

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

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Opinion No. 2014-UP-470 (S.C. Ct. App. filed 12/17/14) **S.C. Supreme Court**

11-GS-26-1335; 11-GS-26-0365

THE STATE,

RESPONDENT,

V.

JON WYNN JARRARD,

PETITIONER

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

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

The State of South Carolina, Respondent,

v.

Jon Wynn Jarrard, Appellant.

Appellate Case No. 2012-212269

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Unpublished Opinion No. 2014-UP-470
Heard November 4, 2014 – Filed December 17, 2014

AFFIRMED

Craig Robert Stanley and Chief Appellate Defender
Robert Michael Dudek, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior
Assistant Deputy Attorney General Deborah R.J. Shupe,
both of Columbia; and Solicitor Jimmy A. Richardson, II,
of Conway for Respondent.

PER CURIAM: Jon Wynn Jarrard appeals his conviction for criminal sexual
conduct with a minor under section 16-3-655(A)(2) of the South Carolina Code

(Supp. 2013). He argues the circuit court erred in permitting the State to reindict him under a different subsection of the statute and to introduce evidence of his prior conviction for a sexual offense in violation of his due process rights. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Geer*, 391 S.C. 179, 195, 705 S.E.2d 441, 449 (Ct. App. 2010) ("In our criminal justice system, the Government retains broad discretion as to whom to prosecute. [S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." (alteration by court) (citation and internal quotation marks omitted)); *Strickland v. State*, 276 S.C. 17, 20, 274 S.E.2d 430, 432 (1981) ("We [have] indicated the fact that a prosecuting attorney may select which of several offenses with which an accused may be charged is not constitutionally obnoxious." (internal quotation marks omitted)); *United States v. Goodwin*, 457 U.S. 368, 382 (1982) ("A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct."); *State v. Benton*, 338 S.C. 151, 154-56, 526 S.E.2d 228, 230 (2000) (indicating the deterrence of repeat offenders is a legitimate state purpose and the introduction of a prior conviction is not unduly prejudicial in establishing this element of the crime of first-degree burglary); *id.* at 155-56, 526 S.E.2d at 230 (noting propensity evidence is not strictly prohibited and may be admissible to establish an element of the crime other than general character in certain circumstances); *State v. Hamilton*, 327 S.C. 440, 445-46, 486 S.E.2d 512, 514-15 (1997) (holding because two prior burglary and/or housebreaking convictions are an element of first-degree burglary under the South Carolina Code, the defendant cannot require the State to stipulate to the prior convictions in lieu of informing the jury about the prior convictions).

AFFIRMED.

HUFF, SHORT, and KONDUROS, JJ., concur.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JON WYNN JARRARD, SR.,

APPELLANT

APPELLATE CASE NO. 2012-212269

Unpublished Opinion No. 2014-UP-470

PETITION FOR REHEARING

Petitioner Jon Wynn Jarrard, Sr., requests rehearing pursuant to Rule 221(a), SCARCR, because this Court may have overlooked, and thereby only addressed, the real issues in this case in passing: "Did the trial court err when it allowed the State to proceed under §16-3655(A)(2)...to use the Defendants prior conviction, as propensity evidence in violation of due process?" Additionally, Petitioner also raised the issue of whether the trial court erred in failing to conduct an on the record Rule 403 balancing test in relation to the introduction of the prior bad act evidence.

In *State v. Benton* the South Carolina Supreme Court held that in order for a law that allowed the admission of a prior conviction as an element of the crime to survive an attack on due process grounds, the law needed to be tied to a legitimate state purpose and reasonably designed to accomplish that purpose. *State v. Benton* 338 S.C. 151, 156, 526 S.E.2d 228, 230. In the context of the burglary first statute, the state purpose is to deter repeat offenders and the reasonable design is the allowance of the introduction of two prior bad acts that are the very same act the defendant is on trial for. The deterrent effect exists as an enhanced sentence, fifteen years to life imprisonment. That is not the case with 16-3-655(A)(2).

Under subsection (A)(2) criminal sexual conduct with a minor statute law, 16-3-655, the state is allowed to introduce one of twenty-three prior bad acts listed in Section 23-3-430(C) as part of the element of the crime. The prior bad acts that are allowed to be introduced as evidence in these cases are as varied as (12) peeping, voyeurism, or aggravated voyeurism (Section 16-17-470); or (15) kidnapping (Section 16-3-910) (of a person eighteen years of age or older except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense). In this case, the trial court allowed a remote fifteen year old conviction under section 23-3-430(C)(13). Subsection (C)(13) allows any violations of Article 3, Chapter 15, Title 16 involving a minor to become an element of the crime. Even if the Court considers a legitimate state purpose the protection of children, due process prohibits the legislature to paint with such a broad brush. *Benton* allows for the introduction of the same crime as an element of burglary first degree, not the introduction of all crimes against people or personal property. There is no legitimate state purpose in allowing a prior murder, lynching, hazing, assault, etc. involving a minor to be allowed to be introduced as an element of criminal sexual conduct with a minor. The defendant is already accused of a

grievous crime and allowing the introduction irrelevant prior crimes goes against our traditional notices of due process and the rules of evidence.

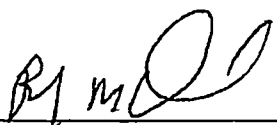
Additionally, this law is not reasonably designed to accomplish a purpose. The law does not accomplish the deterrent effect of a greater sentence. The way the statute is constructed 16-3-655, a conviction under subsection (A)(2) imposes a lesser sentence than a conviction under subsection (A)(1). The only difference between the two subsections is allowance of the prior bad act evidence in. The only reasonable inference is that the introduction of this prior bad act waters down the state's burden of proof and the legislature has acknowledged this by creating a lesser sentence for the crime. The only deterrent factor is that if you are accused of criminal sexual conduct with a minor and the defendant has been a prior bad actor in another unrelated sexual case or a case involving a minor, that evidence will be used against you. This is not a legitimate state purpose and is a thin disguise for the introduction of such prior bad acts that the Rules of Evidence under Rules 403 and 404 were designed to exclude.

The trial court also erred by not conducting an on the record balancing test of the prior conviction under Rule 403. Even if propensity evidence is otherwise admissible, the evidence is still subject to the traditional rules of evidence. *See Benton* at 156, *State v. James*, 335 S.C. 25, 34, 583 SE2d 745, 748 (2003). Neither the trial judge's traditional role in weighing the probative value of evidence versus its prejudicial effect under Rule 403, nor Rule 401, is displaced by the operation of a statute where an element of an offense is a prior conviction. *Id.* Particularly with sex crimes, where the danger for prejudice is so great, the court should not be allowed to shirk its responsibility as gatekeeper. Additionally, this Court in *State v. Spears*, held that failure to conduct an on the record balancing test was sufficient enough to remand the case back to the trial court. *State v. Spears*, 403 S.C. 247, 742 S.E.2d 878 (S.C. App., 2013) In

Spears, the trial court allowed for the introduction of evidence that the defendant engaged in shooting the victim a month prior to the incident he was on trial for, murder and three counts of assault and battery with intent to kill (ABWIK) with the same victim. *Id.* In remanding back the trial court, this Court declined to perform a de novo Rule 403 balancing test likening the requirement for the trial court to conduct a prior conviction balancing test under Rule 609(b). *Id.*; *State v. Colf*, 525 S.E.2d 246, 337 S.C. 622 (S.C., 2000). With no physical evidence of the alleged crime introduced at trial and with some questions of credibility relating to the accuser, the introduction of a prior conviction for lewd act on a minor was fundamentally prejudicial. The introduction of Appellant's prior conviction was fundamentally unfair and stripped him of any of the protections provided by SCRE 403, SCRE 404(b), and the South Carolina Constitution.

In designing 16-3-655(A)(2) the legislature created a giant exception to our state's history against the introduction of propensity evidence. The act effectively allows for the introduction any prior conviction that has some connection toward minors or sexual depravity in general, even if not directed towards children. If the General Assembly is allowed to create this exception what is stopping them from allowing the exception to swallow the rule? If this court allows the exception to continue, why wouldn't the legislature create a crime called "aggravated DUI" and define it as one having one or more DUI within the past 10 years. What about "aggravated drug sales" by defining it as having one or more drug sales within the past 10 years. What about "aggravated shoplifting" by the same type law? The General Assembly simply cannot take away the fundamental right to a fair trial by such tactics. The Constitution prohibits it and only the courts can enforce the constitution. Petitioner requests rehearing.

Respectfully submitted,

By: _____

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JON WYNN JARRARD, SR.,

APPELLANT

APPELLATE CASE NO. 2012-212269

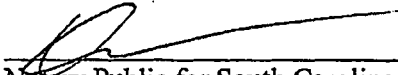
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of December, 2014.



ROBERT M. DUDEK
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 30th day of December, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023.

The South Carolina Court of Appeals

The State of South Carolina, Respondent,

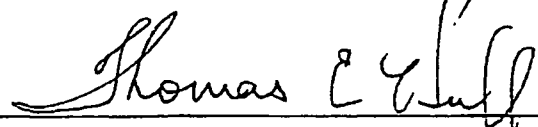
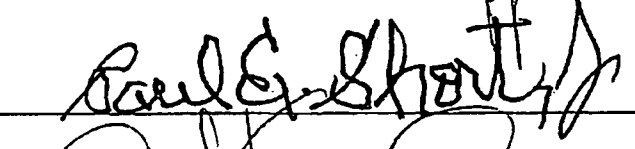
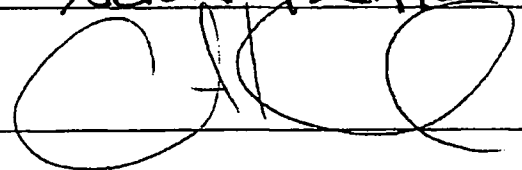
v.

Jon Wynn Jarrard, Appellant.

Appellate Case No. 2012-212269

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.

 J.
 J.
 J.

Columbia, South Carolina

cc:

Robert Michael Dudek, Esquire
 Alan McCrory Wilson, Esquire
 Craig Robert Stanley, Esquire
 Deborah R.J. Shupe, Esquire

FILED

January 23, 2015

Jimmy A. Richardson, II, Esquire
The Honorable Larry B. Hyman, Jr.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Larry B. Hyman, Circuit Court Judge
Appellate Case No. 2012-212269

THE STATE,

Respondent,

V.

JON WYNN JARRARD, SR.,

Appellant.

APPELLATE CASE NO. 2012-212269

RECORD ON APPEAL

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State of South Carolina
County of Horry

In The Court of General Sessions
2011-GS-26-01335
2011-GS-26-00365

State of South Carolina,)
)
)
vs.)
)
Jon Wynn Jarrard, Sr.,)
)
)
Defendant.)
_____)

TRANSCRIPT OF HEARING
PRE-TRIAL MOTIONS

April 3, 2012
Conway, South Carolina

Before:

The Honorable, Larry B. Hyman, Judge

Appearances:

By: Candice A. Lively, Esq.
Attorney For State

BY: T. Kirk Truslow, Esq.
Attorney For Jon Wynn Jarrard, Sr.

BRENDA R. BABB
Circuit Court Reporter

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Pre Trial Motions

3

Ms. Lively: Your Honor, I -- according to the particular indictments, I'll read them out. This defendant, Jon Jerrard, CSC first degree with a minor, 2010-GS-26-4574; lewd act on a minor, 2011-GS-26-365; and CSC with a minor first degree under a separate statute section which is a part of what the defendant is charged with which is 2011-GS-26-1335.

Your Honor, this case started when the defendant was arrested in September of 2010. The defendant does have a prior conviction for lewd act on a minor. The defense has been provided with copies of the certified conviction. During negotiations in the case and as the case proceeded, the defense attorney that was originally assigned to represent this defendant was Thomas Floyd. The case was at some point in time going to be placed on the trial docket. Mr. Floyd was notified as well as myself that Mr. Truslow was taking over the case. Since that time Mr. Truslow has filed several motions; and Your Honor, this case has been scheduled to be heard before you the week of June the 11th of 2012, and that's the reason why we bring some matters before you today because Mr. Truslow wishes to address some issues that could have some bearing on how this case is tried; as well as, Your Honor, just for some judicial economy we could address the issue of the forensic interview ahead of time. I've brought my forensic

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interviewer and well as medical expert, Dr. Rather, in for
just some brief questions regarding compliance with the
forensic interview statute, 1723-175. Your Honor, either
one of us can go. Originally this was scheduled pursuant
to the defendant's motion. Does Mr. Truslow wish to
proceed on those at this time?

The Court: Mr. Truslow, where is your client?

Mr. Truslow: He's not here, he's waived his
presence.

The Court: All right, you're here ---

Mr. Truslow: On his behalf, Your Honor.

The Court: All right, very well.

Mr. Truslow: And regarding the forensic
interview, Your Honor, I do not contest that but we're
still, I'm going to have to put by virtue of the statute,
we have to put that on there but I wanted to let you know
we're not opposing that.

The Court: Very well.

Mr. Truslow: The motions that I brought, and I
kind of want to do these two together, Motion to Quash
Indictment and Motion to Prevent the State from Proceeding
under Section A(2). I filed both of those and give them to
you. I'm kind of going to argue them simultaneously
because it's the same exact issue on both of them. I just
wanted to make sure I covered my bases.

Def.'s Mot. to Quash and Prevent Proceeding Under A(2)

5

To be brief, the background was this client had an attorney and was moving forward, the payoff made. He was indicted under subsection A(1) of 16-3-655.

The Court: Right.

Mr. Truslow: He told me that he decided he wanted a trial. At that point he was re-indicted. At that point he was indicted under 655, Section (A)2. The reason I brought this motion, and everything is in writing here and I'll just be very brief. The initial indictment alleged and was correct, the complaining victim in this case was eight years old. That would fit squarely under subsection (A)1. This is a statutory scheme that's set out by the legislature. Case law makes it clear that a state can bring their charges and prosecute anybody however they want to prosecute them; and I acknowledge that. What else I acknowledge and argue to the Court is that the State's right to do that under case law is not completely unchecked; it is not absolute. I cited Old Chief as some support on page three of the Motion to Quash. And in that case, Judge ---

The Court: The Old case was a speedy trial case, wasn't it?

Mr. Truslow: It was Old Chief v. United States. What happened, Judge, the defendant was charged with possession of firearm, a felon in possession of a firearm,

Def.'s Mot. to Quash and Prevent Proceeding Under A(2) 6
basically. The underlying felony which the State has a right to prove, was assault with intent to kill, or assault to do bodily harm, assault, aggravated assault. The Supreme Court reversed that and said that it was unnecessary to go into the name of that offense because if you do the weighing out that the Court has to do before, it was more prejudicial than it was probative. So what that tells the Court is, and there's one other case I wanted to mention before I go into my argument which was James, State v. James, 355 S.C. 25. In that case that was a burglary case and I liken this to the burglary statute. We know that under burglary first degree, maybe it was second degree, someone who has a prior burglary ---

The Court: Prior.

Mr. Truslow: --- two prior burglaries that's provable to the jury. Now they can't go into the facts of it but they can put in through the Clerk of Court he has two convictions for burglary. In State v. James the judge let them put in seven priors and the judge said, well, they reversed that.

The Court: They reversed the case, it was prejudicial to put in the other five when only two were necessary.

Mr. Truslow: So, Your Honor, what I'm arguing to the Court is that what those cases show is if you review

Def.'s Mot. to Quash and Prevent Proceeding Under A(2) 7

Benton, which is the original burglary case, saying it's okay to put that in. James, Old Chief, at least one truth comes through. The Court does not want an individual convicted solely based upon a prior conviction. That's one thing, that's why we have the balancing test. And the second thing that comes up in these cases is that the judge has discretion to do what he wants to do. On other words, the judge can say you can bring in a prior conviction but you can't talk about the facts so I believe that the Court has the right in this case to disallow them from proceeding under Section a(1); and the reason is, going into the motion where it comes under prosecution, prosecutory retaliation under North Carolina v. Pearce. "Petitioner showed that there was a reasonable likelihood that retaliation was the motive behind new charges, that a presumption of prosecutorial retaliation applied." Now, what upset me was there is absolutely nothing that the State can point to that they brought this case and re-indicted him under Section a(2) except to bring in probative evidence of a prior offense. Well what happened was they learned he was going to trial, they learned that the prior was about fifteen years old so it would not come into evidence. I think we both can agree under A(1) it would not come into evidence, so he was re-indicted under a statute that applies, I think if it's under, if it's a

Def.'s Mot. to Quash and Prevent Proceeding Under A(2) 8
fourteen-year-old, I'm sorry, "sexual battery of a victim who is sixteen years or younger." Actually, Judge, if you read it says, "a victim who is less than sixteen years of age and has either been placed on the sex registry or has a prior sex offense." So Sub-section A(1), "the actor engaged in sexual battery with a victim who is less than eleven years old," which is properly fitting in the legislative scheme for what happened in this case; we're dealing with an eight-year-old. What they have done they have brought, re-indicted under another section that deals with a child who is sixteen years or less but has the added element of a prior conviction for the sole purpose of convicting this individual based upon a prior conviction because if it brings this way all they've got to do is say we tried the case and then they say by the way fifteen years ago ---

The Court: One hundred and ten, the statute A(2) says that if the victim is eleven years of age or less the statute applies, sexual battery.

Mr. Truslow: It even carries more time than eight years.

The Court: Okay.

Mr. Truslow: Yes, sir.

The Court: A(1)). A(2) says if the victim is under sixteen and there has been a prior conviction for

Def.'s Mot. to Quash and Prevent Proceeding Under A(2) 9
sexual battery.

Mr. Truslow: Or they've been on the sex
registry, either one of those.

The Court: And your position is they're only
prosecuting him under A(2) ---

Mr. Truslow: To circumvent ---

The Court: --- so that they can use the prior
conviction for sexual battery.

Mr. Truslow: That's the only reason. It could
be the only reason there's no other neutral reasons they
could point to to do that other than is to circumvent the
rules of evidence in this case which would I say and what I
do is I back up why prosecutorial appears in these cases
apply is because ---

The Court: Wouldn't it be ---

Mr. Truslow: --- in my opinion that violates
due process ---

The Court: Wouldn't it be possibly ---

Mr. Truslow: --- which violates fundamental
fairness.

The Court: --- wouldn't it possibly be
admissible under A(1) as common scheme, design, absence of
mistake, that sort of thing ---

Mr. Truslow: I don't think ---

The Court: --- Lyle-type exceptions, if it

Def.'s Mot. to Quash and Prevent Proceeding Under A(2) 10
fit?

Mr. Truslow: If it fit, but this is something that's fifteen-plus years old and it's a lewd act. I don't think that it would apply based on the age of it.

The Court: All right.

Mr. Truslow: I think that, I think that's a pretty clear substantive; and the other thing I wanted to do was just address the State's response.

The Court: Well age doesn't have anything to do with a Lyle-type exception does it?

Mr. Truslow: No, sir, but there's nothing that's similar ---

The Court: The age of it ---

Mr. Truslow: This was ---

The Court: --- you could still ---

Mr. Truslow: --- this was an older girl and it was a groping fifteen-plus years ago versus a, an eight-year-old girl and a charge of possible cunnilingus.

The Court: You don't think they could show the, the similarities?

Mr. Truslow: I don't, don't think they're similar. But if they could, at least the court would be able to do its duty and do a balancing act and run through those, you know, it would be an element of the case is what they've done actually.

Def.'s Mot. to Quash and Prevent Proceeding Under A(2) 11

The Court: Well let's see what Ms. Lively says.

Mr. Truslow: And I wanted to just quickly point out what she wrote back was that, you know, everything in here goes to the date that this would jeopardize their right to charge, how they want to charge. Nothing addresses the arguments that I'm making under due process; and I think there should be a presumption of prosecutorial retaliation once he got a new lawyer and once he decided to go to trial then he was re-indicted for only the sole purpose. They can't point to any other reason that he was, to circumvent the Rules of Evidence and the analysis of the Rules of Evidence by Your Honor because it's then an element.

The Court: All right, tell me about it, Ms. Lively.

Ms. Lively: Well, Your Honor, first of all whenever this matter was given to Mr. Truslow, or he was retained, I can tell you that there was no intent on my part for any kind of retaliation. As a matter of fact, I've very understanding whenever he came to me; and regarding a bond issue when his client was still stuck in jail having been denied bond because of that prior conviction and he had a death in the family and I consented, with my victim's knowing about it, to letting

Def.'s Mot. to Quash and Prevent Proceeding Under A(2) 12

him out of jail. So that's not it. What I have before me is a case where I have not had the opportunity to use that statute and the elements yet because the cases I've had I've had people who have had no prior convictions on the sex offender registry or anything else. It was something that I could use as an element of the crime. That statute is clearly there for the ability of someone in my situation to be able to use it. When else would I be able to bring a case under that particular statute section but for this particular type of case that I have now? It has nothing to do with retaliation. It has to do with my discretion as a prosecutor as to what case I should bring and be able to show the elements before a jury. I'm not looking to bring in anything regarding the facts of that prior case which clearly would be, you know, inadmissible information, something that I can't and shouldn't go into. I believe Vincent actually addresses that.

The Court: Is he on the registry?

Ms. Lively: He is, Your Honor, he's on the registry. I can even say, I can even show that he's on the sex offender registry if I have to, if the Court see, saw reason make it something other than lewd act on a minor; (b) because the statute clearly says he's on the sex offender registry or has been convicted of a sexually violent offense which he has; and I've given a certified

Def.'s Mot. to Quash and Prevent Proceeding Under A(2) 13
conviction to Mr. Truslow in that regard.

The Court: And that's a lewd act?

Ms. Lively: Yes, sir, and he's actually charged in this particular case with CSC with a minor first degree and lewd act on a minor, because there was in the forensic interview not only the allegation of cunnilingus, which meets the sexual battery of the CSC first degree with a minor, but also just the touching and the inappropriate act, lewd and lascivious act. But I'm not getting into fifteen-year-old conviction but for the element that has been provided through our state legislature to that particular code section as an element of the crime.

The Court: Mr. Truslow, didn't the legislature by implication, say we're going to treat people with prior convictions differently?

Mr. Truslow: Yes, when the victim is less than sixteen which comes right after less than eleven. So when she asks when else could I possibly use that, you would use it when the legislature anticipated you'd use it when that victim, or alleged victim was twelve to sixteen.

The Court: But doesn't our legislature and other statutes bracket ages by saying twelve to sixteen or whatever? Why wouldn't they say that if they did not anticipate this being a special circumstance where you could use the prior conviction if you had a defendant who

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had a prior conviction? It'd be like you're analogy of burglary. I can break into Ms. Lively's home this evening or today. If there are no aggravating circumstances I've committed Burglary II. If I enter her home at night, if I enter her home while I'm armed, if I'm coming or going or any of the other aggravating circumstances, then the State would have the right to say we're going to use this aggravating circumstance and we're going to make this a Burglary II. Isn't that basically what they've done here? The legislature has said if you've got anybody even anyone under sixteen and you have a prior record of a sexually violent act or you are on the sex offender's list you can be prosecuted and that can be used as part of your prosecution, the State's case. Isn't that what the legislature's saying? I mean, it seems they're punishing the prior offender by saying we're going to use this during your trial.

Mr. Truslow: They're doing that by electing to proceed under the section that was not meant for what happened in this case. I think it is bracketed because Section A(1) clearly lays out the violation if the child is less than eleven years of age and that's what we're dealing with here. Then they have a whole separate ---

The Court: So you don't think the legislature contemplated ---

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Mr. Truslow: Running it all together.

The Court: --- by saying, you know, this a aggravating circumstance and if the person is under eleven we're not going to use it? We're only going to use it if they're between twelve and sixteen.

Mr. Truslow: Well see, if that was the case, number one, why would, why would you limit it to, at all, and number two, why wouldn't it be vice versa if you have somebody under eleven?

The Court: Well they have don't they? They said anyone under sixteen. What's the age of consent, seventeen?

Mr. Truslow: Uh-huh.

The Court: Okay, anyone sixteen and under.

Ms. Lively: Sixteen in South Carolina, Your Honor.

The Court: Pardon?

Ms. Lively: The age of consent is sixteen ---

Mr. Truslow: Sixteen.

Ms. Lively: --- in South Carolina.

The Court: Well it's been so long since I've had to consider that. But it's a situation where it would not limit it. I mean, the legislature says any case under sixteen. If you have a prior offender and the act involves someone under sixteen you can go forward under this

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statute. I mean ---

Mr. Truslow: There would be no reason to have
two separate subsections.

Ms. Lively: Well that's not ---

The Court: Certainly there would be. Sexual
battery in the first degree can occur if you have, if you
have never been, if you're as pure as the driven snow, if
you have sexual battery with an eleven-year-old.

Ms. Lively: Under eleven.

The Court: Or under eleven.

Ms. Lively: Yes, sir.

The Court: I mean that's where that comes in,
you don't even have to consider that. I think she can go
forward with it, I'm going to allow her to do so, with some
reservations. You know, we don't need to be talking about
the facts.

Ms. Lively: No, sir.

Mr. Truslow: Well, Your Honor, I would bring
up based upon the James case, if that's the one that's
seven burglaries were reversed, I think that she should
have to elect whether to enter a prior conviction for lewd
act or that he's on the sex registry and ---

The Court: All right, and I believe he's
right there, Ms. Lively. I think, you know, you could do
either one that you choose, which ever would be easier for

Def.'s Mot. to Quash and Prevent Proceeding Under A(2) 17
you. Probably would be easier to just bring in the Sheriff
and say here it is.

Ms. Lively: Yes, sir, that's possibly ---

The Court: I don't know, you do it your way
but I think he's, he's correct in his analysis of the James
case where if it's either or, you don't need to put in
both.

Ms. Lively: And I agree, Your Honor, and I
don't want to give a reason for it to be appealed in
regards to that particular issue. I think it's clearly,
the element just requires that I make that showing and the
bare minimum will be fine and that's what I intend to do.

The Court: Okay.

Ms. Lively: And, Your Honor, the State is
ready to proffer Dr. Rahter in regard to the forensic
interview if you're ready to hear from her.

The Court: I am. If Mr. Truslow ---

Ms. Lively: Okay. I'm sorry.

The Court: If Mr. Truslow is done I am.

Mr. Truslow: Well, Judge, the ---

The Court: Did you have other motions?

Mr. Truslow: --- other motions I have is very
brief and we had thought about doing those right before
trial, it's a Motion in Limine and motion that has to do
with the rape shield statute. There was a Motion to Recuse

Dr. Rahter - Direct Examination by Ms. Lively

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which I'm withdrawing that now and then there's a Motion to Suppress the Expert Testimony but I think we realized what we're going to do with that and that takes care of my motion. We're going to a stipulation for Your Honor based on some of the new case law where she's not going to give expert testimony on the interview itself but rather medical expert testimony only.

Ms. Lively: Yes, sir, that's what we talked about literally before we came in here because of that new case that just came out regarding what we can ask, or what the forensic interviewers can talk about regarding credibility of the particular child during the interview and their perception of what's being said. I told Mr. Truslow that I'm going to have to put it on the record, I do not intend to qualify Dr. Rahter as an expert in forensic interviewing during the trial. What I intend to do is have her testify as a fact witness as to giving the interview, authenticating the actual interview itself for the interview to come into evidence. My intentions are to call her as an expert as a medical doctor as regards to ---

The Court: An examination?

Ms. Lively: --- examination for sexual assault and that's how I intend to call her as an expert. Now I may call, you know, someone regarding child sexual abuse separate and distinct from the forensic interview. The

Dr. Rahter - Direct Examination by Ms. Lively

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forensic interview is going to stand for itself and I am not going to actually qualify Dr. Rahter and ---

The Court: Well isn't that in keeping with the latest jurisprudence, Mr. Truslow?

Mr. Truslow: Yes, sir.

Ms. Lively: It is.

The Court: Okay, all right.

Ms. Lively: Yes, sir, and that's the reason why we're not going to address it but will call Dr. Carol Rahter to the stand at this time.

The Court: All right.

Ms. Lively: I believe that addresses the last matter.

Dr. Carol Ann Rahter,

having been duly sworn testifies as follows:

The Clerk: Please state your name and spell your last name for the Court.

The Witness: Carol Ann Rahter, R-a-h-t-e-r.

Direct Examination

by Ms. Lively:

Q Dr. Rahter, where are you currently employed?

A At the Waccamaw Hospital in the emergency department.

Q And what other services do you actually

State of South Carolina

In The Court of General Sessions

2011-GS-26-01335

2011-GS-26-00365

State of South Carolina,)

)

)

vs.)

)

Jon Wynn Jarrard, Sr.,)

)

)

)

Defendant.)

)

TRANSCRIPT OF HEARING

June 11-13, 2012

Conway, South Carolina

Before:

The Honorable, Larry B. Hyman, Judge

Appearances:

By: Candice A. Lively, Esq.
Attorney For State

BY: T. Kirk Truslow, Esq.
Attorney For Jon Wynn Jarrard, Sr.

BRENDA R. BABB
Circuit Court Reporter

Jury Selection

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1 jury.

2 (Whereupon, the jury was sworn.)

3 The Court: All right, ladies and gentlemen of
4 the jury, I'm going to let you go to lunch till about 2:00.
5 I ask you to be back in your jury room by two. You are
6 sworn as jurors in this case. I'm going to instruct you
7 not to at any time during this trial go to Facebook, My
8 Space, Linked In, any of those sites, try to do any
9 independent research about this case. Don't try to look up
10 a lot; don't try to visit the scene. The evidence that you
11 will hear in this case will all come from that witness
12 stand and that's the only evidence that you're to consider
13 in your deliberations. You must put anything else that you
14 might have a preconceived notion about out of your mind and
15 in that regard you should not go out and try to get
16 information other than what's coming from that witness
17 stand. I hope you have a nice lunch, be back at 2:00 and
18 we'll be ready to go. All right, Mr. Ropp, show them how
19 to get out.

20 (Whereupon, the jury was excused for lunch at
21 12:44 p.m.)

22 The Court: Is everyone ready to get started?

23 Mr. Truslow: Judge, I'll be real brief, I've
24 got two outstanding motions. One is a motion in limine
25 which covers five issues. I don't know if the Solicitor

Jury Selection

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1 agrees to any of them but I'll just start with one.

2 Ms. Lively: What's the date of that one you're
3 referring to, if you don't mind?

4 Mr. Truslow: This is dated July 22nd and filed
5 July 27th. Your Honor, I sent this to you as well.
6 There's five issues on here, Judge, motion in limine, the
7 first one is that we would ask that there be no evidence by
8 the State by Rebecca Ann Jarrard as to any sexual abuse
9 that she alleges her father ever perpetrated upon her as a
10 child. We believe that would be too prejudice. It
11 wouldn't fit within the rules; it's too remote in time. I
12 don't ---

13 The Court: Have to be common scheme design,
14 would it not, Ms. Lively?

15 Ms. Lively: And I have not intended to go into
16 that and I have not filed a motion in that regard, Your
17 Honor.

18 The Court: Not going to do it.

19 Ms. Lively: And I've already instructed my
20 witness as well.

21 The Court: Okay.

22 Mr. Truslow: Your Honor, when this happened he
23 was simultaneously arrested here in Horry County and in
24 Kershaw County based on the same conduct which they said
25 sometimes at his house, sometimes here in Horry County.

Jury Selection

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1 I was asking that, the Kershaw County stuff was dismissed
2 and I would ask that the Kershaw County case not be a part
3 of this case, that we're strictly dealing with Horry
4 County.

