jury's found you guilty, and the
9 evidence supports the guilt. But this, based on your being
10 apparently a hard working man, and having a little bit of
11 trouble in 30 years, I think this is an aberration. I think
12 you said it didn't occur, but it did occur, and the jury
13 says it did. It was something out of character for you.
14 I'm convinced of that.

15 I don't know -- we always wonder when alcohol may make
16 us do strange things, and I know you said you only had four
17 beers, but you didn't put yourself in that situation. That
18 was -- you were, you were put there, so to speak, by
19 circumstances. You didn't seek out anything.

20 Anyway, as a result, I'm gonna sentence you to five
21 years, but I'm gonna suspend that and put you on probation
22 for three years. You're to be enrolled in the Central
23 Registry of Child Abuse and Neglect.

24 Well, I didn't hear anything from the victim's family.
25 I guess I should of heard from that, but I heard their

1 testimony. They don't -- okay. Indicating they didn't have
2 anything to say.

3 Sex Offender Registry with electronic monitoring, and
4 have you have some sex offender counseling even though I
5 just said this was an aberration, and just -- I think that
6 would be helpful.

7 You, of course, are appointed?

8 MR. HALL: Yes, sir.

9 THE COURT: All right. And you owe \$500, in addition
10 to other fees, for having an appointed attorney.

11 Did you serve any time at all in jail for this, like
12 two or three days or---

13 MR. HALL: He was PR'd. It took about six hours.

14 THE COURT: Okay.

15 SOLICITOR GRAY: Did you order a restraining order from
16 the victim, Your Honor?

17 THE COURT: All right. No contact with the victims or
18 her family. Well, I better not say that because apparently
19 the family is now, as we, asunder it sounds like. Well, the
20 adults can just tell you to stay away if they want to, but
21 you're to have no contact with the victim.

22 Thank you.

23 MR. HALL: Thank you, Your Honor.

24 SOLICITOR GRAY: Thank you, Your Honor.

25

WITNESSES

Spartanburg Co. Sheriff's Office

T. K. Tullotson

ARREST WARRANT NUMBER

M182839

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO.

09-GS-42-4016

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

JUL 20 2009

TERM

THE STATE

vs.

Jefferson Lee Perry, Jr.

Indictment for

SEX/LEWD ACT, COMMIT/ATTEMPT
UPON CHILD <16

SC Code: 16-15-0140

CDR Code: 2468

Class FEL-D

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on MIL 17 2009, the
Grand Jurors of Spartanburg County present upon their oath:

SEX/LEWD ACT, COMMIT/ATTEMPT UPON CHILD <16

That Jefferson Lee Perry, Jr., did in Spartanburg County, between the dates of December 29, 2007 through December 30, 2007, he being over the age of fourteen (14) years, willfully and lewdly commit or attempt to commit a lewd or lascivious act upon or with the body of one Minor a minor under the age of sixteen (16) years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or such child, of in violation of §16-15-0140, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 27th, 2013



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEFFERSON PERRY,

APPELLANT

Appellate Case No. 2012-211430

FINAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by instructing the jury that "time is not a material element of the offense of criminal sexual conduct with a minor" since the instruction was gratuitous and prejudicial especially since the defense had concentrated on the time factor in challenging the allegation, and it impermissibly charged the jury that the time of the allegation was not important in a child sex case?

2.

Whether the court erred by admitting the DVD of the forensic interview since a tape of the minor making the same allegation on a prior occasion impermissibly bolstered her testimony?

STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg County Grand Jury for the offense of committing a lewd act on a minor on December 29, 2007 or December 30, 2007. R. 184. The allegation arose from a specific night, appellant's defense was that the child was confused, and that he never touched her. His case was called to trial on April 10, 2012 before the Honorable John C. Hayes and a jury. Robert Hall represented appellant. Abel Gray was the assistant solicitor. R. 1.

On April 12, 2012, the jury found appellant guilty of committing a lewd act on a minor. R. 178, ll. 4-8. Judge Hayes sentenced appellant to five years imprisonment, suspended on the service of three years. Although appellant was not given any prison time, he was ordered to register as a sex offender with "electronic monitoring." R. 182, l. 20 – 183, l. 6.

This appeal follows.

ARGUMENT

1.