5 The Court: Well I mean she, she can only show
6 what occurred in Horry County as part of her case but you
7 don't want her to even talk about this other conduct. What
8 I'm saying, Ms. Lively, is the offense is in Horry County?

9 Ms. Lively: Exactly.

10 The Court: But you don't, Mr. Truslow don't
11 want you talking about the same conduct that would have
12 occurred in Kershaw County.

13 Ms. Lively: Correct.

14 The Court: All right, what's your position on
15 that?

16 Ms. Lively: Well, Your Honor, my position is
17 this, I do not intend to elicit that information from the
18 child regarding the Kershaw County matter. Here's where it
19 gets a little tricky. Your Honor has already viewed and
20 ruled on the admission of the forensic interview. Part of
21 what the child discloses is that some of the abuse occurred
22 at his home and she mentions the road and says ---

23 The Court: That's Acoon Road.

24 Ms. Lively: Yes.

25 Mr. Truslow: But that's on, I'm not concerned

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1 with that part.

2 Ms. Lively: Okay, well that was the only thing
3 I can't control.

4 The Court: The only thing that she intends to
5 do.

6 Ms. Lively: That's right but the child will
7 specifically, I'm going to ask her about in her home here
8 in Horry County what she's saying happened.

9 The Court: The only thing I remember from the
10 transcript and the tape was Aiken Road, I think Ms. Rahter
11 thought it was Aiken Road, the child said it was Acoon
12 Road, I don't know.

13 Ms. Lively: Right.

14 The Court: But that seemed to be the only thing
15 that I can recall.

16 Ms. Lively: That's it, Your Honor, and that's
17 why I just wanted to make sure that you were aware and that
18 we didn't hear it and it came out and there would be a
19 problem.

20 The Court: Okay, all right.

21 Mr. Truslow: The next issue I'd like to address
22 in the motion in limine is that I think we agreed upon
23 this, I just want to confirm it, is that as an element of
24 the offense it was either that he was on the registry or
25 that he was convicted prior of a lewd act or a criminal

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1 offense under that section as an element of the offense and
2 Your Honor had told the State that they needed to go with
3 one of those, that under the burglary as we analyzed if you
4 went with both of them that would be too much and it would
5 be overkill for the purposes of bringing that in.

6 The Court: Only need one, only need one offense
7 under the statute.

8 Mr. Truslow: So my analogy it's going to be his
9 prior conviction and not that he's on the sexual registry.

10 Ms. Lively: Well what I did was I, I
11 specifically sent him an email telling him that the
12 testimony that I will present is that he has a conviction
13 for lewd act on a minor from 1997 and I have a certified
14 conviction from Richland County which I had emailed that I,
15 my position was an exception to the hearsay rule based upon
16 it being basically a self-authenticating document from the
17 Clerk of Court.

18 The Court: And I think it's admissible under
19 that.

20 Ms. Lively: Correct, so what I propose to do,
21 and actually I was going to bring this up as one of those
22 the things that the State wants a little bit of
23 clarification on, this is the first time I've had to do
24 something like this. What I was going to do is Detective
25 Allen Large is going to testify and I was going to ask him

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1 do you know typical what do you do when you get these type
2 of investigations. He ran a background check and there was
3 a conviction for the defendant for lewd act on a minor from
4 1997, not ask about any of the facts, not ask about
5 anything like that because that goes outside the scope.

6 The Court: And that's not necessary.

7 Ms. Lively: And then what I was going to do is
8 actually put in the certified conviction of the, from
9 Richland County into the record as evidence. You know I
10 feel like since it's an element I've got to prove it beyond
11 a reasonable doubt and ---

12 The Court: I understand that and I think what
13 you, I think you're on firm ground there, but let me hear
14 from Mr. Truslow.

15 Mr. Truslow: For the record I object to the
16 certified record coming out. I don't think it's an
17 analysis under hearsay. The analysis was how do you put
18 that in as an element of the defense and it's supposed to
19 be the least intrusive way which in my mind would be
20 testimony by the officer that he in fact has a conviction
21 in 1997 of that.

22 The Court: But that would be hearsay unless you
23 didn't object to it.

24 Ms. Lively: Your Honor, my ---

25 The Court: And then if you did object to it ---

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1 Mr. Truslow: But it's not hearsay because it's
2 an element of the crime and we agree that would come before
3 the Court.

4 The Court: No, no, it's hearsay if that officer
5 testifies to it without putting in the record. If that
6 officer testifies from the stand that he had done a
7 background check and found a record from Richland County
8 that's objectionable as hearsay. If that officer says I
9 have a certified copy from the Clerk of Court for Richland
10 County showing a conviction I think that's the way it's
11 supposed to be properly done.

12 Mr. Truslow: Then I would just ask that we
13 prior to doing that we all take a good look at the
14 certified copy to make sure it's not too much information
15 on it, it doesn't go over what is supposed to be put in
16 cause if you want to bear bone ---

17 The Court: But what, do you have it there, Ms.
18 Lively?

19 Ms. Lively: Yes, I've got the original stamped
20 copy.

21 Mr. Truslow: I mean I understand that that has
22 to go in as an element but to me it just seems to be a
23 awful lot of information about it and it's not supposed to
24 be.

25 The Court: Well you know we have that, this is

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1 the best evidence, we have that case that involved a DUI
2 where the statute says that you may stipulate that it is
3 more than a first offense and if that is done the State
4 cannot put in elements of the offense. There's a later
5 case that comes about that says that applies only where
6 there's a statutory authority for the stipulation if the
7 State, and I cannot recall the case right now, but the
8 State is not required to accept the stipulation, the State
9 can make its proof, and in this case the certified copy of
10 the record -- what part do you, what part of this sentence
11 sheet do you ---

12 Mr. Truslow: Just the entire, the handwritten
13 notes by the Judge as to the sentence.

14 The Court: Just conditions, assessment, and
15 pre-substance abuse if necessary, sex offender counseling,
16 and/or mental health counseling.

17 Mr. Truslow: Yes, sir.

18 The Court: All statutory requirements that no
19 contact of any type with the victim or her family, and will
20 report for beginning of sentence on or before, they let him
21 self report, you know perhaps we can, I don't see where it
22 adds to or takes away from Ms. Lively's case. Ms. Lively,
23 do you have any objection to redacting that?

24 Ms. Lively: Are you talking about where it says
25 other conditions?

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1 Mr. Truslow: In the sentence ---

2 The Court: Other conditions, yeah.

3 Ms. Lively: The other conditions in regards to
4 that part of it I could probably redact without butchering
5 the actual record, I think.

6 The Court: I think we could redact, if you have
7 an objection to that, Mr. Truslow, I could redact that but
8 --

9 Mr. Truslow: I just think that's the safest
10 route to go because the only thing that's supposed to come
11 in is the fact that he had a conviction in 1997.

12 The Court: Lewd act upon a child, that's what
13 this says, lewd act upon a child and that's the charge,
14 that's the penalty code, and that he was sentenced to ten
15 years with probation for three years.

16 Mr. Truslow: I don't even believe that the
17 sentence is relevant element for the crime.

18 The Court: Yeah, but I think when we start
19 taking that out we're going to mess up this, this, this
20 copy. I personally think that what we need to do is if we
21 take out anything we'll take out the conditions of
22 probation.

23 Mr. Truslow: And let the sentence go in cause
24 it was my understanding of that case law it's not supposed
25 to get into any details at all about the case, simply the

Jury Selection

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1 fact that he was convicted.

2 The Court: And this has, and this has no, no,
3 no details about the case at all.

4 Mr. Truslow: All right.

5 The Court: Well how does that add to your case,
6 Ms. Lively, does it make any difference what he got or what
7 the conditions of his probation were?

8 Ms. Lively: No ---

9 The Court: Does that make any difference?

10 Ms. Lively: The conditions don't, my concern
11 about pulling too much out of the certified record is that
12 the confusion to the jury, it doesn't, they're going to
13 look at it and, you know, the one part of the body that I
14 think is important is to show the conviction, absolutely.
15 So it's got a sentence, it's got the charge, and then it's
16 got what his conviction is, that he is committed to the
17 Department of Corrections for a term of ten years. That
18 part of it right there, I believe, needs to be kept intact
19 because that is the, what I have to show beyond a
20 reasonable doubt that he has that conviction. I, you know
21 I don't mind taking out the other conditions, I see the
22 concern ---

23 The Court: Show me your authority for that
24 you're referring to, Mr. Truslow?

25 Mr. Truslow: Your Honor, it's the same stuff

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1 that we went over when I argued my motion to quash the
2 indictment and not let her proceed under that statute.
3 Once we agreed or once you ruled that she could do that the
4 case law was clear under those burglary cases that the only
5 thing you can say is that the bear bones allegation or
6 evidence that they were convicted of it. There was not
7 supposed to be any going into the details of it and I think
8 the sentence it goes beyond just the mere fact that he was
9 convicted.

10 Ms. Lively: Your Honor, if I may, I do have a
11 copy of the cases that Mr. Truslow used in that pretrial
12 motion, that was State v. Benton, sound correct, and I've
13 also got a case of State v. Cheatham, I know you also
14 brought up Old Chief, but I did not bring that case with
15 me. I have a copy of State v. Benton and Cheatham, do you
16 need another copy?

17 Mr. Truslow: My understanding under this case
18 law, Judge, that when I lost my motion that then if she was
19 allowed to proceed under that section then there's no
20 question about it like the burglary cases the prior
21 conviction is an element of the crime which she has to
22 prove, however, the sentence that he received would, would
23 not necessary be an element of the crime that she has to
24 prove. I'm only, all I'm asking is that she be limited to
25 proving the conviction and that's it and I think that the

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1 sentence is just overkill.

2 The Court: I think it does go a little further,
3 Ms. Lively. I'll allow you, Mr. Truslow, to if you want to
4 redact the ten, the two, and the three, and the conditions,
5 okay. Now you challenge, you challenge this document, this
6 conviction on those grounds that it's incomplete she's
7 going to get it all in.

8 Mr. Truslow: Oh, no, I'm not going anywhere
9 near character.

10 The Court: Okay, all right, ya'll can clean
11 that up and get one and do it.

12 Mr. Truslow: Judge, the last thing, Judge, and
13 I'll be very brief, but I need to give a little bit of
14 background on this case. [REDACTED], who's the accuser
15 in this case, was playing at the neighbor's house. She was
16 caught with her clothes off with the neighbor girl ---

17 The Court: Yeah, Allison.

18 Mr. Truslow: --- and Pamela Gause who I've
19 subpoenaed to be here as a witness is the mother of the
20 other child. She, she showed up, she saw them or either
21 the husband did, but right after this she ---

22 The Court: Pamela Gause.

23 Mr. Truslow: Yes, Pamela Gause had a
24 conversation with [REDACTED] immediately following this. She
25 went into where did you learn this, what are you doing, you

Jury Selection

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1 know typically the victims bill of rights allow the mother
2 of the victim to be in here but ---

3 The Court: Since it's a child I'm going to
4 allow the mother to be in, in the courtroom, okay/

5 Ms. Lively: Okay, all right.

6 The Court: Mr. Large, you've been absent from
7 my courtroom quite some time now. I thought perhaps you
8 had retired.

9 Ms. Lively: We won't let him go, Your Honor,
10 not yet.

11 The Court: All right, anything further, Mr.
12 Truslow?

13 Mr. Truslow: No, sir, Your Honor.

14 The Court: Okay, I'm going to bring the jury in
15 and I'll give them a brief preliminary charge then we'll
16 get right into this case. It looks we can probably try
17 this in a couple of days.

18 Ms. Lively: That was my belief, Your Honor.

19 Mr. Truslow: Yes, sir, I think so.

20 The Court: Think so, good, good, good, let's
21 bring in the jury.

22 Mr. Truslow: Your Honor, when you put in the
23 certified copy of the prior conviction is there going to be
24 a limiting instruction with that? I think the burglary
25 case is held as it was, that it was just put in only for an

Jury Selection

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1 element of crime; it's not to be used in terms of ---

2 The Court: Not as to whether or not he
3 committed this crime but only as to, to show that ---

4 Mr. Truslow: Something along those lines ---

5 The Court: Yeah, I will.

6 Mr. Truslow: Yes, sir.

7 Ms. Lively: And that was my understanding, too.

8 : That's why I didn't bring it up and in my, and just since
9 we have a minute to wait just so that I don't overstep, in
10 talking about the elements just so I'm clear whenever, what
11 we've agreed to is that he has a conviction for lewd act on
12 a minor as the element so I can, whenever I'm talking about
13 the elements I have proof beyond a reasonable doubt to the
14 jury that's all I'm going to say. I'm not going to say ---

15 The Court: In your opening remarks you can say
16 that that's what you have to show.

17 Ms. Lively: That's what I have to show and
18 that's it and I just wanted to make sure that we're clear
19 on that.

20 The Court: Okay, there's no question about
21 that.

22 (Whereupon, the jury returns to the courtroom at
23 2:20 p.m.)

24 The Court: All right, ladies and gentlemen,
25 we're about to begin the case as I said of The State v. Jon

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1 consider anything that you or any process that you believe
2 that you have proven to yourself in your lives will lead
3 you to the truth.

4 Now, Mr. Foreman, during the trial of this case
5 you will be the jury's liaison between the Court and this
6 jury. If you need anything please let Mr. Ropp know and
7 he'll bring it to my attention. If you have any difficulty
8 seeing or hearing, any of you, raise your hands, all this
9 evidence is presented for you. If you become uncomfortable
10 and need to refresh yourselves raise your hands. If Mr.
11 Ropp hasn't got biscuits for you in the morning or
12 doughnuts raise your hand when you come back in and I'll
13 straighten Mr. Ropp out. Mr. Ropp, what are you going to
14 have in the morning?

15 The Bailiff: Biscuits.

16 The Court: He's going to have biscuits in the
17 morning, we always try to have something. All right, thank
18 you very much. Ms. Lively, are you ready?

19 Ms. Lively: I am, Your Honor.

20 The Court: All right.

21 Ms. Lively: Thank you very much,

22 Opening Statement

23 By Ms. Lively:

24 Ladies and gentlemen, this case is one that's
25 going to present information to you that may be hard to

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1 listen to at times. One of the things that I like to do
2 whenever I have my first opportunity to talk with you as
3 jurors is to let you know that that is my job to be
4 specific about some of the things that has happened to the
5 child who will be testifying here in this case, [REDACTED]

6 [REDACTED]

7 She now is ten years old, born November 19th, of
8 2001, very young child, happy family, and you will hear, as
9 the Judge mentioned to you, evidence which is what comes
10 from that witness stand is evidence, You will hear
11 statements from the child about what happened to her at the
12 hands of her grandfather and it is a difficult thing to
13 have to hear but you have to hear it because that's your
14 job and that is your important job for this week.

15 Now let me explain a few things to you so you can
16 kind of understand the rules I have to follow as a
17 prosecutor in presenting this evidence to you.

18 I have very strict rules because these type of
19 cases are based on the credibility of witnesses and our
20 state legislature knows that because a lot of times child
21 abuse is the type of crime that happens in private. We
22 don't normally see these type of things happening out, you
23 know, I don't know, you might see somebody beating their
24 kid in Walmart but you know you don't normally see
25 something like some type of a sexual act that has been

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1 alleged in this case out in public. So that's the reason
2 why our legislature has actually passed legislation that
3 states no corroboration is necessary whenever you're
4 bringing forward a case such as this if the witness, or
5 victim in the case, states that it happens and you
6 determine that statement and everything that comes out
7 afterwards to be credible, to make sense. So when the
8 Court's talking to you about weighing the evidence that's
9 what the Court's talking about weighing that testimony that
10 comes out on that witness stand. That's what you're going
11 to have to consider and [REDACTED] also has to be here. The
12 law requires that. We have no option because a defendant
13 has a right of confrontation of an accuser so that's why
14 she's here, not because I have nothing better to do but
15 because that's the law and that's the requirement. So she
16 will speak to you from that witness stand as well, and you
17 can determine her credibility, only you determine her
18 credibility, not me, not Mr. Truslow, so you will hear from
19 her.

20 Also, we had a law passed in 2006 which actually
21 allows for a child in a case such as this to be interviewed
22 by someone who's called a forensic interviewer and that
23 person has learned how to talk to a child about these
24 sensitive type of matters and what they do, and what our
25 law has allowed, is for that to be videotaped and recorded

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1 and played back to you in court. So you will actually be
2 able to see an interview from when [REDACTED] first disclosed
3 what her grandfather had done to her and in that interview
4 you will get to hear the details. You will get to hear how
5 she names her body parts, how she described the different
6 things that happened. That video will be played for you
7 and the law has allowed us to present that as evidence in
8 these type of crimes as well because sometimes it takes
9 years to come to court, no fault of the defense or of the
10 prosecution. It's just the way that these things happen,
11 it takes time.

12 In this case the disclosure came out in May of
13 2010, so we are two years out from when all this came out.
14 You know if I had to try and remember what happened to me
15 three weeks ago I'd probably have a really hard time. My
16 husband tells me I can't remember anything that happens a
17 week ago, so when you think about that and you're dealing
18 with such a witness as a child, even as an adult, but our
19 legislature has actually carved out an exception for
20 children under the age of twelve, which [REDACTED] is, then
21 that can be videotaped close in time to the disclosure so
22 that their memories and their disclosure. The idea is that
23 it's more fresh, that that way if it ends up being two or
24 three years down the road we have a snapshot in time with
25 that child. I'm going to be presenting that to you as well

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1 during the trial for you to review, for you to determine
2 her demeanor and her credibility in regards to what she's
3 saying her grandfather did to her and that's going to be up
4 to all of you.

5 Now the defendant is charged with two crimes. He
6 is charged with criminal sexual conduct with a minor. What
7 this means is I have to show and prove every element beyond
8 a reasonable doubt, and that's the way it is in every case,
9 and so what I tell jurors is that reasonable doubt means
10 that something that causes a reasonable person to hesitate
11 to act. Now that sounds kind of hard to, to take into your
12 mind and figure it out but beyond a reasonable doubt
13 doesn't mean beyond all doubt. It just means think about
14 everything that's being presented to you, what is the most
15 reasonable scenario, what makes sense, what's reasonable,
16 and when you put it all together if it's reasonable you
17 believe the credibility of a particular witness then we've
18 met our burden. That's what it means, and, ladies and
19 gentlemen, if you don't think I'm telling you the way it's
20 supposed to be then trust me, the Judge will clear it up
21 for you. That's what he's there for; he's our referee. He
22 is the one that tells you the law.

23 Now criminal sexual conduct with a minor first
24 degree means that a sexual battery occurred on a minor
25 under the age of sixteen by someone who has a prior

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1 conviction for lewd act on a minor. This child, the
2 evidence will show, was under the age of sixteen at the
3 time of the event. We will provide evidence to you of a
4 conviction for lewd act on a minor by the defendant. We
5 will present that as one of the elements as well.

6 Then the defendant is charged also with lewd act
7 on a minor on the child [REDACTED] [REDACTED] This particular
8 charge means that the defendant touched her body or had her
9 touch him in a way that was lewd and/or lascivious for the
10 purpose of his or her sexual gratification.

11 When I try to explain what that law is typically
12 what I say is that it's, it's what child molestation. It's
13 more of a touching, fondling type of scenario, but it's not
14 touching like you have someone sit on your lap and you pat
15 their thigh or something like that. We're not, you know,
16 it crosses a major boundary. What I have to show is that
17 it was specifically for sexual gratification. So that is
18 what I have to show to you beyond a reasonable doubt.

19 Sexual battery under the CSC, so that you know
20 what to look for, I have to show to you beyond a reasonable
21 doubt that there was either some sort of a penetration,
22 however slight, of the child's genital area, or, and/or I
23 could show some type of oral copulation or oral sex, okay?
24 So those are the things that you're going to be listening
25 out for. Those are the things that I have to show to you

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1 and I have to present to you.

2 These are difficult things to hear, difficult
3 things to consider, but you must consider them all, and
4 place that burden on me because I will present it to you.
5 I will follow the rules. The Judge will help you by giving
6 you the law again but I wanted you to know kind of what to
7 expect, what to look for, and what I am going to be
8 presenting to you, and at the end of this case I will be
9 asking you to find the defendant guilty on both charges,
10 thank you.

11 Mr. Truslow: Please the Court, Your Honor?

12 The Court: Yes, sir.

13 Opening Statement

14 By Mr. Truslow:

15 Ladies and gentlemen of the jury, this is Jon
16 Jarrard, I'm proud to represent him this morning. One
17 thing you need to know from the outset is that he is not
18 guilty of these charges -- you can sit down.

19 I've read somewhere, and I've come to believe,
20 that when it comes to these kind of cases they are the
21 easiest cases to accuse somebody of and they are the most
22 difficult cases to defend and why is that? Because a child
23 becomes, if you let them, a super witness, and we all have,
24 and particular people who go into law enforcement, or they
25 go into forensic interviewing and that type of thing, an

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1 overwhelming desire to protect children. We all have that.
2 We all have that and I think that's innate, but I picked
3 you as jurors because not one of you held up your hand when
4 we asked the question do you believe under any
5 circumstances that a child never makes a false allegation.
6 All of you to a tee, at least none of you raised your hand
7 to that, so I have to believe that you will give us a fair
8 trial because without that I don't know what we're doing
9 here.

10 You come into a courtroom and you can get
11 sideswiped really quickly. We all like the status quo. We
12 all like the path of least resistance and what I've found
13 in many years of practicing criminal law is the easiest
14 thing for a jury to do is look at the defendant and say,
15 hey, the State's told you what happened, she just did, they
16 just told you who did it, all right, now he needs to be
17 punished, that's easy. You were not selected for an easy
18 job. You were selected for a difficult job because what
19 changes to where Mr. Jarrard's sitting and where we're
20 sitting that finger, a finger point, an allegation. As the
21 Judge told you early on, he said the indictment is an
22 allegation, just a charge that somebody said he did this.
23 Somebody points that to me I could be sitting in that
24 chair, Mr. Jarrard is sitting in that chair.

25 Those of you who have not been in jury duty

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1 before, or served at a trial like this before, may have
2 some apprehensive, anything new that we do we have some
3 nervous energy about it. Well you can imagine how nervous
4 Mr. Jarrard is because he did not do this.

5 Now I've also read some places that even though
6 he has the burden or the presumption of innocence and the
7 State has to prove beyond a reasonable doubt that he did
8 this, the defendant cannot prove he's innocent. Nobody in
9 criminal court is ever found innocent. It's either guilty
10 or not guilty and that's because you can't prove your
11 innocence. We have as strong a system as anywhere cause we
12 don't know you all. We don't know you all from Adam but
13 we've selected twelve people that don't know [REDACTED], don't
14 know her mama, don't know Mr. Jarrard. You don't know me
15 and you don't know Ms. Lively. You're going to decide this
16 based on the evidence.

17 What the evidence is going to show is this. Mr.
18 Jarrard is a good grandfather, seven grand kids, a good
19 husband, and a good father on top of being a grandfather.
20 The evidence is going to show that [REDACTED], and let me bear
21 in mind, Ms. Lively said we're going to have to talk about
22 some adult stuff in here and we are, and there is just no
23 way around that, and I apologize to anybody who's offended
24 by that, in particular [REDACTED] this is a tough day for her,
25 too, but this is kind of why we're here, okay? We've got a

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1 system that sometimes entraps children into something they
2 say and is designed not to let them get out of it once
3 they've said it. [REDACTED] was caught in a compromising
4 situation with another little girl. The baby sitter
5 started questioning her about this, cause we all want to
6 believe that children don't understand and can't describe
7 being abused or their body parts or this and that unless
8 they were abused. Well those times have changed and I'm
9 going to show you how she already has this knowledge.

10 This baby sitter caught her, pulled her aside,
11 and I can imagine, I wasn't there, that she was in some,
12 feeling some heat about this at the point. So what happens
13 as the conversation turns and this lady, the baby sitter,
14 is the mother of the other little child who was engaged in
15 some shenanigans without clothes. The baby sitter begins
16 to question her who's done this to you before. She says no
17 one. Now that's not good enough but always remember and
18 look for the evidence because I'm going to give it to you,
19 the first thing she said was nobody. She asked her a
20 second time, she still didn't answer anybody. At some
21 point I believe the bell went off and you know what with
22 children we look for ways to get out of trouble and at that
23 point she said my Papa and ever since that day everything
24 has been shifted from what was going on there to Mr.
25 Jarrard and you talk about a hurricane gaining steam,

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1 that's what happened. We have not been able to do anything
2 about it until today.

3 Now when you're charged with a crime you got a
4 couple of options. If you did it you can say, hey, I don't
5 want to be punished the worst you can do, but I don't mind
6 pleading guilty, I did something wrong, or you can say look
7 I'm laying out why this happened, I'm laying out the
8 evidence, I'm laying what you will also see that [REDACTED]
9 has said since this that, hey, it didn't happen and then
10 back to it did happen. I'm assuming today or in this trial
11 she's going to say it did happen or we wouldn't be here,
12 okay.

13 We show you all this I'm not guilty so I want you
14 to end this thing. The State is not in the habit of doing
15 that. Once they've got their teeth into one of these cases
16 they don't let loose; they don't let loose, and that's
17 where we are.

18 What's the third thing you can do. You can find
19 twelve people who committed to listen to all of the
20 evidence, committed to listening to what we have to say,
21 cause this did not happen. The State has the burden of
22 proof to prove this but I will be honest with you, whenever
23 a child makes an accusation those feelings we have about
24 children and how they become super witnesses and we want to
25 believe them cause we don't want to believe that a child

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1 would lie about something or come up with a false
2 allegation, it almost makes me feel like I've got the
3 burden. Now legally I don't but I'm going to undertake it
4 as best as I can to prove to you that this did not happen.
5 Even though the State is the one that has to prove it, we
6 have nothing to prove, but I cannot do that unless you've
7 heard the story that I just told and you start this trial
8 out looking for the evidence that I need to show you. If
9 you spend this trial looking for the evidence that supports
10 our position then you will see what I'm talking about and
11 you will find him not guilty and there's something, and I
12 only learned this word cognitive dissidents two years ago,
13 and I've been practicing law a long time, it's the first
14 time I'd ever heard of it, and I thought it was kind of a
15 God thing because it just came, I learned it, you know,
16 when this case first happened. But it says that jurors,
17 and that would be me if I was sitting on the jury or
18 anybody, it's hard to hold two competing thoughts in your
19 mind and it's uncomfortable. They say that it's actually
20 physically uncomfortable, guilty or not guilty, and so what
21 your natural reaction to do is to look and try to pick a
22 winner as soon as possible to clean that up in your head
23 because the longer you go with these two competing ideas
24 the more uncomfortable that it is. What I'm asking you to
25 do is look at the evidence for Mr. Jarrard.

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1 Now the State goes first with their witnesses.
2 They're going to call witness after witness. I get to
3 cross examine each of the witnesses. I've got a very
4 distinct and important points if I am to save Mr. Jarrard
5 that I have to make to you and I will make those points to
6 you but if I make a point that doesn't seem that important
7 I ask you, please, to mentally log that point because it
8 may not make sense until the next witness I get to cross
9 examine. I'm not going to spend hours cross examining
10 people. There are only a few things I need from each
11 person to where I can put this thing together for you and
12 show you that, yes, we are in one of those cases that, yes,
13 do happen where people are convicted based upon a false
14 allegation. I can show you why the allegation was made. I
15 can show you why it does not make physical sense with the
16 physical evidence. I can show you certain things that
17 [REDACTED] said, she went a little bit too far in her story and
18 how that backfired was when they did the forensic
19 interview, they also do a forensic medical examination; so
20 she went, they're trying to back off of that now, they
21 probably will through the trial, but I won't let them, and
22 I'm not being mean but that's what I've got to do. She
23 went a little too far in some of the stories because the
24 medical evidence doesn't back up some of the things she
25 said. You're going to see a clean bill of health from the

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1 forensic doctor who examined her organs inside and out.
2 You're going to see that there was no penetration, no
3 tears, no transsections and we'll get into all that as the
4 trial goes, but these are the things that I'm going to
5 point out to you.

6 I'm going to point out to you, I believe, at a
7 minimum of three lies that were told that we know were
8 untruths and you cannot convict him based upon her
9 testimony if she's already lied to you and I'm going to
10 show you that. Now I'm not being harsh but I'm trying to
11 protect somebody's life and livelihood who is falsely
12 accused.

13 The State has to prove beyond a reasonable doubt
14 all these elements. One of the elements she brought up is
15 she's got to prove that he has a prior conviction. I don't
16 think that's going to be too difficult to do. She would
17 just have to show a certified conviction and I think it's
18 from 1997. We're not going to be talking about his
19 character. We're not going to be talking about that but
20 you're going to hear from the Judge a limiting instruction
21 that that has got nothing to do with why we're here today,
22 something that happened fifteen years ago. We're here
23 today to determine whether Mr. Jarrard abused in any way
24 [REDACTED] and I believe that if you will stick with me
25 and if you will view this evidence that I point out to you

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1 and start from where I'm starting from, you will see the
2 truth. If you don't, if you shut down, if you just take
3 the path of least resistance and say, hey, they told us who
4 did it, the bad guy's at the table, we're going to go along
5 with you, we're going to punish him. If you take that easy
6 route then everything I've worked for is null. If you pay
7 attention to the evidence and do your job, and this is an
8 important job, you'll find him not guilty, thank you.

9 The Court: Ms. Lively?

10 Ms. Lively: Yes, Your Honor, the State would
11 call Pamela Gause to the stand.

12 Pamela Gause

13 being first duly sworn, testified as follows:

14 Madam Clerk: Please state your full name and
15 spell your last name.

16 The Witness: Pamela Gause, g-a-u-s-e.

17 Direct Examination

18 By Ms. Lively;

19 Q Ms. Gause, where do you reside?

20 A 117 Edmund Lane in Aynor.

21 Q Okay, and how long have you lived in Horry
22 County?

23 A Thirty-nine years.

24 Q All right, and what do you do for a living?

25 A By trade I'm a nurse but right now I'm

Ms. Gause - Direct Examination by Ms. Lively

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1 unemployed.

2 Q Okay, now, Ms. Gause, do you know [REDACTED]
3 [REDACTED]?

4 A I do.

5 Q Okay, and how do you know [REDACTED]?

6 A I met her originally when she came to our
7 church and now she's my neighbor.

8 Q Okay, and whenever you met her through your
9 church who all was there with her, what family members?

10 A Her grandfather, her grandmother, and her
11 mom.

12 Q Okay, all right, so you've actually had the
13 opportunity to meet the defendant Mr. Jarrard?

14 A I have.

15 Q Okay, and whenever you say her mom, who is
16 [REDACTED]s mom?

17 A Rebecca Jarrard.

18 Q Rebecca Jarrard, okay, and do you know
19 whether or not, what her mom's name is, the Nana, do you
20 know her grandmother's name?

21 A Rebecca.

22 Q It's also Rebecca?

23 A Yes.

24 Q Okay, so that we don't confuse everybody
25 will you refer to, to the biological mother of [REDACTED] as

Ms. Gause - Direct Examination by Ms. Lively

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1 Rebecca Ann?

2 A Yes.

3 Q Okay, all right, so we just clear that
4 issue up. Now do you have any children of your own?

5 A I do.

6 Q Okay, what are the names of your children?

7 A Jonathan and Ashlyn.

8 Q What are their ages?

9 A Jonathan is thirteen, Ashlyn is eight.

10 Q Okay, and do you have an opportunity to
11 spend any time with [REDACTED]

12 A I do.

13 Q All right, and in what capacity would you
14 spend time with her?

15 A I was her baby sitter in 2010 into 2011.

16 Q All right, and so how often would you watch
17 [REDACTED]

18 A Probably three or four times a week.

19 Q All right, and was she, what kind of child
20 was she whenever you would watch her?

21 A In the beginning she, my husband and I had
22 several conversations, she was very demanding, very whiny,
23 picked a lot of fights with our children.

24 Q Okay, and so how did you deal with that?

25 A We were just very understanding. We would

Ms. Gause - Direct Examination by Ms. Lively

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1 have discussions with her about being more flexible and
2 getting along better with all of the children including her
3 sister.

4 Q Okay, and so [REDACTED]'s sister would also be
5 there?

6 A Yes, ma'am.

7 Q And what's her name?

8 A Julie, Julianna.

9 Q Okay, is she older or younger?

10 A She's older.

11 Q Okay, now so let me understand was it you
12 and your husband that would baby sit at times for Rebecca
13 Ann?

14 A There were times that I would have to leave
15 and Steve, my husband Steve, would be alone with the
16 children for just like thirty minutes to an hour.

17 Q Okay, and how would you punish the children
18 if they were, if they didn't listen to you?

19 A We didn't do a whole lot of punishing at
20 all.

21 Q All right?

22 A Maybe just a time out or something.

23 Q Okay, a time out, but was there ever any
24 corporal punishment or anything like that?

25 A Oh, absolutely not.

Ms. Gause - Direct Examination by Ms. Lively

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1 Q Okay, all right. Now whenever you were
2 just mentioning how [REDACTED] was demanding and whiny at times
3 in the beginning, did things get any better or did they get
4 worse as time went by when you were baby sitting them?

5 A They got better as she spent more time with
6 us.

7 Q Okay, if you had to just give us a general
8 idea so the jury would know how much time you spent with
9 her, how many times you may have baby sat for Rebecca Ann,
10 baby sat her children?

11 A Oh, goodness.

12 Q A rough number?

13 A One hundred fifty.

14 Q Oh, okay, all right, so several times?

15 A Yes.

16 Q Okay, now, Ms. Gause, at any point in time
17 over those one hundred fifty, or however many times that
18 you kept the children, did something happen that gave you
19 some concern?

20 A Yes.

21 Q Okay, will you take us back to when that
22 particular time occurred?

23 A The week of May 17th, 2010, my daughter
24 Ashlyn was six at the time and [REDACTED] was eight. They were
25 discovered in my daughter's bedroom with their pants down

Ms. Gause - Direct Examination by Ms. Lively

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1 touching each other.

2 Q Okay, all right, and I need you to be
3 specific, if you don't mind. You said the pants were down
4 they were touching each other. Where were they touching
5 each other?

6 A They had their pants down in my daughter's
7 bed under the covers and when the covers were pulled back
8 they were touching each other's vagina.

9 Q Okay, and whenever that was discovered what
10 did you do?

11 A I took both of them out onto the front
12 porch away from the other children and we talked about it.

13 Q Okay, and whenever you talked about it did
14 you, how did you actually do that, was it with the
15 children, separating the children or something else; how
16 did you do it?

17 A To begin with they were together.

18 Q Okay, and how did you act towards them in,
19 in asking them about what had happened?

20 A I tried to be very nonchalant about it. I
21 didn't want to make them feel, I wanted them to know that
22 it wasn't appropriate what they had done but I didn't want
23 to condemn them for what they had done.

24 Q Okay, were they in trouble at the time?

25 A No.

Ms. Gause - Direct Examination by Ms. Lively

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1 Q Okay, did you put them in time out?

2 A No.

3 Q When you had them together and you were,
4 like you said you didn't want to condemn them so you just
5 talked to them about it, where did the conversation go from
6 there?

7 A I discussed with them about how their
8 bodies were meant for their husband some day and asked them
9 individually how it felt to touch someone that way and how
10 it felt to be touched that way and my daughter said it felt
11 nasty, [REDACTED] in turn said it felt gross. I asked my
12 daughter how, if she had ever been touched that way or
13 touched anyone else that way and she said, no. I then
14 asked [REDACTED] had she ever touched anyone else that way and
15 said, no, and I asked her had that ever happened to her
16 before, had anyone else ever touched her that way. She
17 didn't answer me right away.

18 Q Okay, now let me stop you there. So you're
19 conducting these questions and, and when you're talking to
20 [REDACTED] at that time are you alone with her or are, is your
21 child Ashlyn still around?

22 A My child is still there at this point.

23 Q Okay, and so you said that you stopped when
24 [REDACTED] failed to answer you the second time?

25 A Uh-huh.

Ms. Gause - Direct Examination by Ms. Lively

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1 Q Was there a time whenever the conversation
2 came back up again?

3 A Yes.

4 Q Okay, all right, and, and as you recall
5 talked to you about this earlier, specifically can you tell
6 me without giving me names or anything like that, was she
7 able to provide you with some information that gave you
8 concern?

9 A Yes.

10 Q Okay, and in the information that she gave
11 you was she able to tell you something had happened to her?

12 A She did.

13 Q Okay, and what type of thing had happened
14 to her?

15 A She indicated oral sex, digital
16 penetration, and penile penetration.

17 Q Now at any point in time whenever she was
18 talking to you about this did she, did you ask her a
19 specific name of who that person was? I don't want you to
20 tell me what she said ---

21 A Right.

22 Q --- I'm asking you did you provide a name
23 as to who could have done this to her?

24 A She provided the name.

25 Q Okay, at any point in time did you start

Ms. Gause - Direct Examination by Ms. Lively

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1 listing names of men that could have done this to her?

2 A Absolutely not.

3 Q Okay, all right. Earlier on in the
4 conversation had ya'll discussed anybody in either your
5 family or her family that she had been around that could
6 have done this?

7 A No.

8 Q Do you know who lives with [REDACTED]?

9 A Yes.

10 Q Okay, who lives with her? Where do they
11 live; do they live here in Horry County?

12 A Yes, they live right next door to us.

13 Q Okay, that's right, you said ya'll are
14 neighbors, so have you been to their home?

15 A Yes.

16 Q All right, and who lives in the home with
17 them?

18 A Rebecca Ann, her mother, her sister,
19 Julianna, and her mom's boyfriend Jeff.

20 Q Jeff, okay, all right, and so does Jon
21 Jarrard live there with Rebecca Ann and [REDACTED]

22 A No.

23 Q All right, do you know where he lives?

24 A In Columbia.

25 Q In Columbia, okay, all right. Now, Ms.

Ms. Gause - Direct Examination by Ms. Lively

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1 Gause, whenever this information was disclosed to you by
2 [REDACTED] what, what did you do next?

3 A I explained to her that this information
4 would change these people's lives forever and asked her if
5 she wanted to go ahead and talk to her mom about it and she
6 indicated that she did and we called her mom at work and
7 asked her mom to come home early from work, which Rebecca
8 Ann did, and I turned that information over to her mother.

9 Q Okay, and, and once you gave that
10 information over to Rebecca Ann did you have anything else
11 to do with that disclosure that [REDACTED] gave to you that
12 day?

13 A No.

14 Q All right, and have you had an opportunity
15 to be questioned or talked to you from the Horry County
16 Police Department?

17 A Just over the phone.

18 Q Okay, all right, and as a matter of fact
19 once all this had happened did you have an opportunity to
20 provide a statement regarding what was told to you in May
21 of 2010?

22 A I did.

23 Q Okay, and that statement that you provided
24 you provided to my office, correct?

25 A I did.

Ms. Gause - Direct Examination by Ms. Lively

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1 Q Okay, and now, Ms. Gause, whenever you, you
2 said that you're neighbors with Rebecca Ann and her family,
3 correct?

4 A Correct.

5 Q Okay, have you ever seen any interaction
6 between, just family interaction between them and the
7 defendant Jon Jarrard and his wife Rebecca?

8 A The only interaction between Mr. Jarrard
9 was at church on a couple occasions. I have witnessed
10 interaction between the grandmother.

11 Q Okay, the grand, his wife?

12 A His wife.

13 Q Okay, and, and Rebecca Ann and the family?

14 A Yes.

15 Q All right, but had you seen any, have you
16 seen Mr. Jarrard over at the home of [REDACTED] and Rebecca
17 Ann?

18 A No.

19 Q Okay, now when did ya'll start living next
20 to each other?

21 A In 2010.

22 Q In 2010, okay, right around the time when
23 you started baby sitting her?

24 A It was a couple, it was right around the
25 same time, maybe a month or two after was when they moved

Ms. Gause - Direct Examination by Ms. Lively

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1 beside us.

2 Q So within a month or two of them moving
3 there in 2010 how long was it before this disclosure came
4 out?

5 A The disclosure came about before they moved
6 beside us. I started baby sitting when they were preparing
7 to move beside us.

8 Q I, okay, that's why I wanted to clarify the
9 contact that you had with the family. So you were not
10 living next door to them at the time whenever the
11 disclosure came out?

12 A No, ma'am.

13 Q Okay, all right. So if there had, if the
14 defendant had been going over to their home and spending
15 time at their home you wouldn't have known at that time?

16 A No, ma'am.

17 Q Okay, all right. When [REDACTED] told you what
18 had happened what was her demeanor; you can't tell me
19 exactly what she said, but tell me what her demeanor was?

20 A She was kind of hunched over, very
21 withdrawn into herself, very quiet.

22 Q And once again I want to make sure that I
23 understood you, what punishment did you give to your
24 daughter as well as [REDACTED] that day for what they were
25 caught doing?

Ms. Gause - Cross Examination by Mr. Truslow

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1 A No punishment.

2 Q Who did you let handle that punishment, if
3 any, was going to be given?

4 A There was no punishment.

5 Q Okay, so just no punishment?

6 A No punishment.

7 Q Had you had problems as [REDACTED]'s baby
8 sitter with her making an elaborate statement about
9 something like that when she had been with you?

10 A No.

11 Q Had she ever talked about any type of
12 sexual activity at all when she had been with you in the
13 past?

14 A No.

15 Q Had you ever seen anything like this out of
16 her before that day?

17 A None.

18 Q Were you surprised to see that activity
19 from [REDACTED]?

20 A Yes.

21 Ms. Lively: Thank you, answer any questions
22 that Mr. Truslow may have for you.

23 Cross Examination

24 By Mr. Truslow:

25 Q I want to go back to the statement that you

Ms. Jarrard - Direct Examination by Ms. Lively

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1 that fair to say?

2 A Yes.

3 Q All right, and whenever ya'll would stay
4 there would your father and mother spend the night?

5 A They did.

6 Q And was [REDACTED] there spending the night as
7 well?

8 A Of course.

9 Q Okay, now whenever you, whenever you were
10 using Ms. Gause as a baby sitter for your girls did you
11 have any type of agreement as to how punishment would be
12 administered or anything like that?

13 A I usually let, she let me handle it, most
14 of the time she would put them in the corner.

15 Q Okay, all right, now if, had you ever
16 gotten any reports or problems from Ms. Gause regarding
17 [REDACTED]?

18 A Just the kids bickering.

19 Q The kids bickering?

20 A Uh-huh.

21 Q Okay, and whenever, when, if ever, did you
22 have a time when something happened that really caught you
23 off guard?

24 A The day Ms. Pam called me and told me that
25 we had a problem with [REDACTED]

Ms. Jarrard - Direct Examination by Ms. Lively

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1 Q That you had a problem with [REDACTED]

2 A Yes.

3 Q Okay, and what did you do?

4 A I called my boss and left work immediately
5 and drove straight to where my daughter was.

6 Q Okay, and whenever, when you said you drove
7 straight to where your daughter was, where was she?

8 A At Pam's house.

9 Q Okay, she was still there, now whenever you
10 got there tell us what the scene was like whenever you got
11 there with your daughter and Pam?

12 A It was eerily quiet, nobody really wanted
13 to talk to me about it.

14 Q Okay, and without telling me what Pamela
15 said specifically did she at least provide you with
16 information that you knew what had been disclosed by
17 [REDACTED]?

18 A Yes.

19 Q Okay, so at that point in time were you
20 aware of the ramifications or, or what was actually said by
21 your child that came out?

22 A Not in detail.

23 Q Okay?

24 A I didn't get detail until later.

25 Q All right?

Ms. Jarrard - Direct Examination by Ms. Lively

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1 A But I knew basically what had gone on.

2 Q Okay, without telling me who, were you
3 aware who this, this involved?

4 A Yes, I am.

5 Q Okay, now whenever you got this information
6 and, and talked to Ms. Gause what did you do to [REDACTED] when
7 you learned this?

8 A I hugged her.

9 Q How did you punish her for what she had
10 done with Ashlyn?

11 A I didn't punish her.

12 Q And whenever, whenever you hugged her, when
13 you had that moment, what was your next step in regards to,
14 to what had been disclosed?

15 A That day or the next day?

16 Q Well tell me what happened that day?

17 A That day I went home and I got my kids and
18 I was furious. I was ready to kill the person who did it
19 to her.

20 Q Okay, what did you do the next day?

21 A I went to the police.

22 Q Okay, now when you went to the police were
23 you cooperative in the investigation?

24 A Somewhat.

25 Q Okay, let's talk about in the very

Ms. Jarrard - Direct Examination by Ms. Lively

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1 beginning, okay, when you called the police, do you recall
2 what you told the police you were calling about?

3 A I do.

4 Q Okay, and what was that without telling me
5 the name of any alleged perpetrator?

6 A That my daughter had been molested.

7 Q Okay, and were you able to give, whenever
8 you, okay, let me just, I have to be careful with this now,
9 whenever you gave that information to the police at that
10 point in time were you asked to come in to give a statement
11 or what was the next step?

12 A We actually went down to the police station
13 there in Aynor and they had to follow someone from Horry
14 County over to the Aynor because we didn't live in Aynor at
15 the time and they had us give a statement there and then I
16 think about a week or two later we ended up going to see
17 Allen Large.

18 Q Okay, all right, so you went to see Allen
19 Large and who was he at the time?

20 A A detective.

21 Q All right, okay, and, and whenever you met
22 with Detective Large after that point in time was there
23 anything else you had to do in regards to comply with the
24 investigation?

25 A We went to Children's Recovery Services.

Ms. Jarrard - Direct Examination by Ms. Lively

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1 Q Okay, and when you went to the Children's
2 Recovery Center did you understand why you were taking your
3 daughter there?

4 A To be checked.

5 Q Okay, to be checked, and, and you stated
6 this was about two weeks from the time whenever you first
7 called the police; is that about right?

8 A Yeah, it's about two weeks, we actually
9 went there on June 2nd is when we went to the Children's
10 Recovery Services.

11 Q Okay, all right, let me just back up for a
12 second, okay, and try to remember, if you can, do you
13 remember the last time that you had visited with or [REDACTED]
14 had been around the defendant at the time of this
15 disclosure?

16 A I went to say it was Easter because we all
17 went to George's for Sunday together but I'm not positive.

18 Q Okay, so Easter --

19 A Of 2010.

20 Q Of 2010, okay, and the disclosure came out
21 approximately when?

22 A Sometime in May.

23 Q All right, now, Rebecca, you took [REDACTED] to
24 the Children's Recovery Center to be checked out and
25 whenever you went there did you know the scope of

Ms. Jarrard - Direct Examination by Ms. Lively

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1 everything that the Children's Recovery Center was going to
2 do?

3 A They kind of explained it to me as they
4 went.

5 Q Okay, all right, and at that time were you
6 aware that they were going to do a medical as well as an
7 interview of the child?

8 A Yes.

9 Q Okay?

10 A Because my doctor would not do it.

11 Q Okay, all right, fair enough, and so when
12 you went there were you present for the actual, the
13 interview between the forensic interviewer and [REDACTED]?

14 A No, I wasn't.

15 Q Okay, how about the medical exam, were you
16 present for that?

17 A I was.

18 Q Okay, so you were in the room when that
19 took place?

20 A Yes.

21 Q Okay, now after, excuse me, after that had
22 happened what, if anything, did you do regarding the
23 investigation after that point?

24 A Nothing really, not until later on.

25 Q Okay, and did you have any more

Ms. Jarrard - Direct Examination by Ms. Lively

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1 conversations with Detective Large after that, and I'm
2 saying that close period of time right after the Children's
3 Recovery Center, were you advised as to what was going to
4 take place next?

5 A I don't recall.

6 Q Okay, that's fine. Now after the
7 Children's Recovery Center interview how did [REDACTED] act
8 regarding everything that had happened?

9 A I took her to Wendy's.

10 Q You took her to Wendy's, okay, all right,
11 and how old was she again at that time?

12 A Eight.

13 Q She was eight, okay, and at any point in
14 time after all that had taken place did you have an
15 opportunity to come to the Solicitor's office regarding the
16 charges against your father?

17 A I did.

18 Q You did, okay, will you please explain to
19 this jury what you did?

20 A I brought a video recanting my daughter's
21 statement here.

22 Q Can you say that again a little bit slower?

23 A I brought a video recanting my daughter's
24 statement here.

25 Q Why did you do that?

Ms. Jarrard - Direct Examination by Ms. Lively

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1 A Because my mom asked me to.

2 Q Okay, what else did you bring to my office?

3 A I think it was a signed affidavit.

4 Q Okay, and whose signature was on it?

5 A The signature on it is Rebecca Jarrard but
6 I don't believe it was mine.

7 Q If I showed it to you will that refresh
8 your memory?

9 A Yes, ma'am.

10 The Court: Ms. Lively, before we get too far
11 how about let me see that first?

12 Ms. Lively: Absolutely.

13 The Court: Okay, is that one exhibit?

14 Ms. Lively: No, I actually was going to have
15 this one as one and these were turned in at different
16 times.

17 The Court: All right.

18 Ms. Lively: If I could mark these as State's
19 Exhibit Number 2 and mark these two together.

20 (Whereupon, State's Exhibits Numbers 1 and 2
21 marked for identification.)

22 Ms. Lively: (Continuing)

23 Q Now, Rebecca Ann, I'm going to show you
24 what's marked as State's Exhibit Number 1, and if we could
25 back up a minute, you said earlier that you had actually

Ms. Jarrard - Direct Examination by Ms. Lively 110

1 come to the Solicitor's office to have your, basically to
2 recant the charges; is that right?

3 A That is correct.

4 Q Okay, I'm going to show you State's Exhibit
5 Number 1 and then ask you if you recognize this document?

6 A I do.

7 Q Okay, and is that your signature on that
8 document?

9 A This one is my signature.

10 Q That one is your signature, and that
11 document is that the one that was provided to my office
12 regarding the charges against your father?

13 A I think I filled this one out in your
14 office.

15 Q Okay, all right, but that is your name on
16 this document?

17 A That is my signature on that paper.

18 Ms. Lively: Okay, Your Honor, we'd move State's
19 Exhibit Number 1 into evidence.

20 Mr. Truslow: No objection.

21 The Court: Without objection.

22 (Whereupon, State's Exhibit Number 1 entered into
23 evidence.)

24 Ms. Lively: (Continuing)

25 Q Would you, please, for the purposes that

Ms. Jarrard - Direct Examination by Ms. Lively

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1 the jury can see this tell them what it is that you wrote
2 in regards to the charges against your father?

3 A "My daughter [REDACTED] states
4 that what she had originally told investigators and police
5 is false. She feels much remorse and wishes the charges to
6 be dropped."

7 Q Okay, Rebecca Ann, did that ever happen?

8 A No.

9 Q You need to speak loudly so ---

10 A No.

11 Q Did, did [REDACTED] ever recant to you?

12 A No.

13 Q Why did you write that affidavit?

14 A Cause it was ripping my family apart and my
15 mom asked me to.

16 Q It was ripping your family apart?

17 A It was, it still is.

18 Q I'm going to show you State's Exhibit
19 Number 2 and ask you if you recognize State's Exhibit
20 Number 2, there's two documents there? Do you recognize
21 those?

22 A I do.

23 Q Who drafted those affidavits?

24 A My mom.

25 Q Your mom, who signed those affidavits?

Ms. Jarrard - Direct Examination by Ms. Lively

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1 A Mama.

2 Q Your mom. How did you present them to me
3 at the Solicitor's office?

4 A I dropped them off.

5 Q And you brought these in?

6 A I did.

7 Ms. Lively: Your Honor, the State would move to
8 introduce State's Exhibit Number 2 into evidence at this
9 time.

10 Mr. Truslow: I need to look at Number 2, Judge,
11 please? No objection.

12 The Court: Without objection.

13 (Whereupon, State's Exhibit Number 2 entered into
14 evidence.)

15 Ms. Lively: (Continuing)

16 Q Now I want you to hold onto those for just
17 a moment, the two affidavits that I showed you in the
18 State's Exhibit Number 2 that are in evidence, one of them,
19 the very first page on State's Exhibit Number 2 we're
20 basically repeating what you put in that, that other
21 affidavit you hand wrote; is that right?

22 A That is correct.

23 Q Okay, will you, please, read that out to
24 the jury what you put in that affidavit, the first page on
25 State's Exhibit Number 2?

Ms. Jarrard - Direct Examination by Ms. Lively

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1 A "After talking with my daughter further I
2 believe that nothing happened, her story has changed. She
3 is sorry for what she has done. I hope this video resolves
4 everything."

5 Q And what video are you talking about?

6 A The recantation video.

7 Q Okay, and, Rebecca Ann, once again had your
8 daughter come to you and recanted at that time?

9 A No, she had not.

10 Q Okay, why did you write that statement?

11 A Because my mom asked me to.

12 Q And on the second page of State's Exhibit
13 Number 2, what does that affidavit state?

14 A "I, Rebecca Jarrard, give my permission for
15 this video of my daughter [REDACTED] to be made. This
16 video shows that her story has changed"

17 Q Okay, whose idea was it to do the video of
18 [REDACTED]

19 A My mom.

20 Q Okay, who videotaped the child?

21 A My mom and my brother and I was also there
22 and witnessed.

23 Q Okay, you were a witness to it; how do you
24 feel about that now?

25 A Terrible.

Ms. Jarrard - Direct Examination by Ms. Lively

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1 Q Now when you provided this information to
2 my office had you and I ever met at that point in time?

3 A No.

4 Q Okay, and how long was it before you
5 actually had any type of face to face contact with me and
6 the Solicitor's office?

7 A I have no idea.

8 Q Okay, all right, was it a few months?

9 A I'd say it was closer to like February.

10 Q Okay, February of 2011?

11 A Yes, ma'am.

12 Q All right, now before I go any further just
13 so that I can make sure that we've documented this as well,
14 you said that the videotape you brought a disk in regarding
15 -- you got that, okay -- the video of [REDACTED]; is that
16 right?

17 A Uh-huh.

18 Q You need to answer yes?

19 A Oh, yes.

20 Q Okay --

21 (Whereupon, State's Exhibit Number 3 marked for
22 identification.)

23 Q And in that statement that you provided was
24 it a long statement, short statement, or what?

25 A I think it was kind of short.

Ms. Jarrard - Direct Examination by Ms. Lively

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1 Q Okay, and who is seen in the video?

2 A Just [REDACTED].

3 Q Just [REDACTED] okay. Did you or your mother
4 or your brother make any type, excuse me, make any type of
5 sounds or identify yourselves on the video?

6 A I don't believe so.

7 Q Okay, who was actually running the video
8 camera?

9 A I don't remember.

10 Q You don't remember, that's fine, that's
11 okay, but you were there?

12 A I was there.

13 Q Okay, the recantation statement was it on a
14 disk such as that?

15 A Yeah.

16 Ms. Lively: Okay, Your Honor, at this time the
17 State would move State's Exhibit Number 3 into evidence.

18 Mr. Truslow: No objection.

19 The Court: Without objection.

20 (Whereupon, State's Exhibit Number 3 entered into
21 evidence.)

22 Ms. Lively: (Continuing)

23 Q Rebecca, what was it like when you came to
24 my office and met with me for the first time?

25 A I was scared.

Ms. Jarrard - Direct Examination by Ms. Lively

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1 Q Hum?

2 A I was scared.

3 Q Why were you scared?

4 A Cause I don't want to lose my children.

5 Q Okay, why would you loose your children?

6 A Cause I felt like because it happened to my
7 daughter I was a bad parent.

8 Q Well what about you losing your children
9 because you were allowing her to be around someone who was
10 accused of hurting her?

11 A I, after she, after she accused this person
12 she was not allowed to see him again.

13 Q So you were going to take that upon
14 yourself?

15 A I did.

16 Q Now when you came and met with me was there
17 another person in the room with us; do you remember?

18 A Tony Collins, Amy, and [REDACTED]

19 Q Okay, was there a time whenever I asked you
20 to have your daughter leave?

21 A Yes, there was.

22 Q Okay, and whenever that happened, Rebecca,
23 what was the issue that, that we addressed regarding the
24 protection of your child?

25 A Safety, to go with a safety plan for my

Ms. Jarrard - Direct Examination by Ms. Lively

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1 daughter not to see anyone that would influence her.

2 Q At that time whenever you came to my office
3 was there any conversation about those affidavits and the
4 videotape that you had dropped off to me?

5 A Yes, I told you they were false.

6 Q You told me they were false?

7 A Yes, ma'am.

8 Q At that point in time had [REDACTED] recanted
9 to you?

10 A No, ma'am.

11 Q Where did you go whenever you had left my
12 office?

13 A To DSS.

14 Q Okay, and whenever you went to DSS what did
15 you do?

16 A Spoke to a guy named Chad and filled out a
17 safety plan.

18 Q Okay, and what was the purpose of that
19 safety plan?

20 A To not let my mom see my daughter or speak
21 to her.

22 Q And did you understand why that was the
23 case?

24 A Yes, ma'am.

25 Q And after signing that safety plan what was

Ms. Jarrard - Direct Examination by Ms. Lively

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1 your role in regards to protecting your child?

2 A To just be there for her.

3 Q Since that time how has it, how difficult
4 or easy has it been to keep your daughter and your mother
5 from having contact?

6 A Extremely hard.

7 Q Why is that?

8 A Cause shortly after we signed I lost my
9 brother.

10 Q Shortly after that happened you lost your
11 brother? You want some water? Let me step back and have
12 you look at this document and ask you again if you
13 recognize it?

14 A I do.

15 Q Okay, all right, and we were talking a
16 minute ago about going to DSS, is this document the
17 document that you got from DSS?

18 A It is.

19 Q And, I'm sorry --

20 (Whereupon, State's Exhibit Number 4 marked for
21 identification.)

22 Ms. Lively: (Continuing)

23 Q The signature on that, Rebecca, is who?

24 A Me.

25 Q That's you, all right, and this is the

Ms. Jarrard - Direct Examination by Ms. Lively

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1 document that you signed that you were talking about
2 regarding the safety of your child?

3 A Yes, ma'am.

4 Ms. Lively: All right, Your Honor, the State
5 would move to introduce State's Exhibit Number 4 into
6 evidence at this time.

7 Mr. Truslow: No objection.

8 The Court: Without objection.

9 (Whereupon, State's Exhibit Number 4 entered into
10 evidence.)

11 Ms. Lively: (Continuing)

12 Q And if you would, please, under number one,
13 state to the jury what the safety plan requirement was for
14 you?

15 A "Rebecca Jarrard will not allow any contact
16 whatsoever between the minor child [REDACTED] and the
17 maternal grandparents Jon Jarrard and Rebecca Jarrard."

18 Q Okay, now, Rebecca, you stated that you
19 lost your brother not too long after that; is that right?

20 A Yes.

21 A And have you had an opportunity after that
22 happened to have contact with your mother when [REDACTED] was
23 present?

24 A Yes.

25 Q Okay, and what was that occasion?

Ms. Jarrard - Direct Examination by Ms. Lively

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1 A The memorial service.

2 Q Did you make me aware of that?

3 A I did.

4 Q Now, Rebecca, since that time, and I know
5 it's been a long time, since that time has there been
6 contact between [REDACTED] and your parents?

7 A Between my mom and [REDACTED] and I, yes, after
8 DSS released us from the safety contract.

9 Q Okay, all right, and have you monitored
10 that?

11 A I have.

12 Q You have, okay, and since that time have
13 you had any type of concerns about your mother and [REDACTED]
14 spending time together?

15 A No, ma'am.

16 Q All right, now in regards to coming here
17 today you and I have talked about you coming and
18 testifying; is that fair to say?

19 A Yes, ma'am.

20 Q And whenever I talked to you about it what
21 have I told you was the most important thing to do?

22 A Tell the truth.

23 Q And in regards to what you're telling this
24 jury you're sitting here having to say that an affidavit
25 you signed was a lie and now you're telling them that what

Ms. Jarrard - Direct Examination by Ms. Lively

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1 you're saying here today is the truth?

2 A Yes, ma'am.

3 Q How do you explain that?

4 A I can't lie up here.

5 Q Those affidavits were those your signature?

6 A No, ma'am.

7 Q All right, now the one, the statement that
8 you signed physically here in the Solicitor's office that
9 was your statement; is that right?

10 A Yes, ma'am.

11 Q But is it your testimony here that [REDACTED]
12 has never recanted to you?

13 A Yes, she has never point blank told me that
14 it did not happen.

15 Q Okay, now, Rebecca, has your family
16 financially, I mean your father and your mother financially
17 assisted you in the past?

18 A Yes.

19 Q Okay, and have they, let me just ask you
20 this, Christmas time would they buy your children gifts?

21 A Of course.

22 Q And have ya'll had any type of a falling
23 out before this disclosure came out was there any problem
24 between you and your father and your mother?

25 A No.

Ms. Jarrard - Direct Examination by Ms. Lively

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1 Q Okay, had ya'll had some big fight?

2 A Me and my mom fight all the time.

3 Q Okay --

4 A But never not with my dad. I usually
5 complain to him about what me and my mom fought about.

6 Q Okay, had [REDACTED] been punished by your
7 father or your mother in any way shape or form before this
8 came up?

9 A No, just your normal she hit me, he hit me
10 stuff from the girls fighting.

11 Q Okay, the girls fighting amongst each
12 other?

13 A Yes.

14 Q Okay, had, have you ever had to complain to
15 your parents about how they disciplined the children?

16 A No.

17 Q Okay, all right, have you ever seen
18 anything out of the ordinary in regards to the relationship
19 between your daughters and your father and mother?

20 A No.

21 Q What motive would you have to come here
22 today and help [REDACTED] with what she's disclosed?

23 A I don't want to see it happen to her again.

24 Q Do you want to get your father in trouble?

25 A No.

Ms. Jarrard - Cross Examination by Mr. Truslow

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1 Ms. Lively: Answer any questions, well
2 actually, Your Honor, I do believe I need to publish to the
3 jury that video we keep talking about. It is actually very
4 short; would you like for me ---

5 The Court: Okay.

6 Ms. Lively: --- to do that or maybe give the
7 jury like a ten minute break and then let me put it in and
8 get it up?

9 The Court: It's short?

10 Ms. Lively: It is pretty short.

11 The Court: Let's do that then take a break so
12 that Mr. Truslow -

13 Ms. Lively: Okay, that's fine, all right. Is
14 the podium a problem for any of the jurors? Everybody can
15 see?

16 The Court: Why don't you, can everyone see
17 that? Can everyone see now?

18 (Whereupon, State's Exhibit Number 3 played in
19 open court.)