The court erred by instructing the jury that “time is not a material element of the offense of criminal sexual conduct with a minor” since the instruction was gratuitous and prejudicial especially since the defense had concentrated on the time factor in challenging the allegation, and it impermissibly charged the jury that the time of the allegation was not important in a child sex case.

Relevant trial facts

Wiley Garrett was the “forensic evaluator” in this case. An in camera hearing was held on his testimony. Garrett worked at the Children’s Advocacy Center in Spartanburg. R. 5, l. 10 – 7, l. 22. He had a Master’s degree in social work from the University of South Carolina. R. 6, ll. 1-2.

Garrett said the alleged victim in this case “made a disclosure on both of those dates [February 7, 2008 and February 14, 2008].” R. 8, l. 10 – 10, l. 6. “She made a disclosure of sexual touching which, which, in which she felt uncomfortable.” R. 12, ll. 18-20.

On cross-examination the defense specifically asked Garrett about the video bolstering the child’s testimony which she was also going to present live that day in court for the jury. Garrett admitted: “*It may bolster*, as you say, or it may cause questions. But, again, that’s part of the greater process of which we’re here today.” However, Garrett reasoned: “It would be an advantage to the court to be able to look *at what the child said four years ago to look at what the child said today.*” R. 16, ll. 9-18. (emphasis added).

After Garrett’s in camera testimony, defense counsel objected to the admission of the tape on the grounds it would simply bolster the child’s testimony. “I think it’s just the

same thing the child said on purposes [a prior occasion]. I think it's to bolster what testimony she's going to give in the trial, Your Honor, and we would oppose it." The judge ruled the tape was admissible under S.C. Code § 17-23-175, stating that the child would be subject to cross-examination when she testified. R. 21, ll. 5-14.

The evidence against appellant in this case was very slim. While that likely explains appellant not receiving any prison time, he is still branded for life. He must register as a sex offender, and pay the electronic monitoring hefty fee.

The alleged victim was thirteen-years-old at the time of trial, and she was nine-years old at the time of the alleged incident on December 29, 2007. R. 26, l. 10 – 27, l. 2. The minor said the alleged lewd act occurred "a day or two before my real Dad's birthday." She offered that her "real Dad's" birthday was on December 31, 2007, and she confirmed to the solicitor that is how she remembered it so clearly. R. 26, l. 24 – 27, l. 2.

That night the minor remembered several people were over at the mobile home where she was staying. "It was my Nana, him, my Dad, his girlfriend, and my Uncle Bryan's girlfriend, and this dude names Paul that he knew." R. 27, ll. 10-13.

There was evidence appellant had come over that night to help Bryan, who was the boyfriend of his cousin Liz, with yard work the next morning. The minor said she was asleep on the living room floor when appellant walked into the room with her Uncle Bryan. This was apparently about 10:00 or 11:00 at night after appellant was picked-up to spend the night. The minor said the television was off at the time. That fact would be disputed, which tested her allegedly clear memory of the "incident." R. 29, ll. 5-25.

Her allegation was "I was asleep, and whenever his [appellant Jefferson Perry's] hand up or, up my pants, I felt his hand and I woke up and I moved." She maintained: "I

woke up and I moved to the couch.” She claimed appellant followed her to the couch and “he sat down on the couch and asked me if he could lay his head in my lap.” The minor said she was scared and did not say anything to appellant. She acknowledged appellant did not threaten her or her family. R. 31, l. 4 – 33, l. 5. As will be seen infra, the minor was inconsistent on whether the “head in her lap” portion of her allegation actually occurred also.

The minor’s allegation was that appellant reached his hand up the legs of her pants “to my private.” R. 33, l. 2 – 34, l. 7. The defense sought to show the jury that this was a very implausible allegation. The minor admitted she stayed the rest of the week at the home of her father’s family, but she did not tell anybody what allegedly happened. R. 35, l. 4 – 36, l. 6. She said she told her mother “it think it was after New Years. I don’t remember.” The solicitor asked if it was “after your father’s birthday?” and the minor answered: “Yes.” She did not tell her mother immediately because: “I was still scared something else was gonna happen.” The minor admitted appellant “wasn’t nowhere around, but she did not make the allegation to her mother until the middle of January, 2008 “maybe.” R. 35, l. 13 – 38, l. 20.