20 [REDACTED]: "I'm sorry I lied to
21 everyone because a bunch of us were talking at school and I
22 thought it would be cool and when I told you Papa touched
23 me there when he really didn't."

24 Ms. Lively: That's it.

25 The Court: Okay, all right, Mr. Ropp, if you

Ms. Jarrard - Cross Examination by Mr. Truslow 124

1 would take the jury into the jury room for a little break.

2 (Whereupon, the jury retired to the jury room at
3 3:54 p.m.)

4 The Court: All right, we'll be at ease for
5 about ten minutes.

6 Ms. Lively: Thank you, Your Honor.

7 (Whereupon, a recess was taken and the following
8 takes place on the record after the recess.)

9 The Court: Bring the jury in.

10 (Whereupon, the jury returns to the courtroom at
11 4:06 p.m.)

12 The Court: All right, Mr. Truslow.

13 Mr. Truslow: Yes, sir.

14 The Court: You may cross examine.

15 **Cross Examination**

16 **By Mr. Truslow:**

17 Q Rebecca, can you I call you Rebecca?

18 A Yes.

19 Q Is that all right, you understand you're
20 under oath and it's truth time, correct?

21 A Correct.

22 Q Okay, have you been defending, do you feel
23 like you've been defending yourself up here at what you've
24 done and chose to do?

25 A No, not really.

Ms. Jarrard - Cross Examination by Mr. Truslow

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1 Q Do you understand you're a witness for the
2 prosecution not the defense?

3 A I do.

4 Q Okay, let me ask you this, you've talked to
5 me before, haven't you?

6 A Yes, I do believe I have.

7 Q Okay, did you tell me that you thought that
8 they were going to put you in handcuffs when you went to
9 the Solicitor's office?

10 A The very first time I did, yes.

11 Q Okay, and you went to tell them that [REDACTED]
12 had a different story and that this didn't happen, correct?

13 A Correct.

14 Q That was your initial goal?

15 A When I went to meet Candice?

16 Q No, when you first started bringing
17 affidavits to the Solicitor's office?

18 A Yes.

19 Q You were trying to get the case dropped?

20 A Right.

21 Q Then they told you you had to go in person
22 to meet with Candice; is that correct?

23 A They called me and requested a meeting with
24 Candice, yes.

25 Q Okay, now when you got there it wasn't just

Ms. Jarrard - Cross Examination by Mr. Truslow

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1 Candice there, was it, there were some other folks there as
2 well?

3 A It was Amy and ---

4 Q There was a DSS representative?

5 A No, it was Tony Collins.

6 Q Okay, now were you, did you or did you not
7 tell me that they threatened to take your kids if you tried
8 to unplug this case?

9 A They had told me if I was lying that I
10 would be in trouble.

11 Q All right, and you got put in the position
12 then to choose your parents or your child, correct?

13 A Correct.

14 Q And you chose your child, correct?

15 A Of course.

16 Q You told the Solicitor that your daughter
17 she said, had your daughter ever really taken back or
18 recanted anything and you said, no?

19 A She hasn't.

20 Q Okay, did you just see the video?

21 A I did, but ---

22 Q She did there, right?

23 A She did there but not to me.

24 Q Okay, she has then, right? She has, she
25 has recanted her story?

Ms. Jarrard - Cross Examination by Mr. Truslow

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1 A On video.

2 Q Okay, so when you say she hasn't that's not
3 truthful, is it?

4 A When I said she hasn't ---

5 Q You were in the room when the video was ---

6 Ms. Lively: Your Honor, I just ask that he let
7 her answer.

8 The Court: Let her answer, let her finish her
9 answer.

10 Ms. Lively: Thank you.

11 Mr. Truslow: (Continuing)

12 Q All right, you were in the room when the
13 video was done, right?

14 A I was.

15 Q So you witnessed your daughter recant the
16 testimony?

17 A She was told what to say.

18 Q Okay, but you witnessed her do it
19 regardless?

20 A Yeah.

21 Q So she has recanted her testimony
22 regardless of why you say she did it?

23 A Not to me personally, no.

24 Q You're familiar, have you ever seen this
25 card?

[REDACTED] Direct Examination by Ms. Lively

157

1 being first duly sworn, testified as follows:

2 Direct Examination

3 By Ms. Lively:

4 Q [REDACTED], will you tell me your full name in
5 that microphone in front of you so we can make sure we can
6 hear you good?

7 A [REDACTED]

8 Q All right, how old are you, [REDACTED]?

9 A Ten.

10 Q Ten, when is your birthday?

11 A November 19th.

12 Q November 19th, okay, so you're actually ten
13 and a half?

14 A Yes.

15 Q Yes, okay, where do you live, [REDACTED]?

16 A 113 Edmund Lane.

17 Q Okay, and have you ever heard of what
18 county you live in?

19 A Horry County.

20 Q Horry, okay, Horry County, all right, what
21 school are you in?

22 A Aynor Elementary.

23 Q Aynor Elementary, okay, and you're on
24 summer break now; is that right?

25 A Yes.

[REDACTED] - Direct Examination by Ms. Lively

158

1 Q Okay, now what grade are you going to be in
2 when you start back in the fall?

3 A Fifth.

4 Q Fifth grade, now, [REDACTED] do you have any
5 pets at your home?

6 A Yes.

7 Q Tell us the name of your pets?

8 A Rady, Jack, Ruthie, Baby, and Little Bit.

9 Q Okay, are those, what kind of animals are
10 those?

11 A Dogs and cats.

12 Q Dogs and cats, is there one in particular
13 that yours?

14 A Ruthie.

15 Q Ruthie, is that the cat?

16 A Yes.

17 Q All right, now, [REDACTED], who lives with you
18 in your home?

19 A My mom, my dad, and my sister and me.

20 Q And is, what's your dad's name?

21 A Jeff.

22 Q Okay, is he your real dad or is he your
23 mom's fiance?

24 A Mom's fiance.

25 Q Okay, and where does your real dad live?

[REDACTED] - Direct Examination by Ms. Lively

159

1 A Arkansas.

2 Q All right, and are you going to visit him
3 any this summer?

4 A Yes.

5 Q Now, [REDACTED] do you have any grandparents?

6 A Yes.

7 Q Okay, and what are their names?

8 A Jon Jarrard and Rebecca Jarrard.

9 Q Okay, and where do they live?

10 A In Lugoff.

11 Q In Lugoff, okay, Lugoff. Is that close to
12 Columbia?

13 A Yes.

14 Q All right, and, [REDACTED], do you, when you
15 were growing up did you have an opportunity to spend a lot
16 of time with your grandfather and your grandmother?

17 A Yes.

18 Q Okay, and would they visit you here in
19 Horry County?

20 A Yes.

21 Q All right, were there times when you would
22 visit them in Columbia?

23 A Yes.

24 Q Okay, and whenever they would come and
25 visit you here in Horry County where would they stay?

[REDACTED] - Direct Examination by Ms. Lively

160

1 A In our house.

2 Q In your house, all right, and that's in
3 Horry County, right?

4 A Yes.

5 Q Okay, now, [REDACTED], let me just back up a
6 little bit. You, you've been here through this whole thing
7 and you actually got to see Ms. Pamela come in and talk to
8 all these people in the room, right?

9 A Yes.

10 Q Okay, now who is Ms. Pamela?

11 A She used to be my baby sitter, she's my
12 next door neighbor.

13 Q Okay, she used to be your baby sitter.
14 She's your next door neighbor, all right, and whenever you
15 would go over to her house and she would baby sit you would
16 you play with her, her daughter Ashlyn?

17 A Yes.

18 Q Okay, and what type of things would ya'll
19 do when ya'll played together?

20 A We'd play tag and hide and go seek and jump
21 on the trampolines.

22 Q Okay, all right, and was there ever a time
23 whenever you were over there at Ms. Pam's whenever you and
24 Ashlyn did something that you aren't supposed to do?

25 A Yes.

[REDACTED] - Direct Examination by Ms. Lively

161

1 Q Okay, and what was that?

2 A We pulled our pants down.

3 Q Okay, all right, and when that happened,

4 [REDACTED] where were ya'll; do you remember?

5 A In her room.

6 Q In her room, okay, and do you know why you
7 did that; do you remember?

8 A No.

9 Q Okay, that's all right. Now whenever you
10 did that did someone catch you?

11 A No.

12 Q No one caught you? Well how did Ms. Pam
13 come to, do you know what happened whenever she talked to
14 you about it?

15 A I told my sister and she went and told Ms.
16 Pam.

17 Q Okay, all right, so you told your sister
18 and then she went and told Ms. Pam, so your sister was
19 there for baby sitting, too?

20 A Yes.

21 Q Okay, all right, so she told Ms. Pam and
22 when you talked to Ms. Pam what, do you remember what you
23 told her? I know it's been a long time, it's been two
24 years, but can you remember?

25 A No.

██████████ - Direct Examination by Ms. Lively

162

1 Q No, okay, that's fine. Whenever you talked
2 to her, though, do you remember telling her who, if
3 anybody, had touched you?

4 A Yes.

5 Q Okay, and what did you tell her?

6 A That my grandpa did touch me.

7 Q And, and whenever you told her your
8 grandfather touched you what happened next?

9 A She called my mom and asked her to come
10 home from work early.

11 Q From work, okay, let me do something if you
12 don't mind, you're fine. I just want to pull this down.
13 How's that, okay? All right, okay, so your mom came home
14 from work early. Did Ms. Pam punish you for what you had
15 done?

16 A No.

17 Q Okay, did your mom punish you for what
18 happened between you and Ashlyn?

19 A No.

20 Q All right, so whenever your mom came home
21 from work did you talk to her about what you told Ms. Pam?

22 A Yes.

23 Q Okay, what did you tell your mom?

24 A That my grandfather had touched me.

25 Q Okay, and let me just you this, well I want

██████████ - Direct Examination by Ms. Lively 163

1 to make, I want to find out from you. When you say that
2 your grandfather touched you, is it okay for somebody to
3 give you a hug?

4 A Yes.

5 Q Okay, is it okay for your grandfather or
6 your grandmother to give you a kiss on the cheek?

7 A Yes.

8 Q Okay, so when you say your grandfather
9 touched you we need to know what you mean; can you tell us
10 what you mean?

11 A He touched in an inappropriate place.

12 Q That's a big word, inappropriate place. Of
13 those of us who don't know what inappropriate means can you
14 help us a little bit?

15 A It's a bad place for a person to be around.

16 Q What parts on your body are people not
17 supposed to touch?

18 A From your waist down and your chest up.

19 Q Okay, all right, and when you talked to
20 your mom about where your grandpa had touched you which
21 part of those places are you talking about?

22 A My privacy.

23 Q My privacy, okay, well we're going to try
24 and help you out a little bit, okay? Now, ██████████, when you
25 told your mom this, do you know what she did in response to

[REDACTED] - Direct Examination by Ms. Lively

164

1 that?

2 A No.

3 Q You don't, okay. Do you remember ever
4 having the police, this man right here, Mr. Detective Allen
5 Large talk to you and your mom?

6 A Yes.

7 Q You do, okay, and when that happened were
8 you, who were you with; do you remember who was with you
9 when you talked to Mr. Large?

10 A My mom.

11 Q Your mom, okay, was Ms. Pamela there?

12 A No.

13 Q Okay, and whenever you talked to Detective
14 Large, do you remember what you told him?

15 A No.

16 Q Okay, and that's been a long time ago, I
17 understand. Now whenever, whenever, after you had met with
18 Detective Large did you have an opportunity to go to a
19 place and talk to a woman by the name of Dr. Rahter?

20 A Yes.

21 Q Okay, and do you remember the name of the
22 place where you went to?

23 A No.

24 Q Okay, do you remember the Children's
25 Recovery Center?

██████████ - Direct Examination by Ms. Lively 165

1 A Yes.

2 Q All right, does that sound right? If you
3 don't remember it's okay to say you don't remember?

4 A Yes.

5 Q Okay, so that's it, and whenever you went
6 there do you know why you went there?

7 A No.

8 Q Okay, when you got there do you remember
9 what type of things Dr. Rahter talked to you about?

10 A No.

11 Q Okay, well let me, let me talk to you about
12 what you had told your mother about your grandfather, okay/
13 I need you to help me and this jury know what you're
14 talking about whenever you're talking your privacy, okay?

15 A Okay.

16 Q Is that a yes, okay, all right --

17 Ms. Lively: Your Honor, may I approach?

18 The Court: Certainly.

19

20

21 Ms. Lively: (Continuing)

22 Q I'm going to show you a picture, okay, and
23 can you tell me what this is a picture of?

24 A A little girl.

25 Q A little girl, okay, does she look the same

██████████ - Direct Examination by Ms. Lively 166

1 way that you do if you didn't have your clothes on?

2 A Yes.

3 Q Okay, all right, now, ██████████ I know that
4 it's a little embarrassing but this might help you, okay?

5 A Okay.

6 Q Okay, now will you for me when you're
7 talking about your privacy, okay, can you circle what
8 you're talking about as your privacy?

9 A Yes.

10 Q I'll give you this red pen, okay, will you,
11 please, circle that for me? Okay, and that's your privacy?

12 A Yes.

13 Q Is it okay if I write that?

14 A Yes.

15 Q All right, is that right?

16 A Yes.

17 Q Okay, now what do you call these things up
18 here?

19 A Boobs.

20 Q Boobs, okay, what do you call this right
21 here?

22 A Butt.

23 Q A butt, can I circle that?

24 A Yes.

25 Q Okay, all right, okay, is that what you

[REDACTED] - Direct Examination by Ms. Lively

167

1 call your private parts?

2 A Yes.

3 Q Okay, I want to make sure I got it right.

4 Okay, will you do me a favor, why don't you write your name

5 for me right there, okay? Now, [REDACTED], you said that you

6 told your mom that your grandfather touched you on your

7 privacy?

8 A Yes.

9 Q Is that right, okay, did anyone tell you to
10 say that?

11 A No.

12 Q Okay, why did you tell your mom that your
13 grandfather touched you there?

14 A Cause it was the truth.

15 Q When he touched you in your privacy what
16 part of his body touched your privacy?

17 A His hands.

18 Q His hands, okay, well whenever that
19 happened where, when you would, when he would visit in
20 Horry County here with you and your family tell how it
21 would happen that he would put his hands on your privacy?

22 A He would put it inside of it.

23 Q Okay, and where would you be when this
24 happened?

25 A In my room.

[REDACTED] - Direct Examination by Ms. Lively

168

1 Q In your room, how were your clothes?

2 A My pants were down at my ankles.

3 Q Okay, who put your pants down by your
4 ankles?

5 A I don't know.

6 Q You don't know, okay, were you sleeping or
7 awake or what?

8 A I was sleeping.

9 Q Okay, so whenever, so how did you know that
10 he was touching your privacy?

11 A Because when I woke up he was already
12 doing it.

13 Q Are you sure it was him you saw [REDACTED]?

14 A Yes.

15 Q Okay, did he ever say anything to you?

16 A Not that I can remember.

17 Q And so you said he touched your privacy
18 with his hand?

19 A Yes.

20 Q Okay, now when he did that now it was with,
21 can you show me what part? I mean his hand was, was it his
22 whole hand or was it fingers; do you remember?

23 A Fingers.

24 Q It was fingers. Did it, when he touched
25 you down there was it on the outside, the inside or how did

[REDACTED] - Direct Examination by Ms. Lively

169

1 it feel to you?

2 A It felt gross.

3 Q It felt gross, and did you have any kind
4 of, did it hurt at all, was it uncomfortable?

5 A It was uncomfortable.

6 Q Okay, now, [REDACTED], was there ever a time
7 whenever any other part of his body touched you down there?

8 A No.

9 Q Okay, did he ever kiss you anywhere on your
10 body?

11 Mr. Truslow: Objection, Your Honor, she's
12 leading the witness.

13 Ms. Lively: Under Jeffrey under, held, Your
14 Honor ---

15 The Court: I'm going to give her some latitude
16 due to the young age of the child.

17 Ms. Lively: Thank you.

18 Q (Continuing) Did he ever kiss you anywhere
19 on your body?

20 A He kissed my on my cheek.

21 Q He kissed you on your cheek. Did he ever
22 kiss you anywhere else on your body?

23 A No.

24 Q Okay, and whenever he would touch you with
25 his finger down in your privacy you said that he never said

[REDACTED] - Direct Examination by Ms. Lively

170

1 anything to him, did you ever say anything to him?

2 A No.

3 Q Okay, and whenever, let me just take this
4 from you, okay, did you ever tell your mom or anybody when
5 the next morning that this had happened?

6 A No.

7 Q Okay, and why not?

8 A Cause it would get him in trouble.

9 Q And why didn't you want to get him in
10 trouble?

11 A Cause he's my grandfather and I love him.

12 Q All right, and well now that all this came
13 out has it been hard on you?

14 A Yes.

15 Q Okay, and why is that?

16 A Cause I don't have my Uncle Joe anymore.

17 Q Okay, is he the one that died last year?

18 A Yes.

19 Q Okay, and what about your grandpa, do you
20 get to see him anymore?

21 A No.

22 Q How does that make you feel?

23 A It makes me feel sad.

24 Q And, [REDACTED], we saw yesterday a video where
25 you were sitting on a bed and you were talking about maybe

[REDACTED] - Direct Examination by Ms. Lively 171

1 that you had made these things up; can you explain that to
2 the jury?

3 A My grandmother made me say what I said.

4 Q How did you feel about having to do that?

5 A I didn't feel right.

6 Q Okay, this has been hard for you, huh?

7 A Yes.

8 Q Well let me take you back to whenever you
9 were at the forensic interview with, with Dr. Rahter. Did
10 anything else, did you have to have any kind of an exam
11 like a medical exam; do you know what that means?

12 A Not really.

13 Q Okay, all right, now if you don't
14 understand something remember what I told you, just say I
15 don't understand?

16 A Yes.

17 Q Okay, all right, did they, did the doctor
18 have to actually look at your body down there without any
19 clothes on?

20 A Yes.

21 Q Okay, all right, so you do remember that
22 happening?

23 A Yes.

24 Q All right, and who was in the room with
25 you?

[REDACTED] - Direct Examination by Ms. Lively

172

1 A My mom.

2 Q All right, now whenever you were being
3 interviewed by Dr. Rahter and you were telling her about
4 things that your grandfather did was anybody else in the
5 room with you and Dr. Rahter?

6 A No.

7 Q Okay, so just for that part it was just you
8 and Dr. Rahter in that room, right?

9 A Yes.

10 Q Okay, now you've given us what you call
11 each one of your body parts here, was there ever a time
12 whenever your grandfather would have touched you on your
13 butt?

14 A No.

15 Q Okay, all right, how about what you refer
16 to as your boobs, was there ever a time whenever your
17 grandfather touched you there?

18 A No.

19 Q Okay, all right. Now, [REDACTED], was there
20 ever a time whenever you woke up and your grandfather was
21 doing something other than touching you with his finger?

22 A No.

23 Q Not that you recall?

24 A No.

25 Q You don't recall telling Dr. Rahter he had

[REDACTED] - Direct Examination by Ms. Lively 173

1 done something else down there?

2 A No.

3 Q You don't recall him having his face down
4 there?

5 Mr. Truslow: Objection, Your Honor, leading.

6 The Court: I think we're getting a little too
7 close to leading.

8 Ms. Lively: Okay, all right.

9 Q (Continuing) And whenever your, you were
10 talking about your clothes being down around your ankles,
11 where were your panties?

12 A Down by my ankles.

13 Q Okay, whenever you would, whenever he was
14 done, whenever he, would he leave your room or did he stay
15 in the room with you?

16 A He would normally leave.

17 Q He would normally leave, okay. What would
18 you do with your clothes whenever he would leave?

19 A I would put them back on.

20 Q You would put them back on, okay. Whenever
21 you put your clothes back on was there ever anything that
22 felt uncomfortable to you in your privacy area?

23 A Yes.

24 Q Okay, what?

25 A It felt uncomfortable to have them back on

[REDACTED] - Direct Examination by Ms. Lively

174

1 it cause it felt like weird.

2 Q Okay, all right, was there any, ever
3 anything inside of your panties or anything after he was
4 done; do you remember?

5 A No.

6 Q Okay, did you ever go to the bathroom
7 afterwards when this happened?

8 A Not that I remember.

9 Q Okay, that's fine, it's been two years I
10 understand. Now whenever you talked to Dr. Rahter at that
11 time do you remember how old you were?

12 A Eight.

13 Q You were eight, okay, do you remember
14 telling her about how old you were whenever your
15 grandfather started touching you?

16 A No.

17 Q Okay, now, [REDACTED], after this came out and
18 your grandmother had you make that video, had you told
19 anybody else that what your grandfather did was a lie?

20 A No.

21 Q Okay, and we need to know from you, and I'm
22 asking you here in front of these people, okay, what is the
23 truth, what happened between you and your grandfather?

24 A He touched me.

25 Q Okay, did I tell you to say that?

[REDACTED] - Direct Examination by Ms. Lively

175

1 A No.

2 Q Did your mom tell you to say that?

3 A No.

4 Q Did Ms. Pam tell you to say that?

5 A No.

6 Q Okay, is that what happened?

7 A Yes.

8 (Whereupon, State's Exhibit Number 6 marked for
9 identification.)

10 Ms. Lively: Your Honor, I would move this into
11 evidence as State's Exhibit Number 6.

12 Mr. Truslow: No objection.

13 The Court: Without objection.

14 (Whereupon, State's Exhibit Number 6 entered into
15 evidence.)

16 Ms. Lively: (Continuing)

17 Q You good, you need a break?

18 A No.

19 Q Okay, give me just a moment. Now, [REDACTED],
20 did your grandfather visit you one time or more than one
21 time here in Horry County?

22 A More than once.

23 Q Okay, so him and your Nana came probably
24 what, if you had to guess?

25 A Fifty times.

[REDACTED] - Direct Examination by Ms. Lively 176

1 Q Fifty times, okay, and whenever this thing,
2 when your grandfather touched you, that you talking about
3 when it happened did it happen one time or more than one
4 time?

5 A More.

6 Q More than one time, if you had to guess how
7 many times that it happened what would your guess be?

8 A Ten.

9 Q Ten times, okay, and was it always the same
10 thing?

11 A Yes.

12 Q It was always the same thing he did?

13 A Yes.

14 Q Okay, did he ever do anything different?

15 A No.

16 Q Okay, that was two years ago, is that about
17 right?

18 A Yes.

19 Q Okay, and when you talked to Dr. Rahter in
20 that video did you tell her everything that you remembered
21 at that time?

22 A Yes.

23 Q Okay, and has everything that you told us
24 today the truth as you remember it?

25 A Yes.

[REDACTED] - Cross Examination by Mr. Truslow 177

1 Q Okay, now Mr. Truslow is going to ask you
2 some questions so if you need a break you need to tell me
3 now cause he's probably going to ask you some questions for
4 a little while, are you okay?

5 A Yes.

6 Q You need a water?

7 A No.

8 Q Okay, great. Answer any questions that he
9 has and if you don't understand just let him know you don't
10 understand, okay?

11 A Okay.

12 Ms. Lively: Okay, go ahead.

13 Cross Examination

14 By Mr. Truslow:

15 Q Good morning, [REDACTED], how you doing?

16 A Good.

17 Q My name is Kirk and I represent your
18 grandfather, right?

19 A Yes.

20 Q So this is the lawyer for the State and I'm
21 the lawyer for your grandfather, you understand?

22 A Yes.

23 Q And I'm going to be just as nice and
24 cordial as Ms. Candice was with you asking you some
25 questions, okay?

[REDACTED] - Cross Examination by Mr. Truslow

178

1 A Okay.

2 Q And if you don't understand my question all
3 you have to do is say I don't understand what you're
4 saying, okay, and I will repeat it and let you understand
5 what I'm saying, all right?

6 A Okay.

7 Q When is, before Court today when is the
8 last time that you met with Ms. Candice?

9 A Two days ago.

10 Q Okay, two days ago, and who came with you,
11 your mother?

12 A My mom.

13 Q All right, and did you all meet in her
14 office?

15 A Yes.

16 Q Did you talk about the case?

17 A Yes.

18 Q Did you talk about how the trial goes, what
19 we're doing here, what you could expect at trial and
20 testifying?

21 A Yes.

22 Q Did you go over what your testimony was
23 going to be, did you practice at all?

24 A Yes.

25 Q Okay, and you practiced with Ms. Candice

[REDACTED] - Cross Examination by Mr. Truslow

179

1 what you were going to say?

2 A Yes.

3 Q Okay, now I noticed when you mentioned your
4 grandfather you called him granddad and your grandmother,
5 don't you generally call them Papa and Nana?

6 A Yes.

7 Q Okay, is there any reason you're not
8 calling them that today?

9 A No.

10 Q Okay, now when this, you're saying that you
11 didn't tell Ms. Pam this happened, your sister told Ms.
12 Pam?

13 A That what?

14 Q That, that you were touched? I mean when
15 this first happened when Ms. Pam first found out about it
16 you told your sister and your sister told Ms. Pam?

17 A No.

18 Q Did you tell Ms. Pam?

19 A Yes.

20 Q Okay, I thought you said you told your
21 sister?

22 A I told my sister about Ashlyn.

23 Q Okay, and then, and then she told Ms. Pam
24 about Ashlyn?

25 A Yes.

[REDACTED] - Cross Examination by Mr. Truslow

180

1 Q Okay, and that's when Ms. Pam wanted to
2 talk to you about everything; is that right?

3 A Yes.

4 Q Okay, so when you started, when Ms. Pam
5 wanted to talk to you about this were you a little nervous
6 about this; did you feel like you may be in some trouble?

7 A No.

8 Q You didn't think you would get in any
9 trouble for what you and Ashlyn were doing?

10 A I thought I would get in trouble for what
11 me and Ashlyn were doing.

12 Q Right, okay, so you thought you would get
13 into some trouble for that; did you know it's not
14 appropriate to do that, right?

15 A Yes.

16 Q All right, so when she got you alone and
17 started questioning you about what happened she started to
18 ask you about has anybody else done this to you; do you
19 remember that?

20 A Yes.

21 Q And at that point you didn't answer her at
22 first but at some point you said your Papa; is that right?

23 A Yes.

24 Q Okay, now do you remember, you were in here
25 when Ms. Pam testified?

[REDACTED] - Cross Examination by Mr. Truslow 181

1 A Yes.

2 Q Do you remember when I showed her and she
3 showed me how hard the fingers went inside you?

4 A Yes.

5 Q You showed, you told her they were jammed
6 inside you, is that how you showed her?

7 A She had her fingers tight close together.

8 Q Right, and what did you do with your
9 fingers?

10 A Put it on top.

11 Q Okay, and then did you push them through?

12 A No.

13 Q So you didn't, so are you telling me that
14 basically now you're saying that he touched the outside?

15 A Yes.

16 Q Okay, and not, did he not go inside?

17 A Ashlyn didn't go inside.

18 Q Okay, I'm talking about your grandfather
19 now?

20 A We didn't, me and Ms. Pam didn't talk about
21 my grandfather.

22 Q Okay, well Ms. Pam testified when you were
23 in here that you told her that he jammed his fingers inside
24 of you; do you remember that?

25 A I didn't tell her anything about that.

[REDACTED] - Cross Examination by Mr. Truslow

182

1 Q Okay, so is Ms. Pam not being truthful with
2 us?

3 A She's not being truthful.

4 Q What about when Ms. Pam says that you told
5 her that, and I apologize we've got to use some words that
6 I know you're not used to using, okay, but I'm sorry for
7 that, but that's what it is, okay?

8 A Okay.

9 Q Ms. Pam also testified, Pam Gauze, that you
10 told her that your grandfather put his weenie inside you?

11 A I did not tell her that.

12 Q So you didn't tell her that either?

13 A No.

14 Q Okay, so basically what you're saying
15 today, did you tell, let me back up. When you spoke to Dr.
16 Rahter did you tell Dr. Rahter that your grandfather put
17 his fingers inside of you?

18 A Yes.

19 Q Did you tell her that he did it in such a
20 fashion that it hurt to go pee afterwards?

21 A Yes.

22 Q And then you answered Ms. Candice that you
23 had a medical exam where she had to check you out?

24 A Yes.

25 Q Right, okay, she checked you out, do you



1 recall that giving you a medical exam of your private
2 parts?

3 A Yes.

4 Q Okay, did she talk to you at all about what
5 your medical exam showed?

6 A No.

7 Q All right, now you testified, this was the
8 other day when we had to see if you were qualified to be a
9 witness, I think you said before that you are an a-b
10 student?

11 A Yes.

12 Q Have you always been done pretty well in
13 school?

14 A Yes.

15 Q Do you like school?

16 A Yes.

17 Q Do you have friends?

18 A Yes.

19 Q How many friends do you have?

20 A I don't know.

21 Q A lot?

22 A Yes.

23 Q Okay, do you get along with most everybody
24 at school?

25 A Yes.

[REDACTED] - Cross Examination by Mr. Truslow

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1 Q Do you get sad a lot?

2 A No.

3 Q Pretty happy child?

4 A Yes.

5 Q Okay --

6 Mr. Truslow: Just one second.

7 Q (Continuing) So your school performance of
8 being a a-b student that's been pretty consistent, has that
9 stayed the same, do you continue to do well in school?

10 A Yes.

11 Q Have you attempted to run away or get in
12 any kind of trouble like that before?

13 A No.

14 Q Okay, I want to show you and ask if you can
15 identify this, let me show Ms. Candice this first, this is
16 the card I was given, it's a little difficult to read but
17 you can see a name on there; do you, do you recall that
18 being your name?

19 A Yes.

20 Q Okay, and on this note, this is a note to
21 your Papa; is that right?

22 A Yes.

23 Q Do you see, you can read and write?

24 A Yes.

25 Q Read pretty good, do you see where it says

[REDACTED] - Cross Examination by Mr. Truslow

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1 p.s. on the bottom?

2 A Yes.

3 Q Can you, can you, would it be all right for
4 you to read what that says?

5 Ms. Lively: Objection, Your Honor, that's not
6 in evidence.

7 The Court: I'm going to let him ask her that.

8 Mr. Truslow: (Continuing)

9 Q Could you read what that says right, the
10 second part right there?

11 A Yes.

12 Q What does that say?

13 A "I am sorry I lied and got you in trouble,
14 I love you and miss you so much."

15 Q Now were you in here when we watched that
16 videotape of you?

17 A Yes.

18 Q Okay, now your mother was there, wasn't
19 she?

20 A Yes.

21 Q And then your uncle was there?

22 A Yes.

23 Q Is that correct, did your mother, do you
24 know what DSS is?

25 A No.

[REDACTED] - Cross Examination by Mr. Truslow

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1 Q Do you know what the Department of Social
2 Services is?

3 A No.

4 Q Did your mother ever talk to you about or
5 do you recall any conversations about the fact that you
6 could be separated from your mother?

7 A Yes.

8 Q Okay, what did you, what did you know about
9 that?

10 A I ---

11 Q What do you, what do you remember about
12 that?

13 A I don't remember anything.

14 Q Okay, but you remember at least hearing
15 that that could happen?

16 A Yes.

17 Q Did you hear that from your mother?

18 A Yes.

19 Q Let me just back up to make sure we got
20 this straight, your grandfather you're testifying today did
21 not put his weenie in you; is that correct?

22 A Yes.

23 Q He did not?

24 A He didn't.

25 Q Didn't, he did not do that?

[REDACTED] - Cross Examination by Mr. Truslow

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1 A He didn't do that.

2 Q Okay, did he put his fingers all the way
3 inside of you or just touch you on the outside?

4 A Inside.

5 Q Okay, and he did it in such a fashion as to
6 where you say you told somebody, Dr. Rahter, that it hurt
7 to go to the bathroom?

8 A Yes.

9 Q Correct, and you do recall having a medical
10 exam by Dr. Rahter?

11 A Yes.

12 Q Okay, what is your favorite thing in
13 school?

14 A Math.

15 Q Math, are you good at math?

16 A Yes.

17 Q Do you like math?

18 A Yes.

19 Q Okay, besides having to be here in Court
20 today and all this going on here; are there any other
21 problems that you have that you can think of that make you
22 sad?

23 A No.

24 Q You get along with your sister most of the
25 time?

[REDACTED] - Cross Examination by Mr. Truslow

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1 A Most of the time.

2 Q Okay, you love your animals?

3 A Yes.

4 Q You get in trouble at school for bad
5 behavior?

6 A No.

7 Q So you don't act out or get in any kind of
8 trouble at school?

9 A No.

10 Mr. Truslow: The Court's indulgence one second.

11 Q (Continuing) Now how long has Jeff been
12 living with you?

13 A Five years.

14 Q Okay, have you ever, and remember you're
15 under oath so we have to be completely honest here, okay,
16 have you ever witnessed Jeff and your mom do anything
17 inappropriate?

18 A No.

19 Q Did you ever witness Jeff pulling your
20 mom's pants down?

21 A No.

22 Q Nothing like that?

23 A Nothing.

24 Q Have you ever witnessed the two of them
25 drinking too much?

██████████ - Cross Examination by Mr. Truslow

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1 A No.

2 Q Okay, have you witnessed them drinking on a
3 regular basis beer?

4 A Yes.

5 Q Okay, you think Jeff drinks more than your
6 mother?

7 A Yes.

8 Q Do they drink every day?

9 A No.

10 Q Most every day?

11 A They don't drink every day.

12 Q Okay, what about Jeff, your mother said
13 that he does?

14 Ms. Lively: Objection, Your Honor, I don't see
15 the relevance.

16 The Court: Rephrase your question.

17 Ms. Lively: Thank you.

18 Mr. Truslow: Your Honor, I need to know what
19 was going on at the time this allegedly occurred.

20 The Court: But you were pitting one witness
21 against the other.

22 Mr. Truslow: Yes, sir.

23 The Court: Move on.

24 Mr. Truslow: (Continuing)

25 Q So Jeff drinks more than your mother?

[REDACTED] - Cross Examination by Mr. Truslow

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1 A Yes.

2 Q Okay, do you remember, and I'm not going to
3 beat this, beat this horse. I'm just going to ask you one
4 more time, you're saying, basically what you're saying now
5 is that you didn't lie about the penis and fingers but
6 you're saying that Pam Gauze has told a lie today if she
7 said that your grandfather that you said that, you're
8 saying you didn't say that?

9 A I didn't say he put his --

10 Q Weenie?

11 A Weenie.

12 Q You never said that?

13 A No, I never told her anything about it.

14 Q What, what, what did you tell her?

15 A I told her that my Papa touched me and
16 that's all I told her.

17 Q Did in fact it happen where she did her
18 fingers and you showed her how?

19 A Yes.

20 Q That part did happen?

21 A It didn't happen about Papa, it happened
22 about my next door neighbor Ashlyn.

23 Q So were you showing her, when you jammed
24 the fingers were you showing her like you and Ashlyn were
25 doing?

[REDACTED] - Cross Examination by Mr. Truslow

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1 A Yes.

2 Q And not what, not to do with your Papa?

3 A Not to do anything with Papa.

4 Q And with Pam all you did was she kept
5 asking you has anybody else done this to you you mentioned
6 your Papa, you meant that he had touched you?

7 A Yes.

8 Q Do you remember when you met with Dr.
9 Rahter that you were in a room with her that she said that
10 this was the truth room?

11 A Yes.

12 Q Okay, if that was the truth room this is
13 the ultimate truth room; do you know what I mean by that?

14 A Yes.

15 Q Because you swore to tell the truth under
16 oath on the Bible; do you know what that means?

17 A Yes.

18 Q Okay, so I need you to tell me cause this
19 is very important, is it possible that you told Pam that
20 your grandfather touched you to get out of trouble that
21 day?

22 A No.

23 Q You're sure?

24 A I'm sure.

25 Q But you didn't tell her the other stuff she

[REDACTED] - Cross Examination by Mr. Truslow

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1 said you told her?

2 A I didn't tell her any of it.

3 Q Okay, and in regards to Dr. Rahter you told
4 her that he touched you, right?

5 A Yes.

6 Q Is that all he did?

7 A Yes.

8 Q And you think maybe ten times?

9 A Yes.

10 Q Like they were saying?

11 A Yes.

12 Q Do you recall the men that lived in your
13 house before Jeff; can you recall, remember back to that?

14 A No.

15 Q The other people she may have lived with
16 before Jeff?

17 A I don't remember their names.

18 Q You don't remember any of those names,
19 okay. You don't remember their names but do you remember
20 the men that lived there and what they looked like?

21 A No.

22 Q Do you remember them living there?

23 A Yes.

24 Q Okay, did they drink?

25 A Not that I know.

[REDACTED] - Redirect Examination by Ms. Lively 193

1 Q Have you ever witnessed any of those men
2 frolicking around in their boxer shorts?

3 A No.

4 Q Do you ever remember being uncomfortable in
5 your house based on men being over there?

6 A No.

7 Mr. Truslow: All right, [REDACTED], thank you very
8 much for answering my questions.

9 The Court: Redirect?

10 Ms. Lively: Thank you, Your Honor, just a few.

11 Redirect Examination

12 By Ms. Lively:

13 Q Okay, [REDACTED], I just want to ask you about
14 this letter, it's kind of hard to read but Mr. Truslow
15 asked you about it?

16 A Yes.

17 Q Do you remember looking at this, is that
18 your name?

19 A Yes.

20 Q Okay, and it's got a p.s. at the bottom and
21 he had you talk about how you said I am sorry I lied and
22 got you in trouble, what was that talking about?

23 A Talking about mom getting him put in jail.

24 Q Okay, and why did you write this letter?

25 A Cause my Nana wanted us to write him

Detective Large - Direct Examination by Ms. Lively 194

1 letters and send them to him.

2 Q So your Nana asked you to write this
3 letter?

4 A Yes.

5 Q Did she tell you what to write?

6 A Down at the p.s. part, yes.

7 Q She told you to write that?

8 A Yes.

9 Ms. Lively: That's all.

10 The Court: All right, [REDACTED], you can come
11 down.

12 Ms. Lively: Let me see if one of my witnesses
13 is here, Your Honor.

14 The Court: All right.

15 Ms. Lively: They're sequestered if she's not
16 I'm going to call Detective Large but I just want to see if
17 she's here.

18 Call Detective Large to the stand.

19 The Court: Detective Large, come around.

20 **Detective T. Allen Large**

21 **being first duly sworn, testified as follows:**

22 Madam Clerk: State your full name and spell
23 your last name.

24 The Witness: My full name is Troy Allen Large.

25 **Direct Examination**

Detective Large - Direct Examination by Ms. Lively 195

1 By Ms. Lively:

2 Q Where do you work, Detective Large?

3 A I'm currently employed at the Horry County
4 Police Department.

5 Q And what are your duties there?

6 A I'm assigned to the violent crimes section
7 of investigations with the police department.

8 Q How long have you been in violent crimes?

9 A I worked twenty years starting in child
10 abuse and then it grew into violent crimes which is crimes
11 against a person.

12 Q Okay, and things like murder, sexual
13 assault?

14 A Right, yes.

15 Q Robbery?

16 A Homicide, armed robberies, assaults, child
17 abuse, sex crimes.

18 Q Okay, all right, and in your, in your
19 capacity in doing this type of work did you have an
20 opportunity to be involved with this particular case?

21 A Yes, back in May of 2010 I was assigned the
22 case of Jarrard and that was beginning my investigations.

23 Q Okay, and how did the actual report come to
24 you as to the type of investigation you were going to be
25 conducting?

Detective Large - Direct Examination by Ms. Lively 196

1 A A uniform crime report, police report.

2 Q Okay, and based on the information that you
3 were given what type of crime were you going to be
4 investigating?

5 A It was either going to be a criminal sexual
6 conduct to a minor or a lewd acts to a minor ---

7 Q Okay ---

8 A --- depending on type of assault it ended
9 up being ---

10 Q Okay ---

11 A --- when the investigation was complete.

12 Q All right, and so in the beginning of the
13 investigation you just have a general idea of the type of
14 crime that you're going to be investigating?

15 A Right, it has the witnesses and suspects
16 listed on the report and a brief description that the
17 patrol gets the general information.

18 Q Okay, and once you've got that general
19 information and in particular with this case what was your
20 next, the next step of what you did?

21 A Is to meet with the victim and start the
22 investigation there because that's basically the lead point
23 of this investigation was getting up with the victim.

24 Q Okay, and were you able to get up with the
25 victim and who was the victim?

Detective Large - Direct Examination by Ms. Lively 197

1 A [REDACTED] and mother Rebecca Jarrard
2 was called and had a meeting at the Horry County Police
3 Department to initiate the investigation.

4 Q Okay, so who reported the alleged crime?

5 Q Rebecca Jarrard, the mother.

6 Q Okay, and whenever, and did you have an
7 opportunity to meet with them personally?

8 A Right, made a phone call and then initially
9 brought, brought them into the police department and they
10 had a brief meeting.

11 Q Okay, and whenever you conduct a brief
12 meeting such as that what do you typically want to find out
13 as an investigator?

14 A If there's some type of substantial
15 evidence that would lead to further investigation,
16 basically met with the mother, met with the child, did a
17 brief interview with her, and then from that seemed that
18 we, there was more to it, contacted Children's Recovery
19 Center.

20 The Children's Recovery Center is a place that
21 these, does forensic interviews for the law enforcement in
22 Horry County and surrounding counties. It's a service
23 that's provided that assist to where you can conduct one
24 interview with the child and not have to do multiple
25 interviews.

Detective Large - Direct Examination by Ms. Lively 198

1 Q And, and so did you make that referral in
2 regards to [REDACTED]

3 A Yes, yes, ma'am, I did.

4 Q Did you have a brief interview with her
5 yourself to know kind of what you were dealing with to do
6 in this particular case?

7 A Right, wanted to establish that a crime had
8 committed, also there was, make sure that it happened in
9 Horry County, and there was enough initially without going
10 into details that we believed that a further interview
11 would need to be done and that's why we requested the
12 Children's Recovery Center to do a forensic exam and also a
13 medical exam on the victim.

14 Q Okay, and at that time did you have any
15 indication that the child was in any kind of immediate
16 danger?

17 A No, at that time the alleged suspect lived
18 in a different county ---

19 Q Okay ---

20 A --- and the mother had acted appropriate by
21 making a police report.

22 Q All right ---

23 A And there was no other person that would be
24 a suspect rather than the alleged, the defendant, that was
25 listed.

Detective Large - Direct Examination by Ms. Lively 199

1 Q Okay, and after you made this brief
2 interview with the child and with, with Rebecca Ann
3 Jarrard, the mother, you made the referral to CSC, correct?

4 A Yes, ma'am.

5 Q And do you remember approximately how long
6 it was after you met with them that the child was actually
7 seen at the Children's Recovery Center?

8 A Believe that it was within a week cause I
9 got the case the end of May and the interview was done
10 around the first week of June.

11 Q Okay, and were you present to actually view
12 the interview of the child?

13 A Yes, I was.

14 Q Okay, and describe to the jury when you say
15 present, I mean were you in the room with Dr. Rahter and
16 the child?

17 A No, they, they conduct a medical exam with
18 just maybe a parent in the room and then they go to what
19 they call the truth room where they do a forensic interview
20 which is recorded. The recording is done on DVD tape and
21 they have a room that you can watch the interview being
22 conducted and that's where I was present.

23 Q Okay, and where you're actually is it fair
24 to say it's kind of like those two way mirrors that you
25 would see on T.V. in a police interrogation room?

Detective Large - Direct Examination by Ms. Lively 200

1 A Yes, ma'am.

2 Q Okay, so you're behind that two way mirror;
3 is that right?

4 A Right, yes, ma'am.

5 Q Okay, so from that perspective could Dr.
6 Rahter or the child see you sitting on the other side of
7 that mirror?

8 A No, ma'am.

9 Q Okay, and was it just Dr. Rahter and the
10 child in that, in the truth room that you referred to?

11 A Yes, ma'am.

12 Q Okay, during the interview did you interact
13 with Dr. Rahter or provide her with any information
14 regarding the case?

15 A No, ma'am, other than like I said just
16 requesting general interview but nothing specific during
17 the interview.

18 Q Okay, after the interview was over with
19 and, and you received the information through the interview
20 as to specific instances that occurred were you able to
21 determine if there was going to be charges against the
22 defendant?

23 A Yes, based, based on the interview and the
24 disclosures that were made and initially provided to us
25 there was enough probable cause that I went to a magistrate

Detective Large - Direct Examination by Ms. Lively 201

1 and sought a warrant and obtained a warrant.

2 Q Okay, and what was that warrant for?

3 A Criminal sexual conduct with a minor.

4 Q Okay, and whenever you're conducting your
5 investigation do you have an opportunity to run any kind of
6 a background check on the person you're investigating?

7 A Yes, yes, we do.

8 Q And did you do that in the case with Mr.
9 Jarrard?

10 A Yes, we did.

11 Q Okay, and what did your, your background
12 check reveal?

13 A A prior history of lewd act on a minor.

14 Q Okay, and that prior history was it a
15 conviction or just a history?

16 A It was a conviction.

17 Q All right, now, Detective Large, after you
18 sought the warrant, or maybe it was right before, were
19 there any concerns or problems that you had in regards to
20 cooperation of the victim and her family?

21 A No, up until the point we got the warrant
22 there was no, no problems with any communication or any,
23 any problems with the investigation.

24 Q Okay, did you ever run into any problems in
25 your investigation or post investigation with the victim's

Dr. Rahter - Direct Examination by Ms. Lively

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1 an expert. Just for the benefit of the jury I'm just going
2 to go through a few of the things that she does and that
3 type of expertise.

4 The Court: That's all right, you may.

5 Ms. Lively: Thank you.

6 The Court: But she's admitted.

7 Ms. Lively: Thank you.

8 Q (Continuing) Now, Dr. Rahter, as an expert
9 in dealing with child abuse sexual assault examinations
10 tell the jury exactly what it is that you do?

11 A I'm the medical director of the Children's
12 Recovery Center. We perform forensic interviews and then
13 forensic medical exams on children that have been abused in
14 some way or allegedly abused in some way. I've been doing
15 this for seventeen years now. I've examined over two
16 thousand children and I've done over a thousand forensic
17 interviews.

18 Q Okay, and whenever a child comes to you in
19 your position as a, in the medical field part of it, not
20 the forensic part, the medical, what type of health
21 information do you have to get to know what you're looking
22 for?

23 A We get ---

24 Q History?

25 A We get history of what the alleged event

Dr. Rahter - Direct Examination by Ms. Lively

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1 is, usually by looking at the police report or the DSS
2 report and then we get their past medical history, their
3 past surgical history, any medications they're on,
4 basically by going to any doctor.

5 Q Okay, and once you have all that
6 information in front of you at that point in time is that
7 when the next step occurs, either the forensic interview or
8 the medical examination?

9 A Correct, it depends on if I'm doing the
10 forensic interview or somebody else.

11 Q All right, and whenever the medical
12 examination is actually performed is it performed at the
13 Children's Recovery Center?

14 A Yes, it is.

15 Q And describe to the jury what type of
16 equipment you have in your facility that allows you to do
17 that?

18 A We have a colposcope at the Children's
19 Recovery Center which is kind of like a big microscope
20 where I can view all parts of the child's body and it's
21 hooked onto a T.V. so the child can watch the exam the same
22 time I can watch the exam. We start at the feet and go up
23 so they get to look at the wrinkles on the bottom of their
24 feet all magnified on T.V. and any scars they have on their
25 knees, and we look at their fingerprints and their

Dr. Rahter - Direct Examination by Ms. Lively

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1 fingernails. The very last part of the exam is to look at
2 the genitalia, usually they're pretty comfortable by then
3 because it's pretty neat to see all that stuff on T.V., and
4 then we look at the external structures of the genital exam
5 and then put traction on the outside of the genital area so
6 that we can see the internal structures which is the hymen
7 and the vagina.

8 Q Okay, and is a child sexual assault
9 examination different than an adult sexual assault
10 examination?

11 A Yes, I've never used a colposcope on an
12 adult, well that's not true, I've seen a couple of adults
13 that were mentally challenged and more like children that
14 I've done, used a colposcope on, but generally when adults
15 are sexually assaulted they go to the emergency department
16 there's not a colposcope at the emergency department, you
17 just use the naked eye for examining their genitalia.

18 Q Okay, and whenever you perform this
19 examination are there any intrusions in any way shape or
20 form by you in doing the examination?

21 A No, there's, in adults you put speculums in
22 adults to look at the interior structures; you never do
23 that with a child. You just do traction on the outside
24 which exposes the inside structures and you just look like
25 that.

Dr. Rahter - Direct Examination by Ms. Lively

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1 Q Okay, and again how many of these types of
2 examinations have you performed in your career?

3 A Over two thousand.

4 Q All right, and do you keep records and
5 percentages of these cases in the Children's Recovery
6 Center?

7 A I keep data in the National Childrens
8 Alliance Database on injuries found on children, all kinds
9 of different information, age, who the perpetrator is, time
10 of disclosure, all that information is kept in a National
11 Database.

12 Q Okay, and do you actually put your
13 information into the national database?

14 A Yes, I do.

15 Q Is that a part of what's required in
16 regards to having a facility, a child advocacy center?

17 A An accredited child advocacy center, yes.
18 I don't actually enter the data into the computer.

19 Q Okay ---

20 A Kelly Mason does.

21 Q Kelly Mason?

22 A Yes.

23 Q She works at the Children's Recovery
24 Center?

25 A Yes.

Dr. Rahter - Direct Examination by Ms. Lively

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1 Q Okay, and will you tell this jury whether
2 or not our Children's Recovery Center here in Horry County
3 is an accredited child advocacy center?

4 A Yes, it is.

5 Q All right, and how long has it been an
6 accredited child advocacy center?

7 A I think October will be three years.

8 Q Okay, all right, so in 2010 it was
9 accredited at that time?

10 A Correct.

11 Q All right, now, Dr. Rahter, you mentioned
12 the data and in doing child sexual assault examinations
13 would you, please, explain to the jury what you expect to
14 find whenever you have a child that comes in from what's
15 called a delayed disclosure of abuse?

16 A Basically the rule is it's normal to be
17 normal, what that means is because children oftentimes
18 disclose a long time after something happens you don't have
19 the luxury of seeing a child two hours after the event
20 occurred, so the majority of the time the exams are totally
21 normal and I'm talking totally normal in children who have
22 had penile penetration, young children who have had penile
23 penetration because you don't see them thirty minutes after
24 it occurred and all that tissue down there heals very
25 rapidly. It's kind of like when you bite the inside of

Dr. Rahter - Direct Examination by Ms. Lively

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1 your cheek you know how you get that ridge there and it
2 hurts but two days later it's completely gone, you can't
3 see anything. That's mucosal tissue. The tissue down in
4 the genital area is mucosal tissue. It heals just as
5 rapidly, so it's very rare to actually see an injury on a
6 child who has a delayed disclosure. If you see the child
7 within an hour of it occurring, even within twenty-four
8 hours of it occurring you can sometimes find some abnormal
9 findings.

10 Q Okay, and in your job in doing the sexual
11 assault examinations on children do you have any type of
12 data in percentages that you keep up with as to how many
13 times a child would have a normal exam in comparison to an
14 abnormal?

15 A We do have that data at the Children's
16 Recovery Center. I don't have that with me today but I
17 would estimate that less than ten percent.

18 Q Less than ten percent have findings?

19 A Correct.

20 Q Okay, and so about ninety percent of them
21 will be what you refer to as normal?

22 A Correct.

23 Q All right, now, Dr. Rahter, when, when I
24 asked you, or reminded you, that you were going to be
25 testifying here today were you able to bring any

Dr. Rahter - Direct Examination by Ms. Lively

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1 documentation with you to support your testimony about
2 normal is normal today?

3 A Yes, I brought several articles.

4 Ms. Lively: Okay, I've shown these to the
5 defense, Your Honor.

6 A Okay.

7 Q All right, now, Dr. Rahter, there has been
8 testimony about penetration and the level of penetration
9 and that type of thing. When you're dealing with these
10 type of cases and you have a child that comes in and let's
11 say the disclosure is more than week old, okay, the child
12 is under ten, at that point in time what, if anything, are
13 you expecting to find?

14 A I would expect to find a normal exam.

15 Q Okay, what about the hymen? Explain in a,
16 in a female child to the jury what type of damage could or
17 may or may not happen in regards to the hymen, is there a
18 wife's tale about the hymen?

19 A Yes, there is, the hymen changes as you
20 age. When you, before you have puberty and start your
21 period the hymen is a certain shape. After you start your
22 period it's completely different shape; it looks totally
23 different than when before you have your period. That is
24 mucosal tissue; that's the tissue that heals very rapidly.
25 In a child who is less, you know, has not started their

Dr. Rahter - Direct Examination by Ms. Lively

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1 period yet and has not gone through complete puberty yet
2 and has not started their period the hymen is either
3 crescentic shaped or annular all the way around, and then
4 there's a few other varieties, but basically you look at
5 the hymenal edge to see whether or not there's been any
6 tears, any scarring. The hymen can tear and heal back
7 within seventy two hours with absolutely no scarring
8 whatsoever and this has been documented in multiple
9 different studies but certainly I think the most profound
10 studies are those where there's been admission of the
11 perpetrator of what he has done to the child and they have
12 a normal exam and when there's been videotaped evidence of
13 what's happened to a child and they have a normal exam, so
14 we know that children can have horrific things happen to
15 them and have completely normal exams.

16 Q Okay, and do any of those articles support
17 your position that you brought with you today?

18 A Yes, actually all of them do.

19 Q They all do and what, and what particular
20 studies were those, are those peer review articles, let me
21 ask you that first?

22 A Yes, they are.

23 Q Okay, and peer review means what?

24 A It means that everybody that's in the field
25 that a group of people that are within the field look at

Dr. Rahter - Direct Examination by Ms. Lively 216

1 the research data to make sure that it's valid.

2 Q Okay, and once it's determined that it's
3 valid does it meet the level of it being a peer reviewed
4 article?

5 A Yes, and it's usually published as a peer
6 reviewed article.

7 Q Okay, and those that you have with you what
8 actual journals or publications were they put in?

9 A This is the North American Society for
10 Pediatric and Adolescent Gynecology. This journal is from
11 the American Academy of Pediatrics. This one is from the
12 American Academy of Pediatrics and this one actually is
13 pulled out of a text book that was used, a pediatric text
14 book that the section was written by Dr. Joyce Adams who's
15 done this work for like thirty years ---

16 Q Okay ---

17 A --- and it's really just a summary of a lot
18 of findings.

19 Q Okay, and in doing your work as a child
20 abuse sexual assault examiner being the examiner that you
21 are do you have to keep up with the changes and any type of
22 research in regards to child abuse sexual assaults?

23 A Yes, I do.

24 Q Okay, is that the reason why you have that
25 information with you and you keep it with you whenever you

Dr. Rahter - Direct Examination by Ms. Lively

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1 handle these type of cases?

2 A Yes, and we go to conferences to learn
3 about all the changes but we also meet on a state level
4 three times a year with all the providers in the State of
5 South Carolina that do this kind of exam, which there's
6 only seventeen of us; and we go through all the latest
7 research and all the latest articles and those are sent by
8 email to each of, to all of us through the year and then we
9 do kind of a library round table.

10 Q Okay, now, Dr. Rahter, and I'm going to
11 retrieve these from you for just a second.

12 A Okay.

13 Q Now, Dr. Rahter, were you working in your
14 capacity as a child abuse sexual assault examiner in June
15 of 2010?

16 A Yes, I am, I was.

17 Q Okay, and where were you actually at during
18 that time in your capacity; were you at the hospital or
19 were you at the facility?

20 A I was at the Children's Recovery Center.

21 Q Children's Recovery Center, okay, and just
22 for the benefit of the jury where did you work last night?

23 A At the emergency department.

24 Q What time did you get off?

25 A Seven a.m.

Dr. Rahter - Direct Examination by Ms. Lively

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1 Q Okay, all right, so you basically have two
2 jobs?

3 A Correct.

4 Q All right, now, Dr. Rahter, did you have an
5 opportunity to meet with a [REDACTED] in June of 2010?

6 A Yes, I did.

7 Q All right, and in what capacity did you
8 meet with this particular child?

9 A I actually did [REDACTED] interview as well
10 as [REDACTED] forensic medical exam.

11 Q Okay, and is that normal for you to do
12 both?

13 A I used to do all the forensic interviews.
14 Fortunately I now have two wonderful forensic interviewers
15 so I don't do as many of them and I don't know the reason I
16 did this one other than they may have had too many that
17 week or they may have been at a conference. I've done a
18 lot less the last two years.

19 Q All right, and but this is one of them that
20 you were there for and did?

21 A Correct.

22 Q All right, and do you remember at the time
23 whenever the child was referred to you who actually made
24 the referral?

25 A I can tell you that in one second.

Dr. Rahter - Direct Examination by Ms. Lively

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1 Q Okay?

2 A She was referred by Detective Allen Large
3 of the Horry County Police Department.

4 Q And do you, okay, and where do you take
5 referrals from in regards to having these type of
6 interviews set up?

7 A From the police departments, all the police
8 departments in the area, from DSS, and then we also take
9 direct referrals from therapists and physicians,
10 pediatricians usually.

11 Q Okay, and whenever the child was referred
12 to you how much information do you typically get about what
13 it is that you're going to talk to the child about, what
14 you're going to be looking for?

15 A We almost always, not always, have the
16 police report that I can review, and then there's an intake
17 that occurs prior to the forensic interview and prior to
18 the medical exam where the child advocate sits down and
19 gathers all the information from whoever brings the child,
20 whether it be the mother, the grandmother, the father, the
21 foster mother, to gather as much information as they can
22 prior to the forensic interview.

23 Q Okay, and you're already testified that the
24 history, the medical history of the child is important as
25 well before you visualize that child in a medical exam,

Dr. Rahter - Direct Examination by Ms. Lively

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1 correct?

2 A Correct.

3 Q Okay, so were you able to obtain all that
4 information in regards to [REDACTED]?

5 A Yes.

6 Q All right, and did she have any type of
7 medical condition or anything that concerned you prior to
8 you actually doing your child sexual assault exam?

9 A No.

10 Q All right, and did you have any information
11 as to how long it had been since the last she had contact
12 with the alleged perpetrator?

13 A I don't know that I got a time frame as to
14 exactly how long it had been.

15 Q Okay, did you have any indication that it
16 had been an immediate report?

17 A No, it was not, it was because, it was a
18 report because of something that happened with another
19 child.

20 Q Okay, all right, so you did have that
21 information?

22 A Correct.

23 Q All right, now, Dr. Rahter, since you did
24 the forensic interview in this particular case will you
25 tell the jury, you've talked some about the medical

Dr. Rahter - Direct Examination by Ms. Lively

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1 examinations, but have you had training in doing forensic
2 interview?

3 A Yes, I have.

4 Q Okay, and in that training do you have a
5 specific type of procedure that you follow that has been
6 adopted by the, was it the Child Protection Advocacy
7 Center; is that right or Napsack?

8 A Well there's several different protocols.
9 I actually was trained in doing forensic interviews before
10 any of those protocols actually came out.

11 Mr. Truslow: Your Honor, I'm going to object.
12 I think we're getting beyond the level of her expertise
13 into the interview process. I think that pretrial rulings
14 were that she was going to be a custodian or the person to
15 put the interview tape in through and that was it based on
16 recent case law. She was an expert onto the medical
17 findings only.

18 Ms. Lively: Your Honor, if I may respond?

19 The Court: Yes.

20 Ms. Lively: Thank you. What I'm asking Dr.
21 Rahter to talk about the procedure that she went through
22 which is part of what the jury needs to understand in order
23 for them to see why she asks the certain kind of questions
24 she asked. I'm not qualifying her as an expert. I'm not
25 asking for her opinion regarding the type of questioning.

Dr. Rahter - Direct Examination by Ms. Lively

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1 I'm asking her about the procedure just like I asked
2 Detective Large about his procedure.

3 The Court: I'm going to let her answer.

4 Mr. Truslow: Judge, based on the case law we
5 went through before she should simply say she interviewed
6 the child and put the interview into evidence and let the
7 jury decide for themselves, otherwise she is commenting on
8 the truth or veracity of the interview.

9 The Court: I'm not going to let her comment on
10 that.

11 Ms. Lively: I'm not going to ask her that, Your
12 Honor.

13 Q (Continuing) Okay, what method do you
14 follow?

15 A There's several steps you do. First you
16 build a report with the child then you discuss with them
17 what names they use for their anatomical parts because they
18 all have different names they use and you want to speak the
19 same language. You talk about veracity or truth then you
20 ask open ended questions for them and allow them to respond
21 as to whether or not anybody has ever touched them and then
22 depending on how they answer you ask more directed
23 questions and then at the end of the interview you do
24 closure, where you try to empower the child to make sure
25 they're safe in the future and let them know it's not their

Dr. Rahter - Direct Examination by Ms. Lively

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1 fault, that sort of thing. That's kind of the, it can be
2 named several things depending on which training center you
3 go to but that's basically what all of them do.

4 Q In regards to interviewing a child what is
5 the preference in, in how many times a child is
6 interviewed?

7 A The preference actually is one time but
8 that has now changed in the last couple of years. They're
9 now talking about doing, especially with children who have
10 disabilities of some type doing shorter more repetitive
11 interviews, breaking it out a little bit so that has
12 changed a little bit.

13 Q Okay, and did, when [REDACTED] came to you did
14 you have any indication that she had any type of a
15 disability or learning disability or anything of that
16 nature?

17 A No, actually she demonstrated that she was
18 very bright.

19 Q Okay, and did you, were you able to follow
20 the procedure that you described for the jury in this
21 particular case?

22 A Yes, I was.

23 Q All right, and did you in regards to going
24 through the procedure were you able to get a full statement
25 from [REDACTED]?

Dr. Rahter - Direct Examination by Ms. Lively

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1 A Yes, I was.

2 Q All right, and whenever, excuse me, I
3 apologize, whenever you do these type of interviews do you
4 do anything to preserve the interview for future use?

5 A The interview is audio and video taped, the
6 medical exam is videotaped.

7 Q Okay, and was this forensic interview video
8 and audio taped?

9 A Yes, it was.

10 Q Okay, now during the interview whenever you
11 were meeting with [REDACTED] was there anyone else that has
12 contact with her or can talk with her during that
13 interview?

14 A No.

15 Q Do you allow any interruptions or family
16 contact during these interviews?

17 A No.

18 Q And why is that?

19 A A forensic interview is only with the
20 interviewer and the child because you don't want anything
21 else playing into the interview, body language, even
22 distractions of a phone ringing. You really want to keep
23 it as quiet as possible and you don't want the child to be
24 influenced by any outside environmental things.