On cross-examination the minor said “once we fell asleep I turned off the TV and I went in my Dad’s bedroom.” R. 45, ll. 13-15. The minor also said she was wearing brown capris when appellant allegedly put his hand up her pants. She said appellant’s hand was “smooth.” She said she did not remember saying his hand was smooth on the video. R. 47, l. 2 – 48, l. 23. The significance of this was that appellant worked as a laborer cutting down trees daily, and his hands were not soft or smooth.

The minor's mother testified that she stayed at her uncle's house the week of Christmas, 2007. The minor did not tell her about the alleged touching until January 29, 2008. The mother claimed she had seen behavioral changes in the minor after the allegation including the child wanting to be alone. However, but she said the minor did not have any current behavioral problems. R. 50, l. 11 – 54, l. 6.

The minor's stepfather testified that he did not remember the alleged victim ever saying anything about appellant putting his head in her lap. "She didn't tell me until well after that that that he actually laid his head in her lap there." The stepfather said this allegation only came up after the solicitor mentioned it to him. "But we didn't know all that until afterwards." R. 61, l. 13 – 62, l. 5.

Wiley Garrett was the interviewer in this case. When the solicitor moved the February, 2008 interview into evidence, defense counsel Hall announced: "No additional objections."¹ The DVD of the interview was then published for the jury. On cross-examination, Garrett confirmed that the alleged victim that a hand was put down her pants and that his hand was "smooth." She told Garrett her pants were brown and new and that she was also wearing a short-sleeved shirt. She did not allege to Garrett that appellant put his head in her lap. R. 75, l. 16 – 79, l. 8.

Appellant took the stand in his own defense. He was not married and he had two children. He had a son, age 20, and a daughter, age 18, who lived with him. Appellant denied doing anything improper to the alleged victim that night. He was merely there to

¹ The court reporter wrote that Hall said "no addition or objections, Your Honor." That assertion is inconsistent with the defense objection in this case, and defense counsel states as an officer of the court in affidavit form that he has no additional objection. R. 69, l. 21 – 70, l. 5.

help his cousin and her boyfriend with the yard work the next morning. They picked him up about ten or eleven that night, and he remembered two children sleeping on the floor. He did not remember the minor well since he really did not pay much to the children sleeping on the floor. "I had never met them before." R. 81, l. 2 – 88, l. 20; R. 111, ll. 9-14.

Appellant testified he got up once about two in the morning to use the bathroom. Brittany Fowler was still awake with her colicky baby. Brittany would later testify her son had colic, and she did not sleep at all that night. Brittany could see straight out into the living room from her bed, and she did not see appellant touch the alleged victim or go anywhere near her that night. R. 89, l. 1 – 97, l. 25; R. 130, l. 2 – 141, l. 5.

Appellant also testified the television set was on all night, that he saw Brittany awake that night. He was also not sure which of the two girls actually was on the couch in the morning when he awoke. Appellant told the solicitor on cross-examination: "I know what I didn't do." R. 101, l. 6 – 112, l. 1.

Appellant added he was not drunk by any estimation and that he could have driven the car when he was picked up that evening and brought to the home of his friends where the alleged victim also spent the night. R. 113, ll. 2-21.

Request to Charge

The solicitor told the judge he wanted a jury instruction that "time was not a material element" in the case, and that the testimony of the victim need not be corroborated. Defense counsel objected to an instruction on time not being a material factor, noting:

[W]e have a specific date alleged. They presented it several times. The child testified, if I'm not

mistaken, that it occurred the weekend before my daddy's birthday. Daddy's birthday was December 31st. Very specific and I think to do that is giving, carving out another special consideration for a child victim that cuts in the rights of my client.

So, Your Honor, I would oppose that.

The Court: I will charge it, but you know the other interesting wrinkle about this particular issue is that the mother, Mrs. Gregory, testified that she picked the child up, [minor], on New Years Day. So - - .

Mr. Hall: That - - picked [minor] up, yes, sir.

The Court: Right. Which is before Brittany had her baby.

Mr. Hall: This - - yes, sir, that's another thing that I believe, on my side, is physically impossible for it to have happened beforehand, yes, sir.