25 Q Was [REDACTED] able to provide you with details

Dr. Rahter - Direct Examination by Ms. Lively

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1 of the abuse?

2 A Yes.

3 Q And, and in any of those details was she
4 able to give you any time and place information as to the
5 abuse?

6 A Yes.

7 Q Okay, will you, please, tell us the time
8 that she gave you in regards to when the abuse occurred?

9 A She occur, she reported that it occurred
10 ten or twenty times in one house.

11 Q Okay, hold on just a second, okay --

12 Ms. Lively: Your Honor, may I approach for just
13 a moment?

14 (Whereupon, a bench conference was held off the
15 record in the presence of the jury, but out of the hearing
16 of the jury and the court reporter.)

17 The Court: Would you take the jury out for just
18 a moment, please.

19 (Whereupon, the jury retired to the jury room at
20 11:11 a.m.)

21 The Court: All right, Ms. Lively?

22 Ms. Lively: Yes, sir, Your Honor, and thank you
23 for bringing that particular issue up for, for review.
24 There is something on the forensic interview that we'll
25 need to redact in regards to a mention of a test. It

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1 doesn't say a polygraph test but it does talk about a test
2 and getting money and seeing if he's lying.

3 The Court: It was a test to see if he was lying
4 or not.

5 Ms. Lively: Right, so obviously that's ---

6 The Court: Doesn't say anything about results
7 but it says that ---

8 Ms. Lively: Right.

9 The Court: --- one was taken.

10 Ms. Lively: Just out of an abundance of caution
11 even though it doesn't talk about results and anything
12 else, we want to redact that from the interview as well as
13 I have made copies for the jury to follow along with and
14 I'll have that particular part redacted from that as well.
15 It won't take me long cause it's just that one particular
16 spot, and also, Your Honor, I did not have the opportunity,
17 and this was my fault, to advise Dr. Rahter that we are not
18 discussing through testimony that the events occurred
19 anywhere other than the jurisdiction of Horry County even
20 though ---

21 The Court: That's correct.

22 Ms. Lively: Yeah, even though the child
23 mentions in the forensic interview we're not taking it out
24 of the forensic interview but in regards to your testimony
25 as soon as I was asking you about time and place I realized

Dr. Rahter - Direct Examination by Ms. Lively

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1 that's where you were getting ready to go and that's my
2 fault. I should have told you we had already discussed
3 yesterday.

4 The Court: Is that in the forensic interview?

5 Ms. Lively: Well she talks about on Acoon's
6 Road. Remember we talked about ---

7 The Court: I thought she was just saying where
8 he lived.

9 Ms. Lively: Where he lived and that might be
10 the case but I thought she had talked about that it
11 occurred in two places.

12 The Court: Well that's on page twelve.

13 Ms. Lively: And that's why I brought it up
14 yesterday cause I wanted to make sure it wasn't ---

15 The Court: Where does he live, on Acoon Road,
16 that's where she says it, she says, this is it. Dr. Rahter
17 on page 207 says, "Okay, and, okay, whatever you were,
18 whenever you were at his house, where does he live?" The
19 child says "Acoon Road," Dr. Rahter, 'what is it, Aiken
20 Road," the child, "Acoon Road.' Dr. Rahter, "okay, so
21 that, so is that in Columbia South Carolina," the child
22 "uh-huh." Dr. Rahter, "okay, then you say, you also say it
23 happens at your house. Tell me what you remember about it
24 happening at your house, the same, it happened the same
25 thing what he did at his house.'

Dr. Rahter - Direct Examination by Ms. Lively

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1 Ms. Lively: Right.

2 The Court: So what about that?

3 Mr. Truslow: It's up to you if you want to
4 leave it out there. If you want to clean it up or it
5 doesn't matter to me.

6 Ms. Lively: All right, that's ---

7 Mr. Truslow: Which way is simplest?

8 Ms. Lively: Well I'm going to see the best way
9 for me to do it. I'll tell you I don't want to, I'm not
10 even going to attempt to splice anything, I can promise you
11 that, but what I will try to do is determine exactly where
12 it is that the child is saying it. I can mute it at that
13 time, let it go through and then start it back and then in
14 regards to the transcript I can redact that particular
15 portion. That, you know, like I said I brought it up
16 yesterday and we did talk about it but it appeared that as
17 long as I kept it out of the testimony that it wasn't so
18 clear in the, in the actual video. You know we're picking
19 it apart. I don't know the jury if they would, but out of
20 an abundance of caution I can take that part out, too. I
21 mean I, like I said I'm going to need a rule and a time to
22 do that.

23 The Court: Well how much time do you need?

24 Ms. Lively: Well I'm going to have to see where
25 I can pull this up regarding the two things that you just

Dr. Rahter - Direct Examination by Ms. Lively

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1 mentioned, so we've got from line 207 is where you're
2 bringing up, where, okay, I'm looking at terrified, she's
3 never said anything to you about that, no, she's never told
4 anyone he did or did not, okay, and okay, that's whenever
5 you were at his house, where does he live, Acoon Road. I'm
6 trying to see how far back I need to go.

7 Mr. Truslow: What about at 213, line 213 is
8 when something happened at his house, the same thing what
9 he did at his house.

10 Ms. Lively: What I'll do is I can just maybe
11 where it's at 207 Dr. Rahter's talking, I can just take out
12 the part that says and, okay, that's whenever you were at
13 his house, I can just do it up, I take that out and then
14 let him, her just say where does he live. I think that
15 would be fine, is that --

16 The Court: How about that, Mr. Truslow?

17 Ms. Lively: And then I'll take, and then on 213
18 what you're talking about is where she said, okay, then you
19 also say it happens at your house, I'll take out okay, then
20 you also say, I'll just say it happens at your house, tell
21 me what you remember about it happening at your house.
22 I'll take out that also say it happens, so that way it's
23 not like including the prior ---

24 Mr. Truslow: The next line 215 says it happened
25 the same, the same thing what he did at his house.

Dr. Rahter - Direct Examination by Ms. Lively

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1 Ms. Lively: Okay, let me see, I'll do --

2 Mr. Truslow: 213 that portion and 215.

3 Ms. Lively: Here this is what I'll try to do
4 and I may have to, like I said look at the timing on the
5 thing, and say, okay, then you also say it happens at your
6 house, I'll have to take that part out. Let me listen to
7 it and see if I can figure it out to make it work better
8 because just trying to do, I mean it's easier for me to
9 look. I'm going to have to do the timing anyway and I'll -
10 --

11 The Court: Well it's 11:30 I could sent this
12 jury to lunch until 1:00.

13 Dr. Rahter: But you want to finish with me
14 first, right?

15 The Court: Well that's what I'm trying to do.

16 Ms. Lively: I know but see that's what I mean
17 this is what we're trying to figure out.

18 The Court: Well the last thing is going to be
19 playing the tape, are you going to need her after that?

20 Ms. Lively: Well she's got to be cross
21 examined.

22 The Court: Okay, that's right.

23 Ms. Lively: So that's unless he doesn't want
24 to, I'm sure he does. Yeah, let me see if I can figure
25 that out.

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1 The Court: What do you need, Ms. Lively, I mean
2 you need like five minutes?

3 Ms. Lively: How about this, give me ---

4 The Court: Or do you need an hour?

5 Ms. Lively: No, God, I hope not. Give me ten
6 minutes to see how easy I can make this work. If I can't
7 then I'll come, I'll let you know that it's going to take
8 me longer.

9 The Court: All right, we'll be at ease, just
10 come and get me whenever you're done.

11 Ms. Lively: I will, thank you.

12 The Court: Somebody take care of Ms. Rahter,
13 Dr. Rahter while we're at ease, don't make her sit there.

14 (Whereupon, a recess was taken and the following
15 takes place on the record after the recess.)

16 (Whereupon, State's Exhibit Number 11 marked for
17 identification.)

18 The Court: What I'm going to do it's 12:00 now,
19 we need to finish up with Dr. Rahter. I'm going to go
20 ahead and order lunch. Bobby, order it now, okay, and
21 we'll just let, we'll provide lunch for the jury, okay?

22 Ms. Lively: Yes, sir.

23 The Court: That way we won't end up going to
24 lunch at 1:30 or 2.

25 Ms. Lively: Yes, sir.

Dr. Rahter - Direct Examination by Ms. Lively

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1 The Court: Okay.

2 Ms. Lively: And I'm just going to turn it off
3 when I gets to the parts that I'm redacting and I've shown
4 Mr. Truslow.

5 The Court: Any way you want to do it.

6 Ms. Lively: Thank you.

7 (Whereupon, the jury returns to the courtroom at
8 12:00 p.m.)

9 The Court: All right, yes, ma'am, you may
10 continue.

11 Ms. Lively: Thank you, Your Honor.

12 Q (Continuing) Now, Dr. Rahter, right before
13 we had this break I had asked you about during the forensic
14 interview of the child [REDACTED] if she had provided you with
15 a time and place information regarding the allegations of
16 sexual assault?

17 A Yes, she had.

18 Q Okay, okay, and will you pull the
19 microphone to you so we make sure everyone can hear?

20 A Sorry.

21 Q It's okay, and in regards to timing of the
22 sexual assault did she tell you when it had happened?

23 A She told me it occurred when she was seven.

24 Q Okay, and did she give you a place as to
25 where the, the assault occurred?

Dr. Rahter - Direct Examination by Ms. Lively

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1 A Yes, she did.

2 Q Okay, and was the place in Horry County?

3 A Yes.

4 Q All right, and did she provide you any
5 details about that place in Horry County?

6 A Yes, she did.

7 Q Okay, where did she tell you that it
8 happened?

9 A At her, at her house in her bed.

10 Q Okay, now, Dr. Rahter, whenever you
11 finished with the actual interview at that point in time
12 did you have any more contact with the child after that
13 interview, other than the medical exam, I'm sorry?

14 A Yeah, I performed her medical exam.
15 Sometime, sometimes these children come back to the center
16 for counseling and so I may run into them every now and
17 then but I don't remember seeing her.

18 Q Okay, and you, did you perform the medical
19 exam on [REDACTED]?

20 A I did.

21 Q Okay, and did you, was there a colposcope
22 that was used during the exam?

23 A Yes, there was.

24 Q All right, and will you, please, tell the
25 jury what your findings were in regards to the medical

Dr. Rahter - Direct Examination by Ms. Lively

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1 sexual assault exam?

2 A The physical exam was without abnormalities
3 which does not rule in or rule out sexual abuse.

4 Q Okay, and in in layman's terms does that
5 mean that there, you didn't find any physical injuries?

6 A The physical exam was normal.

7 Q Okay, and in your, in your medical opinion
8 with the medical exam being normal is that in line with the
9 research that you provided for us today here in court?

10 A Yes, it is.

11 Q Okay, and once again I've actually got
12 State's Exhibit 7, 8, 9, and 10 that you testified earlier
13 to that you used in supporting your opinion regarding
14 medical examinations of sexual assault children. Are these
15 documents in peer review articles what you use to maintain
16 your opinion?

17 A Yes, and many years of experience.

18 Q And years of experience, okay --

19 Ms. Lively: Your Honor, at this time the State
20 would move to introduce 7, 8, 9, and 10 into evidence as
21 exhibits evidence in this case.

22 Mr. Truslow: I'll object as hearsay, Your
23 Honor.

24 The Court: I think that it would normally come
25 under as an exception as a learned treatise and it would be

Dr. Rahter - Direct Examination by Ms. Lively

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1 permissible for Dr. Rahter to refer to it, to read from it,
2 any excerpts that she chooses to point out that she based
3 her conclusions on or her opinion on, but to introduce the
4 document as a whole when we haven't even talked about it,
5 I'm inclined to agree with Mr. Truslow.

6 Ms. Lively: Okay.

7 The Court: All right, I'm not going to admit
8 it.

9 Ms. Lively: (Continuing)

10 Q Did you use any of these articles to
11 actually support your opinion here today?

12 A I read lots of different articles. I
13 discuss them with lots of different professionals. You put
14 that in conjunction with many years of experience doing
15 these exams and that's how you form an opinion.

16 Q Okay, so basically the articles that you
17 use to maintain your education as well as your personal
18 experiences is what you're using to support your opinion
19 here today?

20 A Correct.

21 Q Okay, now that's fair, well what I need to
22 show you now is what's marked as State's Number 5 for I.D.
23 purposes and ask you if you recognize this disk and case
24 number?

25 A Yes, I do, it's the forensic interview.

Dr. Rahter - Direct Examination by Ms. Lively

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1 Q All right, and you actually have a number
2 on that disk. Could you, please, tell the jury what that
3 number is referring to?

4 A It's the medical record number, it's CRC10-
5 79 which means this was performed in 2010 and it was the
6 seventy ninth interview that year.

7 Q Okay, and is that you keep a record of the
8 interviews of children who come to your center?

9 A Yes, I do.

10 Q Okay, all right, and is that the interview
11 that you conducted with [REDACTED]

12 A It is.

13 Ms. Lively: Okay, Your Honor, the State would
14 introduce this as State's Exhibit Number 5.

15 Mr. Truslow: Your Honor, we renew our objection
16 that it's hearsay under Crawford and Davis v. Washington.

17 The Court: All right, and that's noted, I'm
18 going to admit it.

19 (Whereupon, State's Exhibit Number 5 entered into
20 evidence.)

21 Ms. Lively: Your Honor, at this time the State
22 would ask to be allowed to publish this video to the jury.

23 The Court: Yes, you may. Ladies and gentlemen
24 of the jury, there are two portions of this tape that I
25 have determined to be irrelevant to this case and not

Dr. Rahter - Direct Examination by Ms. Lively

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1 admissible and you could expect there to be at least two
2 points at which the tape will be muted and that's at my
3 direction.

4 Ms. Lively: And, Your Honor, we actually have a
5 transcript that's actually been redacted where you ordered.

6 The Court: Okay.

7 Ms. Lively: For just assistance to the jury,
8 I'm not putting it into evidence at this time but in case
9 there's any trouble with anyone hearing or there's a little
10 bit of mumbling here and there and I wanted to provide this
11 to the jury to assist and I have copies for Your Honor as
12 well.

13 Mr. Truslow: No objection.

14 The Court: All right, without objection.

15 Ms. Lively: Thank you, Your Honor.

16 The Court: I have a copy of it.

17 Ms. Lively: Okay, you want a copy?

18 Mr. Truslow: I take that back, I do object to
19 it based on the previous objection, Your Honor.

20 The Court: All right.

21 Mr. Truslow: Interviewing as a whole.

22 The Court: I understand, I understand, and
23 that's noted, overruled.

24 Mr. Truslow: I'll just use mine.

25 Ms. Lively: Okay, that's fine.

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1 (Whereupon, State's Exhibit Number 5 played in
2 open court as follows:)

3 Dr. Rahter: The green turtle. That's cool,
4 isn't it? There's lots of those in here. I don't know
5 where we got all those. Okay, you have a seat in that big
6 chair for me and I'm going to sit in the little chair,
7 okay? Okay, good, so I'm just going to talk to you a
8 little bit in here and take some notes, okay? This is
9 paper you can draw and we have all kinds of Markers and gel
10 pens and all that kind of stuff so you can draw whatever
11 you want while we are talking. Okay, let me see your
12 medal, I didn't get a chance to really see it, and what did
13 you get this for?

14 [REDACTED] Making all A's for the whole entire
15 year.

16 Dr. Rahter: Wow! How many kids get these?

17 [REDACTED]: My sister, me, five people.

18 Dr. Rahter: That's all in the whole school?

19 [REDACTED]: No, five people in my class.

20 Dr. Rahter: Oh, five people in your grade. What
21 grade? Second grade?

22 [REDACTED]: Second grade.

23 Dr. Rahter: Second grade.

24 [REDACTED]: Five people out of my class.

25 Dr. Rahter: Wow, that's pretty special. Let's

Dr. Rahter - Direct Examination by Ms. Lively

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1 see what this says, academic excellence. That is just
2 wonderful, you should be so proud of yourself. Okay,
3 [REDACTED], let me be sure I am spelling your name right,

4 [REDACTED]

5 [REDACTED]: Uh-huh.

6 Dr. Rahter: Okay, and then it's [REDACTED].

7 [REDACTED]: Uh-huh.

8 Dr. Rahter: Okay, and what's your date of birth?

9 [REDACTED] [REDACTED]

10 Dr. Rahter: Okay, so your, tell me how old
11 again? Eight?

12 [REDACTED]: Eight.

13 Dr. Rahter: Eight years old. And you just
14 finished 2nd grade. And you made all A's. That is
15 wonderful. What is your favorite thing in school?

16 [REDACTED]: Science.

17 Dr. Rahter: Is it, really?

18 [REDACTED]: Yea, I got to do a lot of projects.

19 Dr. Rahter: Great.

20 [REDACTED]: Except I had to do them in class.

21 Dr. Rahter: What...(coughing)... Excuse me.

22 What do you want to do when you grow up?

23 [REDACTED]: Work at my mom's work.

24 Dr. Rahter: Where's your mom's work?

25 [REDACTED]: Sally Beauty Supply.

Dr. Rahter - Direct Examination by Ms. Lively

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1 Dr. Rahter: Oh, really. Do you go and help her
2 when she's working?

3 [REDACTED]: Yes, sometimes.

4 Dr. Rahter: Well very good. Well [REDACTED] tell me
5 who lives in your house?

6 [REDACTED]: My Jeff, my sister, me and mom.

7 Dr. Rahter: Okay. What's your sister's name?

8 [REDACTED]: Julie.

9 Dr. Rahter: Julie and how old is Julie?

10 [REDACTED]: Five.

11 Dr. Rahter: And who is Jeff?

12 [REDACTED]: My step-dad until they get married.

13 Dr. Rahter: Okay. And when your mom, and what's
14 your mom's name?

15 [REDACTED]: Rebecca.

16 Dr. Rahter: Rebecca. Any dogs, cats, fish,
17 skunks?

18 [REDACTED]: We are getting a dog but my mom hasn't
19 named it yet. I got a cat, that's calico and her name is
20 Ruthie.

21 Dr. Rahter: Ruthie.

22 [REDACTED]: Uh-huh. Because she's calico, her
23 skin's, her skin's calico. We got a white cat name
24 Littlebit.

25 Dr. Rahter: Name Littlebit. Ahh.

Dr. Rahter - Direct Examination by Ms. Lively

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1 [REDACTED]: We had two fish. One was purple with
2 purple heart and one was orange with an orange heart. Mine
3 was the purple one and its name. I didn't name it.
4 Although his name is P. Julie named hers Orangey.

5 Dr. Rahter: And what happened to the fish?

6 [REDACTED]: Julie's died. Because it got caught in
7 that filter thing.

8 Dr. Rahter: Oh no.

9 [REDACTED]: And Julie forgot to feed mine when I
10 was in bed. So it died.

11 Dr. Rahter: Were they Beta fish?

12 [REDACTED]: They were little tiny

13 Dr. Rahter: Just like tiny fish

14 [REDACTED]: Uh-huh.

15 Dr. Rahter: Fish are kind of hard to keep
16 alive.

17 [REDACTED]: Uh-huh.

18 Dr. Rahter: Plus they have lots of babies and
19 then you can kind of keep replenishing them with all the
20 babies. But, I use to have a fish tank and they were hard
21 to keep alive. You know? Did you change the water in
22 yours?

23 [REDACTED]: No, my dad had to do that. He had that
24 plug thing that magnet through the glass and he had to
25 scrub it on the moldy stuff. And I did that every day

Dr. Rahter - Direct Examination by Ms. Lively

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1 until Julie did it too hard and it hit her fish.

2 Dr. Rahter: Oh no.

3 [REDACTED]: It came up and hit her fish in the
4 head.

5 Dr. Rahter: And, and is that what happened to
6 it? You think that's what killed it?

7 [REDACTED]: Mine got stuck on the water tank,
8 thing. The thing that sucks the water.

9 Dr. Rahter: The filter. Yea, well you did the
10 best you could. All right, [REDACTED], what is your favorite
11 besides science in school? What do you like to do at
12 school?

13 [REDACTED]: Recess.

14 Dr. Rahter: Recess. What do you like to do
15 when you are at recess?

16 [REDACTED]: Swing.

17 Dr. Rahter: Swing.

18 [REDACTED]: On that swing thing that people have to
19 push you on and then they jump off and land on and you
20 around.

21 Dr. Rahter: On that sounds like fun. I don't
22 think they had one of those on my playground. And you go
23 to Loris, right?

24 [REDACTED]: No, Aynor Elementary.

25 Dr. Rahter: Aynor Elementary. Sorry, I like

Dr. Rahter - Direct Examination by Ms. Lively

243

1 Aynor Elementary, it's a good school. Do you know, Dale
2 Gerald?

3 [REDACTED] Uh-huh.

4 Dr. Rahter: She's a teacher out there, she
5 teaches Spanish. She might not be there anymore.

6 [REDACTED] We don't have Spanish teachers no more.

7 Dr. Rahter: Oh, you don't anymore. Oh, well
8 she's not there then. She use to teach Spanish there.
9 Okay, well, [REDACTED], did anybody tell you why you were
10 coming here to talk to me today?

11 [REDACTED] My mom did.

12 Dr. Rahter: What'd she tell you?

13 [REDACTED]: She said that we were going to talk
14 about what happened with my Papa.

15 Dr. Rahter: Okay. okay. So let me just tell
16 you the rules of this room. This room is called the truth
17 room, and the only thing we talk about in here is the
18 truth. You can tell me anything you want, as long as it's
19 the truth. Okay?

20 [REDACTED] Okay.

21 Dr. Rahter: Tell me in your own words what
22 telling the truth means?

23 [REDACTED]: To say what, happened.

24 [REDACTED]: Uh-huh. Very good. Okay we are going
25 to be talking about private parts in here too, so I need to

Dr. Rahter - Direct Examination by Ms. Lively

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1 know, know the words you use for your privates.

2 [REDACTED] I either use hoo-ha.

3 Dr. Rahter: Hoo-ha. That's for down here
4 right?

5 [REDACTED]: Hmmm.

6 Dr. Rahter: Hoo-ha.

7 [REDACTED]: For up here I use titties.

8 Dr. Rahter: Titties, okay. And what's this
9 part down here?

10 [REDACTED]: My bottom or my tushie.

11 Dr. Rahter: Tushie or bottom. Okay. And then
12 boys have a bottom, right?

13 [REDACTED]: Hmmm.

14 Dr. Rahter: Or a tushie. And then what's the
15 part of the front of boys, what do you call that?

16 [REDACTED]: A private.

17 Dr. Rahter: A private, very good. Do you know
18 why [REDACTED] that we call titties, hoo-ha and tushie,
19 privates? Do you know why we call them privates?

20 [REDACTED]: (No response.)

21 Dr. Rahter: Because they are private just for
22 us. You know kind of like your diary has your private
23 thoughts in it. You don't want everybody on that bus
24 reading your diary. Well your private parts are just like
25 that, they are private just for you. And no one is

Dr. Rahter - Direct Examination by Ms. Lively

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1 supposed to be touching them or looking at them unless you
2 have to go to the doctor. Okay? So, remembering that this
3 is the truth room. Tell me if anybody has touched your
4 boo, titties, your hoo-ha, or your tushie?

5 [REDACTED] My grandfather.

6 Dr. Rahter: Okay. do you know when that
7 happened?

8 [REDACTED] About when I was seven.

9 Dr. Rahter: Do you know how many times that
10 happened?

11 [REDACTED]: Ten or either twenty.

12 Dr. Rahter: Ten or twenty. Let's think about
13 the very first time, if you can remember back to the very
14 first time, he touched you. Tell me what you remember
15 about that?

16 [REDACTED]: I don't remember anything about that
17 one.

18 Dr. Rahter: Okay. Okay. Well tell me the
19 first thing you do remember.

20 [REDACTED]: I do remember him saying something
21 about letting me feel how heavy you are.

22 Dr. Rahter: Okay. And, was this at night time
23 or day time?

24 [REDACTED]: Night.

25 Dr. Rahter: Okay. Were you asleep when it would

Dr. Rahter - Direct Examination by Ms. Lively

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1 happen?

2 [REDACTED]: Hmmm.

3 Dr. Rahter: And when you would wake up, what
4 was he doing?

5 [REDACTED]: He'd either have his mouth down there
6 or his hand.

7 Dr. Rahter: Okay. When he had his hand down
8 there would he touch you on the outside of your hoo-ha or
9 the inside of your hoo-ha?

10 [REDACTED]: In.

11 Dr. Rahter: Okay. And how do you know it was
12 inside?

13 [REDACTED]: Because, I felt it. Because I woke up
14 when I felt it.

15 Dr. Rahter: Okay. And what did it feel like?

16 [REDACTED]: Gross.

17 Dr. Rahter: And when he would put his mouth
18 down there, what did he do with his mouth?

19 [REDACTED]: He's stick his tongue on it.

20 Dr. Rahter: Okay. And what did that feel like?

21 [REDACTED]: It felt really gross.

22 Dr. Rahter: Did anything hurt?

23 [REDACTED]: When he had his hand down there.

24 Dr. Rahter: Okay. And how, how, did it hurt?

25 [REDACTED]: Because he took his finger and stuck it

Dr. Rahter - Direct Examination by Ms. Lively

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1 up.

2 Dr. Rahter: Okay. Do you remember what it felt
3 like when you would go peepee after this would happen?

4 [REDACTED]: Yes, it hurt to go potty.

5 Dr. Rahter: Okay. Do you know how it hurt?

6 [REDACTED]: (No response.)

7 Dr. Rahter: Okay. Did anything ever come out
8 of you?

9 [REDACTED]: No.

10 Dr. Rahter: Okay. Did you ever see his private
11 part?

12 [REDACTED]: No.

13 Dr. Rahter: Now, what were you wearing when you
14 were asleep in your bed?

15 [REDACTED]: I normally wear just a tee shirt
16 because I get hot.

17 Dr. Rahter: Did you have any panties on?

18 [REDACTED]: Yes.

19 Dr. Rahter: And when you would wake up and he
20 was doing this where were your panties?

21 [REDACTED]: On the bed.

22 Dr. Rahter: So they were off of you?

23 [REDACTED]: (No response.)

24 Dr. Rahter: Okay. And did he ever say anything
25 to you when he was done?

Dr. Rahter - Direct Examination by Ms. Lively

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1 [REDACTED]: He said do not tell anyone.

2 Dr. Rahter: Okay. Did he say what would happen
3 if you did tell?

4 [REDACTED]: He said that I might get a spanking
5 from my mom.

6 Dr. Rahter: Okay. But, you know that's not
7 true now, right?

8 [REDACTED]: (No response.)

9 Dr. Rahter: Yes, those are secrets we don't
10 want kids to keep. Right? Okay. And, did he ever touch
11 you anywhere else?

12 [REDACTED]: (No verbal response.)

13 Dr. Rahter: Did he ever touch your butt? Your
14 bottom?

15 [REDACTED]: (No response.)

16 Dr. Rahter: Did he ever kiss you anywhere?

17 [REDACTED]: He kissed me on my mouth.

18 Dr. Rahter: Okay. Did he kiss on the outside
19 of your mouth? Or did he kiss on the inside of your mouth?

20 [REDACTED]: He kissed on the outside.

21 Dr. Rahter: Okay. And did you ever have to
22 touch him anywhere?

23 [REDACTED]: (No response.)

24 Dr. Rahter: And how about your sister? Did he
25 ever touch your sister?

Dr. Rahter - Direct Examination by Ms. Lively

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1 [REDACTED]: I don't know.

2 Dr. Rahter: Okay. She's never said anything to
3 you about that?

4 [REDACTED]: She's never told anyone if he did or
5 not.

6 Dr. Rahter: And when it happened at your house,
7 where were you then?

8 [REDACTED]: I was in my bed trying to go to sleep.

9 Dr. Rahter: And where was your mom?

10 [REDACTED]: In her bed.

11 Dr. Rahter: And where was Julie?

12 [REDACTED]: Her bed with Nana.

13 Dr. Rahter: Okay. Now is Nana, when Julie's in
14 her bed with Nana, is that in the same room with you or a
15 different room?

16 [REDACTED]: Different room.

17 Dr. Rahter: Okay.

18 [REDACTED]: Now, me and Jules sleep together.

19 Dr. Rahter: Okay. And he would come in and do
20 the same thing there?

21 [REDACTED]: (No response.)

22 Dr. Rahter: Do you know how many times it
23 happened at your house?

24 [REDACTED]: Five.

25 Dr. Rahter: And did he ever say anything

Dr. Rahter - Direct Examination by Ms. Lively

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1 different to you when it happened at your house?

2 [REDACTED]: (No response.)

3 Dr. Rahter: And, has anyone else ever touched
4 any of your private parts?

5 [REDACTED]: Ashlyn, she's six years old.

6 Dr. Rahter: Okay. Tell me about what Ashlyn
7 did.

8 [REDACTED]: Ashlyn said for me to go on my hands
9 and my feet, so I did and she undone my pants and put her
10 finger on it.

11 Dr. Rahter: Okay.

12 [REDACTED]: She didn't put it on the inside, she
13 put it on the outside.

14 Dr. Rahter: Okay. And how do you know Ashlyn?

15 [REDACTED]: She's my new next door neighbor.

16 Dr. Rahter: And when did that happen?

17 [REDACTED]: I don't, I can't remember when that one
18 happened.

19 Dr. Rahter: Was it a long time ago?

20 [REDACTED]: It was about like a month ago, I told
21 ...

22 Dr. Rahter: Who did you tell?

23 [REDACTED]: Julie told Mr. Steve and Mr. Steve told
24 Ms. Pam and Ms. Pam told my mom.

25 Dr. Rahter: Okay, and so did Julie see it

Dr. Rahter - Direct Examination by Ms. Lively

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1 happen?

2 [REDACTED]: Yes.

3 Dr. Rahter: Okay. And who is Mr. Steve?

4 [REDACTED]: My baby sitter's wife. Not my baby
5 sitter's wife, my baby sitter's husband.

6 Dr. Rahter: Okay. Is he the daddy of Ashlyn?

7 [REDACTED]: Uh-huh.

8 Dr. Rahter: And what happened to Ashlyn when
9 she told or when Mr. Steve found out?

10 [REDACTED]: Ashlyn, we, she didn't get in trouble.

11 Dr. Rahter: She didn't? Okay. But she hasn't
12 done it since?

13 [REDACTED]: Yes, she hasn't done it.

14 Dr. Rahter: Okay. Because sometimes when we
15 are talking about privates and privates are private just
16 for us. So we don't want anybody touching your private
17 parts, unless you have to go to the doctor. Okay. So do
18 you know what you are suppose to do if somebody tries it?

19 [REDACTED]: What?

20 Dr. Rahter: You scream, no and you run away
21 from them and you go tell. Okay? And if you tell somebody
22 and they don't help you, you tell somebody else until you
23 get somebody to help you. Okay. So you scream "NO!", you
24 run away and you go tell. All right. When did, who did
25 you first tell about what was happening with your Papa?

Dr. Rahter - Direct Examination by Ms. Lively

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1 [REDACTED]: Ms. Pam. She asked me if anyone else
2 had touched me there.

3 Dr. Rahter: Oh, okay. So was that when you
4 were talking to Ms Pam about Ashlyn?

5 [REDACTED]: Uh-huh.

6 Dr. Rahter: Okay. Okay. Well I am so glad
7 that you told. That's what you are supposed to do. How do
8 you feel about it now that you have told?

9 [REDACTED]: I don't feel good, because I don't
10 want, I want to see my Papa again.

11 Dr. Rahter: So, this is what I have to tell you
12 about that. We want to make sure you are safe, okay, and
13 your Papa obviously has some troubles, okay. He needs to
14 get some help. So until Papa gets help, you can't be
15 around him. Okay, because we don't want him to do this
16 again. All right, and it's not your fault. Some people
17 just have a problem where they do things to kids, they
18 shouldn't do and it's not the kid's fault.

19 [REDACTED]: Can I draw?

20 Dr. Rahter: Sure. Draw whatever you want. You
21 know sometimes it's just something that these people have a
22 problem with and they just have to get some help and that's
23 not your responsibility. It's not your fault and I know
24 you miss him. We just have to keep you safe and until he
25 gets some help you can't be around him. Okay? Because we

Dr. Rahter - Direct Examination by Ms. Lively

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1 want to make sure that it doesn't happen again. All right.

2 [REDACTED]: My mom is really good.

3 Dr. Rahter: Oh, is that who did that?

4 [REDACTED]: No, I did this one. I tried to make
5 this.

6 Dr. Rahter: You love writing on your skin.

7 [REDACTED]: I also like to draw stuff on my
8 sister's.

9 Dr. Rahter: Oh, do you? And she lets you?

10 [REDACTED]: Most of the time I'll just sneak up and
11 draw.

12 Dr. Rahter: Do you have a counselor that you
13 see?

14 [REDACTED]: Ms. Hathaway. She said that she is
15 going to get me tomorrow.

16 Dr. Rahter: Oh good, and where do you see Ms.
17 Hathaway?

18 [REDACTED]: At school in her office.

19 Dr. Rahter: Okay. Well we will see if Ms.
20 Hathaway wants to keep seeing you and if sometimes,
21 sometimes the school counselors want you to see somebody
22 else that has a little more expertise in this area. They
23 know a little bit more of what they are doing in this area.
24 So if Ms. Hathaway wants you to see somebody else would you
25 come back here and see one of our counselors?

Dr. Rahter - Direct Examination by Ms. Lively

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1 [REDACTED]: Uh-huh.

2 Dr. Rahter: Okay. Good. Are you having any
3 trouble sleeping?

4 [REDACTED]: Yes. Most of the time when mom tells
5 me to go to bed because, my bed time is eight o'clock, and
6 when she let's us stay up to nine o'clock I'll go in there
7 and start staying up and flipping and tossing trying to go
8 to sleep.

9 Dr. Rahter: But if you go to bed at eight
10 o'clock, you don't have a problem?

11 [REDACTED]: I still have problems. I'll stay up,
12 up for about two hours and then I'll fall asleep.

13 Dr. Rahter: Okay. Are you having any
14 nightmares?

15 [REDACTED]: Yes.

16 Dr. Rahter: What are your nightmares about?

17 [REDACTED]: One time I had a nightmare that a tiger
18 was chasing me from Alexis's house all the way down to my
19 dad's and I fell on the grass and I'm in my bed going,
20 because I had a feeling that it was actually biting my
21 head.

22 Dr. Rahter: Oh no. That's a scary one. Are
23 you having any trouble eating?

24 [REDACTED]: Yes, my throat hurts when I swallow.

25 Dr. Rahter: Okay.

Dr. Rahter - Direct Examination by Ms. Lively

255

1 [REDACTED]: Because Ashlyn she has step throat and
2 her mom didn't know she still had it and me and her be
3 around each other a lot and I think I got it from her.

4 Dr. Rahter: We need to look in your throat.

5 [REDACTED]: She's got that fuzz stuff back there
6 and blisters all over her tongue.

7 Dr. Rahter: Oh goodness.

8 [REDACTED]: I don't think I'll get that unless I
9 actually kiss her and I'm not going to kiss her.

10 Dr. Rahter: Good idea. I wouldn't be kissing
11 her either. Well I am so glad you came in and talked to me
12 today, [REDACTED] you did a really good job. You want to take
13 your picture home with you? Okay. So what did you learn
14 today, if anybody ever tries to touch your private parts
15 what are you going to do?

16 [REDACTED]: Say no, run away and tell someone.

17 Dr. Rahter: And go tell, very good. That's why
18 you got all A's, because you have a good memory and I am
19 very proud of you for getting that medal. You keep up the
20 good work. What are you going to do this summer for fun?

21 [REDACTED]: Go swimming.

22 Dr. Rahter: Go swimming? That's nice. Do you
23 go swimming in the ocean or in a pool?

24 [REDACTED]: A pool. I have a little pool but we
25 are going to be moving and I'm going to Arkansas for two

Dr. Rahter - Direct Examination by Ms. Lively

256

1 weeks and they've got a humongous pool.

2 Dr. Rahter: Who lives in Arkansas?

3 [REDACTED]: Sammy, my real dad. I'm going to visit
4 Sammy's dad, her mom we are going to drop her off at
5 Charleston and I'm actually going to see my little two year
6 old brother that has to wear one of them floatie things and
7 he'll go ahhh. And he'll start going like that
8 (indicating) He does not like those.

9 Dr. Rahter: So that's where your real dad lives
10 is Arkansas, huh?

11 [REDACTED]: Sammy didn't want, dad didn't want to
12 move but Sammy's the one who did.

13 Dr. Rahter: And who is Sammy? His wife?

14 [REDACTED]: Uh-huh. My mom said that she's going
15 to break up with Daddy and they're going to get married.
16 Mom and dad are still married.

17 Dr. Rahter: They are?

18 [REDACTED]: They are still trying to get divorced.

19 Dr. Rahter: You know how to do block writing
20 very well.

21 [REDACTED]: I almost do it every time.

22 Dr. Rahter: Do you? So when you go see your
23 real dad, is your mom going?

24 [REDACTED]: Huh-uh, she has to stay here.

25 Dr. Rahter: She has to stay here?

Dr. Rahter - Cross Examination by Mr. Truslow

257

1 [REDACTED]: Uh-huh.

2 Dr. Rahter: Well who is going to drive you
3 there?

4 [REDACTED]: Sammy and her mom.

5 Dr. Rahter: Oh, okay. And, will your sister go
6 with you?

7 [REDACTED]: Yeah. And mom said that I don't have a
8 choice that I had to go.

9 Dr. Rahter: Well probably your dad wants to see
10 you.

11 [REDACTED]: I hadn't seen him since, for like,
12 about when I turned, the last time I saw him was my
13 birthday and five weeks, five more weekends. Then he was
14 in Arkansas and I hadn't seen him for three months.

15 Dr. Rahter: Oh wow, well he probably really
16 misses you and wants to see you. All right, [REDACTED] well
17 thank you so much for talking to me, you did a really good
18 job and I'm going to get you out of here. Do you need a
19 note for school?

20 [REDACTED]: Huh-uh.

21 Dr. Rahter: Are you already out of school?

22 [REDACTED]: I'm out of school until tomorrow is my
23 last day.

24 Dr. Rahter: Tomorrow is the last day, okay.
25 Well, let's go out here and see mom.

Dr. Rahter - Cross Examination by Mr. Truslow

258

1 [REDACTED]: Mom said that ya'll might check me for
2 strep throat.

3 Dr. Rahter: Yea, I'm going to look at your
4 throat.

5 (Whereupon, the playing of State's Exhibit Number
6 5 is concluded.)

7 The Court: Does that conclude it?

8 Ms. Lively: Yes, it does, Your Honor.

9 The Court: All right, is lunch here? All
10 right, Mr. Truslow -- are you done with this witness?

11 Ms. Lively: I am, Your Honor, and do you want
12 me to retrieve the transcripts at this time?

13 The Court: Yes, yes, please. All right, Mr.
14 Truslow.

15 Mr. Truslow: Yes, sir.

16 **Cross Examination**

17 **By Mr. Truslow:**

18 Q Good afternoon, Dr. Rahter, how are you?

19 A I'm fine, thank you.

20 Q You work two jobs?

21 A I do.

22 Q And how many hours a week do you work,
23 roughly?

24 A I work two hundred twenty hours a month.

25 Q Okay, so that's a lot, all right. In

Dr. Rahter - Cross Examination by Mr. Truslow

259

1 regards to the outfit that you work with children's, is it
2 called the Children's Recovery Center?

3 A Yes, it is.

4 Q Are you familiar with the Mission
5 Statement?

6 A I am.

7 Q Okay, and would that be forensic interview,
8 medical exams, an effective advocacy for children suspected
9 of being abused?

10 A Correct.

11 Q Okay, and when I use the word advocacy
12 what, what does that word advocacy mean to you?

13 A Advocacy means that you do everything that
14 you can to protect the child and to facilitate treatment of
15 the child.

16 Q So by your very mission statement you're
17 not necessarily beginning from a neutral point, are you, if
18 you're an advocate for the child?

19 A I would hope that everybody would be an
20 advocate for a child but there's a forensic process both
21 medically and, and a forensic interview and then there's
22 the whole part of the center that's after that which is the
23 counseling and the advocacy and going, having somebody
24 represent them in court and so forth, so it's the whole
25 thing together, but there is a forensic process.

Dr. Rahter - Cross Examination by Mr. Truslow

260

1 Q In regards to the medical report, I want to
2 ask you about that, this is what, I guess has been termed
3 thus far as a normal report?

4 A Normal exam.

5 Q And as far as winning this thing, because I
6 mean we either get an exam where there is tears in the
7 hymen tissue or issues like that but if we get, correct me
8 if I'm wrong, if we get a normal exam then what you're
9 saying is everything has just healed itself; is that what
10 you're telling the jury?

11 A No, I'm not saying that at all. There's
12 lots of things that happen to children where there's even
13 you saw them thirty minutes later there's no injury at all.

14 Q Okay ---

15 A So you, all you can say is at the time that
16 you examined the child whether or not the exam is normal.

17 Q Can't we tell whether a female is a virgin
18 or not?

19 A No, you cannot.

20 Q You cannot, so that's just a myth?

21 A That is a myth.

22 Q Okay --

23 A Everybody thinks the hymen pops and goes
24 away, it doesn't. I can find hymen on eighty-year-old
25 women, remnants of hymen.

Dr. Rahter - Cross Examination by Mr. Truslow

261

1 Q Okay, well let's take a seven-year-old girl
2 and a grown man. Now you don't expect to find any kind of
3 tearing or scarring when there's a, when there's
4 penetration between those two?

5 A Like I ---

6 Q Do you expect to see something?

7 A If I saw a child immediately after there
8 was digital penetration of a hymen there probably would be
9 at least some petechiae which are little broken blood
10 vessels.

11 Q And what about lacerations?

12 A Not necessarily, not necessarily a
13 laceration.

14 Q Right.

15 A Penile penetration of a hymen in a child
16 you very well may find some transection of the hymen but if
17 you see the child seventy two hours, a week later, you may
18 see nothing.

19 Q So people can be a virgin again in terms of
20 at least medically?

21 A Virgin is just a euphemism. Virgin is when
22 somebody allows, what I tell children a virgin is when
23 somebody allows somebody to have intercourse with them.

24 Q Okay, and again you're advocating for the
25 child today; is that correct?

Dr. Rahter - Cross Examination by Mr. Truslow

262

1 A I'm always a child advocate.

2 Q Okay, now in your report it says that
3 physical exam without abnor --

4 A Abnormalities.

5 Q Abnormalities which does not rule in or
6 rule out sexual abuse?

7 A Correct.

8 Q Correct, so this is consistent with non
9 abuse as well; isn't that correct, this report?

10 A I would expect a child who's not abused to
11 have a normal exam unless they had some injury that caused
12 a penetration.

13 Q Right, now what is the difference between
14 sexual abuse and sexual battery, is there a difference in
15 terminology, I know there are legal issue, is there a
16 medical difference?

17 A There's not a medical definition of sexual
18 battery that we use.

19 Q Basically, did you notice when you're
20 interviewing the child that you're kind of praising the
21 child somewhat when they're giving you the answer you're
22 telling them that it's really good that they're telling the
23 truth?

24 A I think that's very important that children
25 know that.

Dr. Rahter - Cross Examination by Mr. Truslow

263

1 Q Okay, would it be surprising to you that
2 she told you her mother told you what she was coming in
3 there for, correct?

4 A She told me --

5 Q Her mom, mom ---

6 A Her mother told her that she was coming
7 there to talk about what happened with Papa.

8 Q Right, so she's coming in there prepared to
9 tell you what she's been saying before to other people; is
10 that a fair statement?

11 A I don't know what kind of conversation her
12 mother had with her but most people tell the child why
13 they're coming to the center.

14 Q Okay, now in addition to the physical
15 stuff, and I guess we've kind of gone through that and
16 ruled out that, she's got a normal report, is it normal
17 when children are sexually abused that you see the
18 indications of them acting out in your literature and your
19 studies?

20 A There's all kinds of behavioral things that
21 you can see with children that are sexually abused. There
22 are some children that show none of those behaviors;
23 there's some children that show a few of the behaviors.
24 There's some children that show a lot of the behaviors.

25 Q Well I run through a couple with you that I

Dr. Rahter - Cross Examination by Mr. Truslow

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1 got from your web site, just tell me whether or not these
2 are things we could see, shock, is that something you could
3 see?

4 A You mean like physical shock?

5 Q From a sexually abused child?

6 A I don't know ---

7 Q I got it off your web site. It says shock,
8 so what does that mean to you shock?

9 A You have to put it in context of a
10 sentence, I don't know what you're talking ---

11 Q How about anxiety?

12 A Anxiety we frequently see.

13 Q Frequently see anxiety, how about
14 depression?

15 A We do see depression.

16 Q Do you see shame?

17 A Often times.

18 Q How about fear?

19 A Often times.

20 Q Loneliness?

21 A Sometimes they're isolated from family
22 members because of an incident so they feel some
23 loneliness.

24 Q How about self blame?

25 A Frequently.

Dr. Rahter - Cross Examination by Mr. Truslow

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- 1 Q Poor self esteem?
- 2 A Sometimes.
- 3 Q Anger and mental health issues?
- 4 A There's often times some acting out that
- 5 occurs, yes.
- 6 Q Do you see changes in school performance
- 7 sometimes?
- 8 A Sometimes you do, sometimes you don't.
- 9 Q Changes in hygiene habits?
- 10 A That's, I don't see that as frequently but
- 11 that is in the realm of things you can see.
- 12 Q Okay, now is it a true statement if I would
- 13 say to you false allegations of sexual abuse are made; is
- 14 that true?
- 15 A That is true.
- 16 Q You at least acknowledge and believe that?
- 17 A Absolutely.
- 18 Q Okay, and again I don't, I'm not going to
- 19 berate this issue because we've gone over this as a normal
- 20 exam because there was no, there were no tears of the
- 21 tissue you found, correct?
- 22 A That's correct.
- 23 Q You found no scarring?
- 24 A That's correct.
- 25 Q You found no damage at all to the hymen?

Dr. Rahter - Cross Examination by Mr. Truslow

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1 A That's correct.

2 Q You found no transection?

3 A That's correct.

4 Q Let me ask you about this cause I asked the
5 detective and he wasn't certain, but isn't there when
6 you're interviewing these children forensically, isn't
7 there a practice of interviewing the child one time with
8 everybody involved as opposed to having numerous
9 interviews?

10 A You're talking about it used to be before
11 forensic interviews when child advocacy centers opened a
12 child would be interviewed by a detective, they might be
13 interviewed by a nurse at the hospital, be interviewed by,
14 you know, a medical interview by a nurse practitioner or a
15 physician, then DSS would have them on a different day
16 doing the interview; so one of the reasons for child
17 advocacy centers is to have one forensic interview
18 performed that all the different people that are
19 investigating that case or involved in that case can come
20 and watch as the interview is occurring or even later so
21 that the child doesn't have to keep going through the
22 process.

23 Q Right, now I've read some literature. I
24 want to ask you if you agree with it. Is one of the other
25 purposes that just having one interview with the child

Dr. Rahter - Cross Examination by Mr. Truslow

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1 provides for a consistency of information?

2 A I think it does provide for, I think when
3 you have multiple different people asking questions,
4 everybody ask in a different way and so you, and children
5 also disclose in a real piecemeal fashion, so you may have
6 one part of one incident that occurred told to one person
7 and a different part of the maybe same incident in the same
8 day told to somebody else and so when you get separate
9 interviews like that it's more confusing trying to put all
10 of it together.

11 Q So if one of the goals is for the
12 information to be consistent what you're looking at is you
13 don't want to have any inconsistencies in the statement of
14 the child by having numerous interviews; is that a fair
15 statement?

16 A I think the reason you don't, the main
17 reason you don't want to have multiple interviews is it's
18 not fair for a child to go through this thirteen times.

19 Q Is it true that going to this one interview
20 is not only provided consistent information but it's also
21 helped increase criminal prosecutions and can prove the
22 outcome of the criminal prosecution?

23 A I'm sure that's true.

24 Q And that's again because you get one time,
25 one story, and it's not going to be changed or messed up by

Dr. Rahter - Redirect Examination by Ms. Lively

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1 somebody who may say it differently or say something else
2 happened or didn't happen and interviewed again?

3 A Well there's, you know, there's the second
4 part after the forensic interview is performed we refer
5 these children to counseling and so frequently by the time
6 we go to trial what was disclosed in the forensic interview
7 there's a whole lot more that's disclosed in ongoing
8 counseling with the counselor. So I don't know that
9 necessarily when you, especially when you have a case where
10 that counselor comes in and testifies to further things the
11 child disclosed while in counseling I don't know that that
12 necessarily decreases your chances of prosecution, so I
13 think it's in the child's best interest to have one
14 forensic interview. I don't think you're doing that to
15 make sure that you, you know, increase prosecution because
16 certainly counselors come and testify all the time all the
17 different things that are disclosed after the forensic
18 interview.

19 Q Sure ---

20 A I don't know if I totally answered your
21 questions but I was trying to.

22 Q That's fine, and again there was no
23 penetrating injury to the minor?

24 A There was no signs of any trauma on the
25 exam.

Dr. Rahter - Redirect Examination by Ms. Lively

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1 Q Were you present for [REDACTED] testimony
2 today?

3 A No, I was trying to sleep.

4 Mr. Truslow: That's all I've got, Judge.

5 The Court: Ms. Lively?

6 Ms. Lively: Thank you, Your Honor.

7 Redirect Examination

8 By Ms. Lively:

9 Q In regards to your agreement with Mr.
10 Truslow that false allegations do occur at times in regards
11 to sexual and physical abuse, do you know what those
12 statistics are?

13 A It's more common for a child to not tell
14 the truth about some sexual abuse that did occur or
15 minimize what occurred than it is for a child to falsify an
16 allegation of sexual abuse that did not occur.

17 Q Okay ---

18 A That's what the research shows. As far as
19 my opinion and my experience there's a couple of cases a
20 year where we know the child is not telling the truth and
21 it's later proven that the child is not telling the truth,
22 so I am very well of the fact, aware of the fact that there
23 are times that there are false allegations.

24 Q Okay, I'm sorry, in regards to the false
25 allegation issue whenever you do your forensic interview of

Dr. Rahter - Redirect Examination by Ms. Lively

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1 the child why do you ask things like what did it feel like
2 whenever you pee?

3 A Because there's certain things that
4 children say that an adult wouldn't know to tell them.

5 Q Okay ---

6 A That are consistent with being sexually
7 abused.

8 Q And in regards to concerns of false
9 allegations by a child do you ask other details regarding
10 the sexual battery and assault?

11 A The forensic interview is all about detail.
12 It's about where you were, what it looked like, what it
13 smelled like, what it tasted like, what it felt like, all
14 of those forensic details are what allow some other people
15 to determine whether or not something occurred.

16 Q Okay, so just hypothetically speaking in
17 regards to the false allegation issue, if a child is unable
18 to tell you where their clothes were when someone was
19 touching them or whether they were in the bedroom or
20 something like that if you're unable to get those details
21 do you have concerns?

22 A I think the more forensic detail that is
23 there the easier it is for law enforcement or DSS to
24 determine if something has occurred.

25 Q Okay, so the details are what you're trying

Dr. Rahter - Redirect Examination by Ms. Lively

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1 to get in your forensic interview?

2 A Correct.

3 Q Okay, and in regards to your web site and
4 the information that you have on there about the signs, I'm
5 assuming, that a child might exhibit regarding someone
6 who's been sexually abused, one of them is guilt and self
7 blame, Mr. Truslow brought that up, when you see those type
8 of situations is that when you might self blame and guilt
9 regarding maybe an interfamilial abuse case?

10 A It's much more common if it's the person
11 who's perpetrated the child is in a loving relationship
12 with them.

13 Q Okay, and, and when that happens could that
14 be what you refer to in regards to self blame and guilt?

15 A Correct.

16 Q And in those cases do you often hear that a
17 child will, you were talking about a child minimizing and,
18 and trying to maybe back off in what they said, have there
19 been times when a recantation occurs?

20 A It's very common that children recant;
21 there's a lot of pressure after a child discloses from
22 other family members, often times financial pressures
23 because often times, or many times, the person who is
24 perpetrating the child has financial control over the
25 family and so money is lacking after there's a report of

Dr. Rahter - Redirect Examination by Ms. Lively

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1 sexual abuse. There's a lot of different pressures these
2 children feel, sometimes they're taken out of the home and
3 put in foster care. I mean truth be told when children
4 disclose I don't know why they don't all recant because of
5 what occurs to them after they make a disclosure of sexual
6 abuse. Their life is completely changed.

7 Ms. Lively: Okay, thank you, Dr. Rahter, that's
8 all I have.

9 Mr. Truslow: None.

10 The Court: All right, Doctor, you may step
11 down, any further need for Dr. Rahter?

12 Ms. Lively: Not from the State, Your Honor.

13 Mr. Truslow: No, sir.

14 The Court: You're excused from your subpoena,
15 Dr. Rahter, thank you for coming.

16 Dr. Rahter: Thank you.

17 The Court: All right, ladies and gentlemen, I
18 did not want to break Dr. Rahter's testimony when she
19 started so I stayed, kept you over a little later than I
20 usually do, so what I did is I ordered lunch for you and
21 Mr. Ropp tells me it's here and we have lunch for you in
22 your jury room. Mr. Ropp, take the jury out, Okay.

23 (Whereupon, the jury was excused for lunch at
24 12:52 p.m.)

25 The Court: All right, Ms. Lively, was that your

Dr. Rahter - Redirect Examination by Ms. Lively

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1 last witness?

2 Ms. Lively: I have one last witness and that's
3 it.

4 The Court: One more, okay, all right, thank
5 you.

6 Ms. Lively: Yes, sir.

7 The Court: We're at ease until about 1:00, I
8 guess, and I have proposed, I mean 2:00, excuse me, I have
9 proposed charges. As you are both aware my practice is to
10 give the jury a copy of my charge. I have not included
11 anything about a lesser included, are you going to ask for
12 a lesser included or could you tell me at this juncture,
13 Mr. Truslow?

14 Mr. Truslow: Not at this juncture, Your Honor

15 The Court: Ms. Lively?

16 Ms. Lively: No, Your Honor.

17 The Court: Okay, all right, if you would have a
18 chance to looking over that during the break where you'll
19 be familiar with it so we can do any additions or deletions
20 that might be necessary, okay?

21 Ms. Lively: Yes, sir.

22 The Court: All right, thank you, and we're at
23 ease.

24 (Whereupon, court was recessed for lunch.)
25

Mr. Collins - Direct Examination by Ms. Lively 274

1 The Court: I'm going to include that one little
2 sentence in your, that you requested in the charge ---

3 Ms. Lively: Yes, sir.

4 The Court: --- prosecution under this charge is
5 not required that the testimony of the victim be
6 corroborated.

7 Ms. Lively: Thank you, Your Honor.

8 The Court: Bring the jury in.

9 (Whereupon, the jury returns to the courtroom at
10 2:08 p.m.)

11 The Court: Ms. Lively, your witness, please.

12 Ms. Lively: Thank you, Your Honor. The State
13 would call Tony Collins to the stand.

14 Tony Collins

15 being first duly sworn, testified as follows:

16 Madam Clerk: Please state your full name and
17 spell your last name.

18 The Witness: Tony Collins, c-o-l-l-i-n-s.

19 Direct Examination

20 By Ms. Lively:

21 Q Mr. Collins, where are you currently
22 employed?

23 A Palmetto Chevrolet.

24 Q Okay, and prior to being employed there
25 where did you work?

Mr. Collins - Direct Examination by Ms. Lively

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1 A The Horry County Solicitor's office.

2 Q And before then where did you work?

3 A Horry County Police Department.

4 Q Okay, and whenever you were hired at the
5 Solicitor's office in what capacity were you hired?

6 A Investigator.

7 Q All right, now as an investigator for the
8 Horry County Solicitor's office would you receive requests
9 for investigations from prosecutors in the office?

10 A Yes, ma'am.

11 Q All right, and did you have the opportunity
12 to become involved in this particular case with a Rebecca
13 Ann Jarrard and a [REDACTED]?

14 A Yes, I did.

15 Q Okay, will you, please, tell the jury the
16 purpose of the initial reason why you became involved in
17 this particular case?

18 A I received an investigative request to
19 obtain certified conviction report in this case.

20 Q Okay, all right, and in regards to the
21 defendant Jon Jarrard?

22 A Yes, ma'am.

23 Q All right, and were you able to actually
24 fulfill that request?

25 A Yes, I did.

Mr. Collins - Direct Examination by Ms. Lively

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1 Q Okay --

2 Ms. Lively: If I may approach, Your Honor?

3 The Court: Yes.

4 Ms. Lively: (Continuing)

5 Q I'm going to show you what's been marked as
6 State's Exhibit Number 11 for I.D. purposes and ask you if
7 you recognize that document?

8 A Yes, ma'am, I do.

9 Q Okay, and is that the document you received
10 in response to your request for a certified conviction?

11 A Yes, it is.

12 Q Okay, and other than the redacted portion
13 of it is it a fair and accurate, well it's not a copy, is
14 that the actual certification you received from the Clerk
15 of Court?

16 A Yes, it's stamped with the certified true
17 copy stamp.

18 Ms. Lively: Okay, Your Honor, at this time the
19 State would move this into evidence as State's Exhibit
20 Number 11, I believe?

21 The Witness: Eleven.

22 The Court: Mr. Truslow?

23 Mr. Truslow: I'd like to preserve my objection
24 as to the motion to quash the indictment not received under
25 this subsection.

Mr. Collins - Direct Examination by Ms. Lively

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1 The Court: Okay, it's admitted.

2 Ms. Lively: Thank you.

3 (Whereupon, State's Exhibit Number 11 entered
4 into evidence.)

5 Ms. Lively: (Continuing)

6 Q And in regards to this particular
7 conviction will you, please, tell me what the charge and
8 conviction was for?

9 A It refers to lewd act upon a child.

10 Q Okay, thank you, now other than that
11 certified conviction I requested was there a time whenever
12 I needed your assistance in a potential interview of the
13 mother in this case?

14 A Yes, there was.

15 Q Okay, and, and whenever that occurred what
16 was the purpose for having you involved in that, Mr.
17 Collins?

18 A I was there just to witness the
19 conversation between yourself and her.

20 Q Did you have any information prior to that
21 meeting so to allow you to know what it was that we were
22 meeting about?

23 A I had seen some information in the case
24 file, yes, ma'am.

25 Q Okay, and had you ever seen a video of the

1 By Mr. Truslow:

2 Q Do you know how she wound up with DSS
3 shortly after that meeting?

4 A I have no idea ---

5 Q Social Services?

6 A I didn't know she wound up with them.

7 Q Okay, can you tell us the date of that
8 conviction that you pulled?

9 A If you show me the form again.

10 Q Right to your, right to your right there.

11 A After the redaction the date is indicating
12 August the 11th, it appears to be 1997.

13 Mr. Truslow: All right, thank you, nothing
14 further.

15 The Court: Ladies and gentlemen of the jury,
16 redaction means parts that have been marked out at the
17 instruction of the Court because they have no relevance in
18 this particular case, okay.

19 Ms. Lively: That's all from this witness, Your
20 Honor.

21 Mr. Truslow: Nothing further.

22 The Court: You may step down, Mr. Collins,
23 thank you for coming. Is that the State's case?

24 Ms. Lively: Your Honor, the State rests.

25 The Court: All right, take the jury out for a

1 Mr. Truslow: Yes, sir.

2 Ms. Lively: Yes, it does.

3 The Court: Well what about that, Ms. Lively?

4 Ms. Lively: Well you can take, it can be by
5 common sense is one, Your Honor. He's the grandfather of
6 the child and I believe there's been more than ample
7 information to show that this is an individual who is over
8 the age of fourteen, that's any evidence.

9 The Court: Oh, the defendant was over the age
10 of fourteen, okay.

11 Ms. Lively: Exactly, and the child was under
12 the age of sixteen, we've said that a hundred times that
13 she's eight then, ten now.

14 The Court: Well I think the inference is there.
15 There is certainly, in determining whether or not a
16 directed verdict should be granted not only can the jury
17 consider the evidence but any inferences that can be drawn
18 from it, reasonably be drawn from it, and I think it would
19 certainly be reasonable to conclude that the grandfather of
20 the child, who is now ten or was eight at the time, is
21 certainly older than fourteen years of age, and also he is
22 in Court today and the jury has had an opportunity to view
23 him and I don't think that any reasonable jury could
24 possibly think that he was less than fourteen years of age.
25 I'm going to deny your motion in that regard.

1 Now, Mr. Truslow, have you discussed with your
2 client the issue of testifying?

3 Mr. Truslow: Yes, sir, we're going to testify.

4 The Court: Mr. Jarrard, at this time I'm going
5 to explain to you certain of your rights and if you don't
6 understand anything that I say please let me know and if
7 you want me to explain anything in a more detailed fashion
8 please let me know that; you understand?

9 Defendant Jarrard: Yes, sir.

10 The Court: Okay, now we've reached the stage in
11 the trial where you may present your defense. You have the
12 right to claim the protection of the Fifth Amendment to the
13 Constitution of the United States which says in part, no
14 person shall be compelled in any criminal case to be a
15 witness against himself. This means you cannot be required
16 to testify in this case. You have the right to testify on
17 your own behalf, however, no one can make you testify.
18 This is a personal right and no one can waive that right
19 except you.

20 If you decide to testify you will be subject to
21 the same rules that govern other witnesses and you may be
22 examined and cross examined on any relevant issue in the
23 case.

24 In addition if you have any convictions involving
25 dishonesty or false statement or for crimes punishable by

1 imprisonment for more than one year and this Court
2 determines that the probative value of admitting the
3 evidence outweighs the prejudicial effect to you the
4 Solicitor will be able to introduce your record to attack
5 your credibility.

6 In that regard, Mr. Jarrard, we've already heard
7 evidence of one conviction, that was admitted because it is
8 an element of the offense. If there are any others out
9 there those also may be used; do you understand that?

10 Defendant Jarrard: Yes, sir.

11 The Court: Okay, if you decide to testify this
12 decision on your part must be freely, voluntarily, and
13 intelligently made with knowledge of the protections given
14 to you by the Fifth Amendment and the consequences of your
15 decisions, decision to testify.

16 If you decide not to testify I will instruct the
17 jurors that they cannot give that fact any weight
18 whatsoever. They might not even consider it and there's to
19 be absolutely no prejudice to you because you did not
20 testify. It is left entirely up to you whether or not to
21 testify. You may talk with your attorney, your family,
22 your friends, or anyone else but the final decision will be
23 left entirely up to you; do you understand what I've
24 explained to you?