The Court: Well, that's your argument to the jury.

R. 148, ll. 7-25.

Defense counsel argued to the jury:

We've got two mothers, a grandmother, two women testifying where the people were. Consistent. I don't know what happened with the investigation of this, why the people weren't talked to, why it took so long. But what we have here is a change in story by the victim that the State is asking you believe some version that it happened in December or January or whatever in 2007, 2008, that the hand went down the pants, didn't move, but did move, went up the pants, didn't move, but did move. That, that's a laborer.

His hands are smooth?

When you consider all this, what [has] the State proven beyond a reasonable doubt, and apply it to the law, they're gonna come up short. There's not credible evidence that you can determine the State has proved, beyond a reasonable doubt, sufficient to convict Jeff Perry and live with that.

I ask you to consider all these things, the inconsistencies, the changes in the stories, who was there, who was not there, when did it happen, how it happened. Consider those things, apply it to the law, do the right thing, come back with a verdict of not guilty.

R. 159, l. 22 – 160, l. 16.

The judge charged the jury that time was not a material element of the offense of criminal sexual conduct with a minor. He also charged the jury that the testimony of “the victim need not be corroborated.” R. 172, ll. 13-16.

Discussion

The jury charge on time not being an element of the crime in this case was gratuitous. Appellant’s defense centered on attacking the inconsistencies regarding the Christmas alleged incident, and when it was reported, and who was allegedly around.

In State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), the defense focused its reasonable doubt argument around the State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991), jury instruction that “a reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act.” Id. at 417, 409 S.E.2d at 375.

Not liking the defense strategy of this effective closing argument emphasizing the “hesitate to act” language, the solicitor was successful in having the judge remove this language from his reasonable doubt charge. The Supreme Court found this was fundamentally unfair, and prejudicial to the defense.

Here, the defense was anchored in the minor’s inconsistencies, and the alleged time when the offense occurred. The solicitor requested this jury instruction to negatively impact on appellant’s defense in the same manner as in State v. Jones. The fact that a time period of when the sex abuse occurred in an indictment can be broad does

not mean that the jury instruction that time is not a material element should be given. That is particularly true where the jury instruction is gratuitous and unfairly prejudices the defendant as it did here. See State v. Jones, supra. Appellant should be granted a new trial.

The court erred by admitting the DVD of the forensic interview since a tape of the minor making the same allegation on a prior occasion impermissibly bolstered her testimony.

While S.C. § 17-23-175 has been held to be a valid legislative enactment, it is still impermissible to offer testimony bolstering that of the alleged victim, and invading the province of the jury. See State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012); State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011). Evidence which bolsters the credibility of the complaining witness is inadmissible. See State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (2012).

While bolstering in these types of cases often revolves around the forensic interviewer giving the jury the impression he or she believes the child is telling the truth, that is by no means the only form of impermissible bolstering. See Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010); Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001).

Here, defense counsel correctly objected that playing the DVD of the minor's statement to the jury was essentially a prior consistent statement that unfairly bolstered her credibility and testimony. Further, as seen, on cross-examination during the in camera hearing the defense specifically asked Garrett about the video bolstering the child's testimony which she was also going to present live that day in court for the jury. Garrett admitted: "*It may bolster*, as you say, or it may cause questions. But, again, that's part of the greater process of which we're here today." However, Garrett reasoned: "It would be an advantage to the court to be able to look at *what the child said four years ago* to look at *what the child said today*." R. 16, ll. 9-18. (emphasis added).

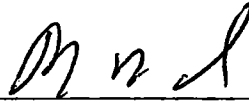
Garrett ironically captured the whole problem with the DVD here. The jury would conclude she said the same thing, or roughly the same thing, years ago so it must be true. That was the basis of trial counsel's objection to the admission of the tape on the grounds it would simply bolster the child's testimony. "I think it's just the same thing the child said on purposes [a prior occasion]. I think it's to bolster what testimony she's going to give in the trial, Your Honor, and we would oppose it."

Moreover, merely because the statute in question is obviously a legislative creation it still must be considered against the evil of bolstering because our Supreme Court has held the cumulative effect of the prior consistent statement with the present testimony enhances the devastating impact of improper corroboration. Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994). Defense counsel correctly objected to this improper bolstering testimony, and appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing argument, appellant's convictions should be reversed and this case remanded to the Spartanburg County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read 'R M Dudek', is written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

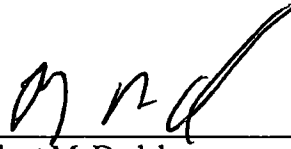
ATTORNEY FOR APPELLANT

This 17th day of October, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

October 17th, 2013

A handwritten signature in black ink, appearing to read 'R. M. Dudek', is written over a horizontal line.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

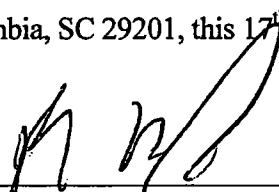
V.

JEFFERSON PERRY,

APPELLANT

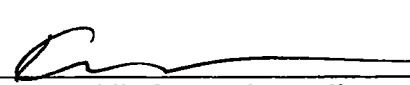
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of October, 2013.


Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of October, 2013.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: August 21, 2023

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2012-211430

The State,

Respondent,

vs

Jefferson Lee Perry, Jr.,

Appellant.

FINAL BRIEF OF RESPONDENT

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Rule 801, SCORE..... 10

STATEMENT OF ISSUES ON APPEAL

- I. The trial court did not err in charging the jury on the correct statement of law that time is not a material element of the crime.
- II. The trial court did not err in admitting the video recording of the forensic interview pursuant to Section 17-23-175 of the South Carolina Code because it did not impermissibly bolster the child's testimony.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

The minor victim, nine years old at the time of the incident, visited her Uncle Bryan around Christmas time. (T.47-48; R. pp. 26-27) On December 29, 2007, several days before the minor victim's father's birthday, she slept in the living room of her Uncle's house. Appellant entered the room with the minor victim's uncle, but only Appellant remained. (T.49-50; R.pp. 28-29).

Appellant put his hand up the minor victim's pants. His hand was between her pants and her panties over her vagina. He only touched the outside of her panties and not skin, but touched her "private part." (T.54-55; R. pp. 33-34). The minor victim awoke and moved from the floor where she was sleeping to the couch. Appellant followed her to the couch. (T.52; R. p. 31). Appellant asked to lay his head in the minor victim's lap. She did not respond because she was scared and shaking. (T.53; R. p. 32). He put his head in her lap and fell asleep. She was able to get up and move to her father's bedroom. (T.54; R. p. 33).

The minor victim testified she went back to her mother's house after her father's birthday on December 31, which is how she remembered the incident happened on December 29. Appellant also indicated he could have been at the house December 29 or 30th. (T.125; R. p. 101). He did admit it was in 2007 between Christmas and New Years. (T.131; R. p. 107). He also admitted he had been drinking that night and woke up with the minor victim on the couch with him. (T.134-136; R. pp.110-112).

ARGUMENT

I. The trial court did not err in charging the jury on the correct statement of law that time is not a material element of the crime.

Appellant contends the trial court erred in charging the jury that time is not a material element of the crime. The trial court's charge was a correct statement of the law in South Carolina. As a result, the trial court did not err in charging the jury.

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Id. at 479, 697 S.E.2d at 583

A trial court is required to charge the current and correct law of South Carolina. See State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 73 (2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. See Rayfield, 369 S.C. at 119, 631 S.E.2d at 251; Sheppard, 357 S.C. at 665, 594 S.E.2d at 473; State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted).

Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error. State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence

and issues presented at trial. State v. Lee Grigg, 374 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007).

During the charge conference, the State asked the trial court to charge the jury that time is not a material element of the crime and the minor victim's testimony did not need to be corroborated. (T.171-172; R. pp. 147-148). Counsel indicated the child testified the lewd act occurred on a specific day and to give the charge that time is not a material element "is giving, carving out another special consideration for a child victim that cuts into the rights of my client." (T.172; R. p. 148). After Appellant's counsel objected, the trial court indicated he would give the requested charges. (T.172-173; R. pp. 148-149). During his charge to the jury, the trial court stated: "Additionally, time is not a material element of the offense of criminal sexual conduct with a minor."¹ (T.197; R. p. 172).

Appellant argues this case is analogous to State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001). In Jones, during the charge conference prior to closing argument, the trial court specifically indicated he would provide the Manning reasonable doubt charge to the jury. As a result, defendant's counsel tailored his argument to the "hesitate to act" language in Manning. Jones, 343 S.C. at 576-577, 541 S.E.2d at 820-821. The State asked the trial court to change the reasonable doubt charge and the court removed that language. Id. at 577, 541 S.E.2d at 821. The South Carolina Supreme Court found it fundamentally unfair for the charge to be altered after counsel relied on the court's statement it would give a specific charge. Id. at 578, 541 S.E.2d at 821-822.

¹ Neither party corrected the judge's reference to criminal sexual conduct with a minor as opposed to lewd act charge for which Appellant was tried and convicted. The law is a correct statement for either crime. If anything, the fact the charge related to criminal sexual conduct and not lewd act, the crime for which the judge told the jury Appellant was charged, lessens any possible prejudice to Appellant.

First, this issue is not preserved for review on appeal. Counsel never objected regarding the charge being fundamentally unfair or unfairly restricting the effect of his argument to the jury. He never maintained the court's ruling was similar to the one in Jones. Instead, he simply argued it would give special consideration to the child and that the evidence only indicated a specific date for the incident to have occurred. Appellant cannot raise one ground at trial and attempt to raise another unrelated ground on appeal. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (defendant may not argue one ground below and another on appeal); State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (party cannot argue one ground below and then argue different ground on appeal). As a result, this issue is not preserved for review on appeal.

On the merits, Appellant's counsel knew prior to argument exactly what charge would be given to the jury. The trial court made it clear the evening before closing arguments were to be given what he would charge. (T.171-173; R. pp. 147-149) Counsel had the benefit of knowing the full charge, including the language that time is not a material element, prior to beginning his closing argument. (T.175-178; R. pp. 150-153). The trial court charged the jury with the same language the court indicated in the charge conference would be used. (T.197; R. p. 172). The Jones opinion is completely inapposite to the case at hand.

Further, the court gave an appropriate charge on the law of South Carolina. "It is well settled that it is not necessary to prove the precise day, or even year, laid in the indictment, except where time enters into the nature of the offense, or is made part of the description of it." State v. Reynolds, 48 S.C. 384, 26 S.E. 679 (1897). The only exception is when the defendant asserts an alibi defense.

While it is true that the State need not prove the exact date set forth in the indictment unless time is an essential element of the offense or is made a part of the description of it ... the State should not be allowed to prove a different date than that set forth in the indictment where the defendant relies upon the defense of alibi. . . .

State v. Pierce, 263 S.C. 23, 27, 207 S.E.2d 414, 416 (1974) (citation omitted).

“Time is not a material element of . . . committing a lewd act on a minor.” State v. Tumbleston, 376 S.C. 90, 101, 654 S.E.2d 849, 855 (Ct. App. 2007); see also, State v. Baker, 390 S.C. 56, 62, 700 S.E.2d 440, 443 (Ct. App. 2010) (“time is not a material element of committing a lewd act on a minor”). As a result, the State need not prove the exact date the lewd act occurred.

The trial court charged the jury on the elements of committing a lewd act upon a minor as well as the State’s burden of proof. (T.190-197; R. pp.165-172). The court then explained: “Additionally, time is not a material element of the offense of criminal sexual conduct with a minor.” (T.197; R. p.172). This is a correct charge of the law because time is not a material element and does not have to be proven beyond a reasonable doubt by the State.

Further, the trial court gave an analogous charge in State v. Anderson, 59 S.C. 229, 37 S.E. 820 (1901). In Anderson, the defendant was charged with larceny, which did not require time as a material element similar to Appellant’s lewd act charge. The trial court charged the jury:

Time is not what we term of the essence of a crime when a theft or other criminal offense is said to have been committed at a certain time. The gist of the charge does not consist in proving that it was done at the exact time laid in the indictment. The gist is whether or not the crime as alleged was committed, and, if the state proves that it was committed at any time,-the particular charge contained in

the indictment prior to the finding of the true bill,-that would be sufficient; but the state must prove the charge as contained in the indictment. It is not necessary, and the state is not required, to prove the exact time laid in the indictment; but, still, it must prove that substantial charge as having been committed at some date, certainly before the finding of the true bill.

Anderson, 37 S.E. at 821. The South Carolina Supreme Court found the charge was proper and in accordance with the law of the state which does not require the State to prove the exact time where it is not a material element of the crime. Id. This Court should find the charge by the trial court in the instant case was not an improper charge, but instead was a proper charge of the law as it currently exists.

Counsel was entitled to argue any alleged inconsistencies in the testimony, and did fully argue regarding the alleged inconsistencies, to the jury. He was free to argue regarding the credibility to assign to witnesses, including the victim. It was for the jury to determine what version of the facts to believe. The court, in instructing the jury, appropriately and correctly told the jury in making its determination of guilt that the exact date or time was not an element of the crime.

II. The trial court did not err in admitting the video recording of the forensic interview pursuant to Section 17-23-175 of the South Carolina Code because it did not impermissibly bolster the child's testimony.

Appellant maintains the trial court erred in admitting the video recording of the forensic interview of the victim because it had the effect of impermissible bolstering her testimony. The trial court properly admitted the video recording under section 17-23-175 of the South Carolina Code and it did not impermissibly bolster the victim's testimony.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant. State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

First, the South Carolina Supreme Court found section 17-23-175 to be a valid legislative enactment that did not run afoul of either the United States or South Carolina Constitutions. State v. Whitner, 399 S.C. 547, 559-560, 732 S.E.2d 861, 867 (2012). Specifically, the Court held:

Unless a legislative enactment concerning a matter of evidence violates the constitution, the legislative enactment is valid. See City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (holding that the General Assembly may enact any law not expressly, or by clear implication, prohibited by the state or federal constitutions).

....

Section 17-23-175 is a valid legislative enactment.

Id.

Additionally, this Court has found the bolstering effect of the video recording does not preclude its admission under the statute. See State v. Russell, 383 S.C. 447, 451, 679 S.E.2d 542, 544 (Ct. App. 2009). As the Court of Appeals discussed, in general, the admission of a prior consistent statement has been held to be hearsay and, when the statement has been admitted for the sole purpose of bolstering the credibility of a crucial witness, the error in admission is not harmless. See e.g., State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003) (holding the admission of a witness's prior consistent statement, which clearly bolstered her crucial trial testimony, could not be considered harmless error). The statute in this case, however, has made a specific allowance for these out-of-court statements by child victims provided the above requirements have been met.² Russell, 383 S.C. at 451, 679 S.E.2d at 544.

Further, the South Carolina Rules of Evidence specifically state that they can be preempted by statute or other rule. See Rule 101, SCRE ("Except as otherwise provided by rule or by statute, these rules govern proceedings in the courts of South Carolina to the extent and with the exceptions stated in Rule 1101."). The hearsay rules or any other rules of evidence are superseded by the statute in determining the admissibility of the video recording.

It is clear the legislature intended to allow the video recording into evidence even though it will likely constitute hearsay under Rule 801, SCRE, and may run afoul of other rules of evidence. The legislative enactment requires the child to testify prior to allowing the video recording into evidence, which demonstrates the Legislature presupposed some

² It should be noted Appellant has not challenged the trial court's ruling that the requirements for admission of the videotape has been met. Accordingly, the unappealed finding of the trial court that the videotape met the requirements for admissibility under the statute is the law of the case. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (holding that an unchallenged ruling, right or wrong, is the law of the case).

bolstering will naturally occur and the bolstering was deemed acceptable. Additionally, the statute shows the Legislature of our State has made a public policy decision that admitting evidence of the child's prior statement will be beneficial to finding the truth in sexual crimes where there is a child victim. As a result, the court need not partake of the same analysis required of other evidence, and the video recording should not be excluded on the basis that it bolstered the minor victim's testimony. The trial court did not err in admitting the video recording because it did not impermissibly bolster the victim's testimony.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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October 10, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2012-211430

The State,

Respondent,

vs.

Jefferson Lee Perry, Jr.,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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ATTORNEYS FOR RESPONDENT

October 10, 2013

STATE OF SOUTH CAROLINA

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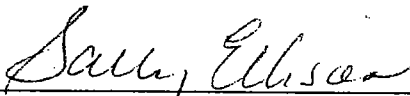
Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 10th day of October, 2013.


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