25 Defendant Jarrard: Yes, sir.

1 The Court: Okay, do you have any questions
2 about what I've explained to you?

3 Defendant Jarrard: No, sir.

4 The Court: Okay, have you discussed with your
5 lawyer whether you should testify or not?

6 Defendant Jarrard: Yes, sir.

7 The Court: Do you wish to talk to your lawyer
8 any more?

9 Defendant Jarrard: No, sir.

10 The Court: Do you wish to testify?

11 Defendant Jarrard: Yes, sir.

12 The Court: Very well, all right.

13 Mr. Truslow: I would like to point out and make
14 sure that, cause we've had some preliminary discussions,
15 but the way that 404(b) cases have been coming down they've
16 been tightening up quite a bit. This is a fifteen-year-old
17 conviction, the one we're talking about. It's my
18 understanding that that would not be right for cross
19 examination.

20 The Court: It would be more than ten years old,
21 however, under these circumstances I think she can ask him
22 if in fact it occurred. She's put up evidence that it did
23 but I believe that she can ask him that because it's an
24 element of the offense. Normally something over ten years
25 of age I agree with you one hundred percent could not be

1 used but this is ---

2 Mr. Truslow: Just that question not any details
3 about anything.

4 The Court: I think that's as far as Ms. Lively
5 needs to go with that because it is exactly the same
6 offense and if we look at the cases under the Lyle, what we
7 call them Lyle exceptions in South Carolina, but if we look
8 at those prior bad act cases they have, the Supreme Court
9 has said that where it is exactly the same offense it
10 should not be admitted because the prejudice is so great
11 that it outweighs any probative value that it might have,
12 so I will allow you to ask it but not go any further than
13 that, okay.

14 Ms. Lively: Your Honor ---

15 The Court: No details about it.

16 Ms. Lively: The other question, the question
17 that I was going to have in regards to that is now that he
18 is taking the stand that the fact that he is a registered
19 sex offender should come in because that goes to his
20 character and I believe at that point now that he has
21 opened himself up to that that was, I was never going to go
22 there. Obviously I chose to do lewd act on a minor
23 conviction as the element for the actual charge and ---

24 The Court: Doesn't that go to our burglary
25 cases where, and I cannot recall the case off hand, but

1 it's where the prosecutor wanted to use five property
2 crimes as opposed to two other property crimes.

3 Ms. Lively: That was Benton.

4 Mr. Truslow: yes, sir.

5 The Court: Yeah, Benton, and the Court said,
6 no, you go too far. In your case you can ask him I
7 believe, you put up evidence about the fact that he has a
8 prior conviction for lewd act on a child. If he denies
9 that on the stand I would let you go further but I don't
10 think there's any necessity of going further if it is not
11 contested.

12 Ms. Lively: Okay.

13 The Court: All right.

14 Ms. Lively: Thank you.

15 Mr. Truslow: Which would, which would forebear
16 her from going into the sexual registry which civil in
17 nature?

18 The Court: That's what I'm talking about.

19 Mr. Truslow: Yes, sir, thank you.

20 The Court: Okay, all right.

21 Mr. Truslow: We're ready to proceed.

22 The Court: All right, now if your client is
23 going to deny it be aware of the fact that she can go
24 forward with that and I would allow her to put up rebuttal
25 witnesses if he were to deny that as well.

1 Mr. Truslow: Yes, sir.

2 The Court: Okay, all right, would you bring our
3 jury in for us, please, thank you.

4 (Whereupon, the jury returns to the courtroom at
5 2:30 p.m.)

6 The Court: Ladies and gentlemen of the jury, we
7 have heard from the State and the State has now rested and
8 we'll now hear from the defense.

9 Mr. Truslow: Please the Court, Your Honor, the
10 defense calls Jon Wynn Jarrard to the stand.

11 Jon Wynn Jarrard

12 being first duly sworn, testified as follows:

13 Mr. Truslow: Your Honor, can we approach,
14 please?

15 (Whereupon, a bench conference was held off the
16 record in the presence of the jury, but out of the hearing
17 of the jury and the court reporter.)

18 The Court: Ladies and gentlemen of the jury,
19 one of the last things you heard was evidence concerning a
20 prior conviction of Mr. Jarrard for the offense of lewd act
21 upon a child. We, that was admitted for one purpose and
22 one purpose alone and that was to establish or go to
23 establish, whether it establishes or not entirely up to
24 you, but to establish one of the elements of the offense
25 that he is charged with, that is criminal sexual conduct in

Mr. Jarrard - Direct Examination by Mr. Truslow 292

1 the first degree with a minor. That is required, or one of
2 the requirements, is that there be showing beyond a
3 reasonable doubt that the defendant had a prior conviction
4 for certain offenses. You will consider it for no other
5 purpose than to establish that particular offense and for
6 that purpose; do you understand? All right.

7 Madam Clerk: Please state your full name and
8 spell your last name.

9 The Witness: Jon Wynn Jarrard, Sr., j-a-r-r-a-
10 r-d.

11 Direct Examination

12 By Mr. Truslow:

13 Q Mr. Jarrard, let's just go right to that,
14 they entered a certified copy of a conviction that you had
15 for a lewd act on a minor in 1997; is that correct?

16 A Yes, sir.

17 Q Okay --

18 A Yes.

19 Q Pull up a little bit and face the jury, if
20 you would?

21 A Okay.

22 Q Can you give the jury the benefit or your
23 work background, just bring us up to snuff ---

24 A I spent ---

25 Q --- what you've been doing?

1 2:47 p.m.)

2 The Court: All right, ladies and gentlemen, as
3 I said both sides have rested now and we're about to hear
4 closing remarks. The first one will be given by the
5 defense and that will be followed by the State and I will
6 then charge you. Mr. Truslow.

7 Mr. Truslow: Yes, sir, if it please the Court?

8 **Closing Argument**

9 **By Mr. Truslow:**

10 Ladies and gentlemen, that's all the evidence
11 that you're going to hear. As yesterday when we first
12 qualified the jury downstairs and all of you were there and
13 the Judge told you, I think, that next to military service
14 the next highest honor as far as civil duty is jury duty.
15 Now I've heard that for many many years. I think the Judge
16 told you I've been practicing twenty-five years, and I'm
17 not that old, maybe he's was stretching it just a little
18 bit, but I've been hearing that a long time and, you know,
19 at some point things like that begin to get a little
20 clickish but I want to make real to you cause what you're
21 doing here today is very very real. You've got somebody's
22 life in your hands, somebody I submit to you who is not
23 guilty of this offense.

24 Some things have come together here that have put
25 us in this spot. We've had a finger pointed at us and

1 we're sitting there and we've done the best we can to show
2 you what makes sense and what doesn't make sense. When you
3 want to see which way the tree or the wind is blowing they
4 say you don't look at the tree trunk, you look at the
5 leaves. What I've tried to do is point out some things to
6 you so you can look at the leaves and see what really
7 happened here.

8 Now you told me by agreeing to be on jury duty
9 when I selected you that you would do your job. There are
10 jurors all over the country right now sitting in the box
11 just like you are doing the same thing. The last bastion
12 of hope that you or I or anybody has that's accused with a
13 crime is a jury. When the Judge says that you are the
14 ultimate finders of fact that's what that means. You are
15 the judges of the fact. What you say in this case goes.
16 Your decision today is a big decision and will affect many
17 lives, so I know I, I know you're going to take it
18 seriously but I point that out to you to, please, take it
19 seriously. Please listen to both what I have to say and
20 what Ms. Lively has to say when it's her time, although I
21 will point out, the way things go I have to go first. She
22 gets to talk to you last so it is important that you try to
23 remember what I say and not get drowned out cause that
24 happens sometimes and I sit there and I just cover my ears
25 cause I can't say another word after I sit down.

1 One thing I want to point out to you is that
2 criminal sexual conduct in the first degree requires that
3 somebody have a prior conviction, number one, and, number
4 two, that they commit a sexual battery on a child under the
5 age of sixteen under the section that we're looking at.

6 A sexual battery, as the Judge is going to point
7 out to you, is the things that I was trying to get at and
8 point out to you. It's penetration whether with a penis,
9 or a finger, or what they call cunnilingus which is oral
10 sex. Those things did not happen in this case but I point
11 out those elements to you because that's what this case is
12 really about, the first element being convicted of a prior
13 crime, can't do anything about that. He was convicted of
14 something in 1997, almost fifteen years ago. He's paid his
15 dues for that and that's something to carry around your
16 neck for the rest of your life because look what it did in
17 this case. It shows instead of bringing a, a different
18 kind of charge they got to bring this one cause the
19 legislature, in all their knowledge, upped the ante and
20 said that we're going to make that an element of the crime.
21 Ordinarily you wouldn't, you probably wouldn't hear about
22 that prior conviction but they made it an element of the
23 crime so that you have to hear about it and I submit to you
24 to convict somebody on a case because they were convicted
25 on something before is just wrong. That's not doing

1 justice. You need to, if you swear by what you swore to do
2 and go by the rules, you need to convict them on the facts.

3 There needs to be enough facts left to convince
4 you beyond a reasonable doubt of what happened. That's a
5 very, very serious thing because if you did not take this
6 serious, and the other jurors working around the state did
7 not take that serious, we would not have a good system. We
8 would not have a fair system and if any of us wound up in
9 trouble we wouldn't have much of a hope, because the system
10 is only as strong as you make it cause you are that system
11 that's happening right now, right here. If you don't go by
12 the rules and if you don't make it a strong system, if you
13 don't believe in reasonable doubt then, guess what, we
14 don't have a strong system. It's either strong for Mr.
15 Jarrard or it's not and if it's not strong for him it's not
16 strong for me or a family member or somebody that winds up
17 sitting in a chair with a finger pointed at them.

18 Mr. Jarrard was unlucky, unfortunate, however
19 you want to say, to get caught up into, I won't say the
20 perfect storm, but a storm. Everybody in this family knows
21 fifteen years ago he got in trouble, okay, that's common
22 knowledge. I would submit to you that members of [REDACTED]
23 family, including her dad who's not around much, had always
24 been on air about that. People know this about him. You
25 take that, you combine that with what happened, Mr. Jarrard

1 is not responsible for what [REDACTED] was doing with Ashlyn
2 that day. She got caught in a very compromising situation
3 and I'm not going, you know, getting on [REDACTED] about that
4 because I don't believe it's all that uncommon for children
5 to experiment or something to happen. I mean, you know, it
6 is what it is, but that happened, but parents don't like
7 when that happens. They're really not sure what to do
8 about it. They want to figure out a reason why it
9 happened.

10 Now when Ms. Pam, the baby-sitter, found out
11 about this, took her alone, she went far beyond just trying
12 to figure out what happened and why it happened. She went
13 right immediately to seek, "you must know something about
14 this or you wouldn't be fiddling around like this" and I
15 submit to you that kids seven, eight, nine years old today
16 see enough on T.V. and experiment enough that they know
17 these things. They're already talking about it in school,
18 but Ms. Pam had other ideas and she began to drill her
19 about has anybody touched you before, anybody done this to
20 you before. She wouldn't answer her, yes, at first. I
21 think somewhere at some point it clicked that if she says
22 something, you know, she could take all the heat off of her
23 and change this situation completely. Now I don't think
24 that she thought that two years later we'd be sitting in a
25 courtroom and it would catch like the hurricane that it did

1 and it would turn into what it did but oftentimes children
2 get caught up in this type of system for saying something
3 that didn't happen and they can't get out of it. They
4 can't get out of it.

5 Regardless of what they want to say about her
6 recanting or changing her stories her story has changed a
7 bunch. She changed it on video. You got her saying
8 different things at different times and what I'm asking you
9 is are you going to convict a man based upon somebody who's
10 saying two or three or four different things cause that's
11 what's at stake here.

12 The first thing that she told, or Pam told, the
13 jury, told you, was that [REDACTED] said that she, he stuck his
14 weeny in me, he jammed his fingers up in me, and I think
15 she said he had oral sex with me. Now I don't think Pam is
16 going to make that up. I think [REDACTED] went overboard and
17 told just made this up, told her this to get the heat off
18 her. As you heard at least two or three times she nor
19 Ashlyn got into any trouble because at that point things
20 changed. The focus was no longer [REDACTED] and Ashlyn; the
21 focus was then Jon. Jon was under the microscope then; Jon
22 was in trouble then, okay, and we know that's not right.
23 So what did they do? They try to rectify that.

24 More than once the mother Rebecca wrote the
25 Solicitor's office, she read this to you. "My daughter

1 [REDACTED] states that what she had originally
2 told investigators and police is false. She feels much
3 remorse and wishes charges to be dropped." Now I'm going
4 to submit to you any mother or any father that believes
5 that that was done to their child is not going to say that,
6 is not going to go forward and do that even if it is their
7 father, just not going to do it. That's just not a
8 mother's instinct to do that, so at some point she believed
9 that [REDACTED] was not telling the truth.

10 I had [REDACTED] read where she wrote a letter when
11 Mr. Jon was in jail before he bonded out, which was quite
12 some time, "p.s. I'm sorry I lied and got you in trouble.
13 I love you and miss you very much." So what happened was
14 we've got something was said that wasn't true that takes on
15 a life of its own and now they're trying to figure out how
16 to undo it and they're almost successful in doing that but
17 let me tell you what happens.

18 Once this thing gets into the system it's not
19 getting out, so when these affidavits come through the
20 Solicitor's office just doesn't say, okay, fine. They're
21 like, either you did something wrong by lying to us and
22 reporting something wrong to the police, or you're going to
23 follow through with this thing.

24 She was summoned to a meeting at the Solicitor's
25 office. This was not a meeting to sit down and do trial

1 strategy or anything else cause at this point now Rebecca
2 says she was going there to come clean but she didn't make
3 the appointment to go there, she was summoned to go there,
4 okay? She would have brought herself there or made her own
5 appointment to go there if that's what her intentions were.
6 She was summoned to be there at this meeting and when they
7 got her to this meeting they told her how dare you, this
8 happened, your daughter is in danger, if you're not going
9 to do something about it, we're going to do something about
10 it.

11 You heard about her home life that Jeff is doing
12 better than he used to do, she said, but he still drinks
13 every day, so if you go back a few years what does that
14 mean? He's probably drinking a whole lot. She said she
15 drinks three or four beers a day. I'm sure that's not the
16 first brush with DSS, I don't know, but they said if you're
17 not going to do something about it, we're going to do
18 something about it. You're not going to move forward on
19 it, we're going to move forward on it and, guess what,
20 you're not going to have your children.

21 Now how did they go from that meeting to the next
22 thing a formal DSS report where she testified that she had
23 to sign off on. Basically what this is saying is I'm
24 moving forward, it says the first thing you're going to do,
25 you're not going to talk, have these kids around your mama

1 or your daddy anymore, okay? Let me tell you what a safety
2 plan is. A safety plan is you abide by this with us you
3 can keep your children; that's what a safety plan is with
4 the Department of Social Services. That's what happened.

5 Now let's talk about some of the things that
6 [REDACTED] said and this is real important. You saw the video
7 that she made where she said that this didn't happen. This
8 was early on when they were again trying to undo the wrong
9 that had happened. The mother was present. Again I tell
10 you if she didn't believe that [REDACTED] was not being
11 truthful about this she would not participate in that.
12 That's not what a mother does. A mother would not because
13 she told you also the first thing she told you when she
14 found out about that from that baby sitter that day was
15 that she wanted to kill somebody. That's what she told
16 you, so she went from that to participating in a videotape
17 recanting what had happened to make things right. The
18 videotape is testimony in evidence just like she testified
19 here today. You can accept that.

20 She gets on the stand today and, guess what, and
21 it really surprised me as well, [REDACTED] told me nobody stuck
22 a weeny in her, nobody stuck their fingers in her, and
23 there was no talk at all about anybody putting their mouth
24 on her. She went as far as to say, I said, well you've
25 been in here in the trial and you know what Pam said you

1 said, she said well Pam was lying, so now we've got a real
2 trick, okay, because now either Pam or [REDACTED] is lying.

3 Now let's just assume for a second that we
4 believe the adult who was the baby sitter, who was right
5 there on the scene when this happened, what motivation
6 could she possibly have in lying that [REDACTED] said that?
7 [REDACTED] did say all this stuff and that's what got
8 everything going; that's what got everything started, but
9 she changed today, and I think what changes is this. When
10 you get on that stand and you swear on the Bible and you're
11 in front of a jury and you swear to tell the truth she's
12 got to tell the truth and, guess what, things changed.

13 I've had no contact with her; I've got no control
14 over her. The only people she's been able to talk with as
15 she told you a few days ago she prepared her testimony.
16 She practiced her testimony and I think she probably
17 surprised some people at this table when she came out with
18 that when she said, no, nobody did that to me, okay, and
19 that's important. That's very, very important.

20 Ladies and gentlemen, you are the only hope that
21 this man has to not be convicted of something that he did
22 not do. He took the stand, he looked you in the eye, he
23 told you that he didn't do this.

24 [REDACTED] said on the stand that her panties would
25 be on bed. She, she said in her other statements to

1 Rebecca that her panties would be down around her ankles
2 with her shorts and it's the little things you've got to
3 look at, cause when that kind of thing happens to you you
4 don't, you don't forget that much about it. That's a
5 pretty important thing, so when you put all this stuff
6 together you've got reasonable doubt at least.

7 Now I've done my best to try to show you here
8 what happened and that's all that I can do. Nobody in
9 criminal court has ever found innocent. I can't prove to
10 you that somebody is innocent. All I can do is prove to
11 you that they're not guilty of the offense.

12 What else do we have? We have a doctor that came
13 in who did the interview. Now if you notice in that
14 interview [REDACTED] is wrapped up in this thing, now they're
15 going forward, and when you meet with authorities and
16 people in authoritative positions you want to give them
17 what they want. She was told what this was about. She's
18 going in to talk to her about it and she does, but she
19 doesn't tell the interviewer that anybody stuck their penis
20 in her. She's very funny about what she does say, but you
21 notice the praise that is put on the child because they
22 know what that person wants to hear.

23 Lo and behold, after that interview they take her
24 and do a complete physical examination. I can't win for
25 losing, okay, because now what they do is if they have an

1 examination where an eight-year-old girl was penetrated by
2 a fifty-something-year old man we've got to use our common
3 sense. We have to use our common sense. There would be
4 scarring; there would be some abnormality of the vagina.
5 There would be some tearing; there would be something. She
6 has got a clean bill of health. It is like nothing ever
7 happened. It doesn't rule in or rule out sexual abuse.
8 Now why does it say that? What it should say is it should
9 say physical exam without abnormalities and stop there, but
10 it goes on to say which does not rule in or rule out sexual
11 abuse cause they're still not willing to give up on it.

12 Now Dr. Rahter works two jobs. She's an E.R.
13 doctor and she's also started this outfit for children.
14 She's told you what she is, she's an advocate for children,
15 so she did not meet with a neutral and independent person.
16 She met with somebody who believes whatever child they
17 bring in there from the get go and that's what she did, so
18 what she's done now is taken a report that should help us
19 gain some knowledge into this case and said well, guess
20 what, you know, things can heal and whatever, and that's
21 what you call back-peddling cause you know what, this is
22 one thing I have that they can't get away from. This is
23 the one thing, an eight-year-old or at that time they said
24 seven-year-old girl penetrated by having fingers jammed in
25 her, or by being penetrated by a penis not having any

1 symptoms whatsoever but having the most normal vagina
2 that's ever been seen. They have to still say well she
3 could have still been sexually abused. It could have
4 healed itself up.

5 I'm telling you where that's coming from, it's
6 coming from the bias of Dr. Rahter. She is not going to
7 testify a child was not sexually abused when that child
8 tells her that she was sexually abused even when her own
9 medical report say so. She cannot bring herself to do it,
10 she cannot bring herself to do it. I told her, I said,
11 well at least me ask you this, this is also consistent with
12 nothing happening and she said yes, because that's common
13 sense, she has to admit that.

14 We have no physical evidence in this whatsoever.
15 We have a number of story changes. We have a cast of
16 characters putting in their input as to what happened.
17 Most importantly we've got a story that changed from what
18 [REDACTED] told Rebecca the day this happened and then what she
19 told us today on the stand and to some degree what she said
20 on that videotape.

21 Now each of you gets a vote and your vote to
22 convict somebody or acquit some not guilty has to be
23 unanimous. What I would do is tell you that you all have
24 an equal vote. Everybody has to be convinced and what is
25 reasonable doubt, the Judge is going to tell you. When I

1 explain reasonable doubt to you I'm going to tell you that
2 I believe that you're going to have reasonable doubt. You
3 have to be firmly convinced that this happened, firmly
4 convinced that this happened. If you are not firmly
5 convinced that Jon did this then he is not guilty. You
6 have to be strong enough to look at this stuff that I'm
7 pointing out to you.

8 Now I told you earlier in the trial the status
9 quo is always easy. It's easy to come into a courtroom,
10 and I've been in here for years and I've seen it done and
11 sometimes it breaks my heart to see somebody when they're
12 sitting at the defense stand and they say well the police
13 brought them in, the prosecutor told us what was done, the
14 prosecutor told us who did it, that's good enough for me.
15 That is the easiest cheapest way out that you can go. That
16 is not what's expected of you; that's not what the Judge
17 expects of you. He expects you to put some long hard
18 thought into this and that long hard thought should, should
19 include the things that I've pointed out to you cause
20 that's all I can do. I don't have a crystal ball and I
21 can't put it in front of you and show you what happened nor
22 can the State, but you can use your common sense.

23 You can discount testimony when it gets all
24 jumbled up and changed around or when you start thinking
25 about factors that may be weighing on [REDACTED] why she might

1 say this in the first place.

2 The other thing I pointed out was, and Dr. Rahter
3 had to agree with me, children who are sexually abused go
4 on to experience all kinds of other difficulties and that's
5 what I was getting at when I was talking to [REDACTED] about
6 her life. She's still an A B student; she has friends,
7 lots of friends. She enjoys her friends; she enjoys life,
8 doesn't want to run away. She has good hygiene. You know
9 all those things that they put in their paperwork about
10 what kids display when they're sexually abused are not
11 present, none of them, and why is that, because it didn't
12 happen. So not only do I have a report that shows you
13 there's absolutely no physical evidence that any of this
14 happened, none of those things are present as well so what
15 I'm going to ask you to do is do the right thing and the
16 hard thing. The easy thing is go along. The hard thing is
17 take a hard look at it, think about the fact that you're
18 judging somebody, and your judgment will have serious
19 consequences. Ask yourself when you discuss this, am I
20 firmly convinced, firmly convinced that Jon Jarrard did
21 these things after all the evidence that I heard, all the
22 evidence that I didn't hear, and all the conflicting
23 evidence I heard from the same people. I would submit to
24 you that you cannot be firmly convinced based upon that.

25 It's time for me to sit down and when I do I

1 can't talk to you again. If there were things you heard
2 that are important in your decision please discuss them
3 among yourself. If I left them out I didn't mean to; I can
4 only remember so much. The prosecutor gets to close last
5 and that's a powerful thing sometimes being able to be the
6 last person to talk to the jury, to get the last word.
7 We've all heard that for years, our whole lives, because I
8 can't say anything else after I sit down, please don't let
9 me get drowned out. Please remember the things that I'm
10 telling you and talk about it cause the prosecutor is going
11 to tell you a lot of stuff that she believes shows that he
12 is guilty. Please don't forget these things that I'm
13 telling you now, thank you.

14 The Court: Ms. Lively.

15 Closing Argument

16 By Ms. Lively:

17 I guess you could say there is some benefit in
18 getting to go last because I will be the last word that you
19 hear, but the thing is is that it doesn't take away from
20 the fact that the people who have control over what happens
21 in this case it's not me and it's not Mr. Truslow and it's
22 not the Judge. It's all of you and what decisions you make
23 today based on the information that was provided to you, so
24 even though I have the last closing it does not mean that
25 you guys don't have that final say and you've had it from

1 the beginning. And one of the things that I mentioned to
2 you in the very beginning of the case was that these cases
3 truly do ride on the credibility of witnesses, victims, and
4 defendants in a particular sexual assault type matter like
5 this because abuse happens in private and I knew I would
6 get back in front of you at the end of this case to talk to
7 you about the fact that when these things occur, since they
8 happen in private, then that just presents a huge mountain
9 to climb for a prosecution of this case and it's never
10 easy, ladies and gentlemen, because we are looking at not a
11 crystal ball which would be wonderful to have, but I would
12 be out of a job, but what I do like to do is bring you the
13 good, the bad, and the ugly, and that's what I've done here
14 in this case. I cannot pick my witnesses. I cannot pick
15 and choose what they're going to say to you.

16 What I do is present you with everything that I
17 have and I'm going to tell you another thing. One of the
18 things about going second after Mr. Truslow speaks is I
19 have a tendency to want to rebut what he said so the only
20 thing that I am going to tell you that I think is important
21 because it's been a central theme for the defense and I do
22 want to make sure that all of you understand where I stand
23 in these cases.

24 I would today, all over again, do what I did that
25 day I had Rebecca Ann Jarrard come into my office to talk

1 to her about that videotape of her child sitting on a bed
2 saying her grandpa did not touch her. I would do it today
3 and I will continue in these cases if I feel like a parent
4 is putting a child in a bad situation or exposing them to
5 potentially someone who had sexually molested that child
6 because they don't want to go forward. Why would I let
7 that go? That's my job.

8 Now it's not my job to convict, that's going to
9 be your job. My job is to present the evidence to you and
10 that's all I have to do and whenever I know as a prosecutor
11 that a child at the age of eight, nine, and ten is being
12 videotaped by family after making an allegation, they're
13 sending me affidavits where they're saying my child has
14 told me this didn't happen then what I do is well let's get
15 to the bottom of it because I will tell you on the record
16 right now I have dismissed cases like that. I will have to
17 continue to dismiss cases like that for different reasons,
18 okay, but what I do is what I did that day for this case.
19 I had Tony Collins there; I had Amy Ayers, my victim
20 advocate there; I had Rebecca Jarrard, and I had [REDACTED]
21 there. [REDACTED] never recanted according to her mom. She
22 came clean and I said, well I still have concerns because -
23 --

24 Mr. Truslow: Your Honor, I'm going to object
25 that she's arguing facts not in evidence. There's never

1 any testimony that [REDACTED] did not recant in her office or
2 said anything in her office. She's now saying that [REDACTED]
3 did not recant and, and stood firm and told her something
4 in her office. There's never been any testimony of [REDACTED]
5 talking to her in her office.

6 The Court: My understanding was she said ---

7 Ms. Lively: I said Rebecca Jarrard said that
8 she never recanted.

9 The Court: That's my understanding.

10 Ms. Lively: Yes, sir.

11 Mr. Truslow: I believe she said [REDACTED].

12 The Court: Okay, I think it was Jarrard ---

13 Ms. Lively: She said [REDACTED] did not -- okay.

14 All right, you guys can listen to any of the
15 testimony if I'm saying anything incorrectly. What I'm
16 saying is the mother came in and told me, no, the child had
17 not recanted to her which is exactly what she got on the
18 stand and told you during her testimony, okay? So I have
19 that information but I still have that video of a child
20 sitting on a bed, you know, being told to say something
21 else, so, you know, what, what am I supposed to do there,
22 just say, well I appreciate you telling me that but because
23 now I've got this other video I have to dismiss the case
24 just because there's going to be too much of a mess to take
25 to a jury? And you know what, there may be some

1 prosecutors out there who would do that but I still had her
2 forensic interview, the details of a forensic interview
3 from an eight-year-old child within weeks of her disclosure
4 that give details that no one here has been able to testify
5 to and tell you how she would know to say those things, no
6 one. So do I stand by my decision to bring them in there,
7 maybe talk a little harshly to Ms. Jarrard, yes, but as Mr.
8 Collins said, who was there, I didn't threaten anybody, I
9 did not tell anyone they were going to loose their
10 children. I just said I need to know what the truth is
11 because ethically I have a duty to disclose that to the
12 defense and it needs to all be out in the open. If we're
13 searching for the truth here everything comes out, good,
14 bad, and ugly. That's what I'm talking about.

15 Now remember whenever I started with this case I
16 told you that these cases are so unique in coming to trial,
17 it's not like a burglary where we're going to test for
18 fingerprints and we're going to have, you know, maybe an
19 armed robbery where we're going to have surveillance
20 cameras or something to where I'm going to be able to say,
21 see, doesn't this kind of look like the defendant; and, you
22 know, the uniqueness of the case is a part of the problem
23 that I have whenever I come into court to show you why our
24 legislature notices that, too, because we are basically a
25 T.V. society and you're used to seeing these magnificent

1 forensic cases and you get all this DNA and you get, you
2 know, all of this wonderful information that's just going
3 to make you feel convinced that now I know what happened.
4 Well I'm sorry, the only two people that know what happened
5 is Mr. Jarrard and [REDACTED] and Mr. Jarrard told you
6 he didn't do it. Did you expect him to say anything else,
7 no, and that's why I didn't really cross examine him
8 because when you have a situation like that I think that at
9 that point we'd all heard enough. There's no point. He's
10 not going to tell you that he performed oral sex on his
11 granddaughter. He's not going to tell you he digitally
12 penetrated her, but she did.

13 He could have gotten up there and told you why
14 she would have lied or if there was a motive to lie. We've
15 heard all kinds of stuff about Rebecca Ann Jarrard drinking
16 and her husband drinking and all of these things that are
17 just ---

18 Mr. Truslow: Your Honor, I generally don't do
19 this but she's shifting the burden in saying what Mr.
20 Jarrard could have testified to to help himself.

21 Ms. Lively: Well, Your Honor, he did take the
22 stand in regards to ---

23 The Court: Yes ---

24 Mr. Truslow: But he was under no obligation to
25 give theories.

1 The Court: Keep in mind that he has no
2 obligation to defend this action by putting up any
3 witnesses or testifying to anything.

4 Ms. Lively: Yes, sir, I'll move on.

5 Now, ladies and gentlemen, in regards to the
6 legislature and the reason why we have an offense like we
7 have against this defendant, we have someone with a
8 conviction for lewd act on a minor which is admissible into
9 evidence and that's unique. We have cases in South
10 Carolina like prior burglary offenses that can enhance what
11 you're actually going to be charged with and potentially
12 convicted of at trial, okay, and, and Mr. Truslow brought
13 this up, too. You know, it's one of those things where
14 it's out there and he can't change that, but our
15 legislature also knows that because of these cases and
16 because of the fact that we're depending on a child coming
17 in here and testifying, if we're going to be able to
18 prosecute a case, we're dealing with credibility issues.
19 We're dealing with not having evidence. We're dealing with
20 very limited information so that's the reason why the
21 legislature has made that law so that I can give you every
22 piece of information I can give you for you to be able to
23 reach your conclusion that he committed this crime.

24 Now, ladies and gentlemen, another thing is that
25 the legislature has passed a law, this has been in these

1 cases of sexual battery, there doesn't have to be
2 corroboration. That means I don't have to show you DNA. I
3 don't have to show you fingerprints. I don't have to
4 necessarily show you anything other than the testimony of a
5 child and that testimony is up to you decide whether you
6 believe her or not.

7 Another thing our legislature did was they
8 recognize the fact that these cases take months to years to
9 come to court. We have a child who was eight years old who
10 has been out there now for two years. Not only has she
11 been out there for two years since anything had happened,
12 even Ms. Jarrard testified that it had been probably around
13 Easter of 2010 the last time the defendant was around
14 [REDACTED], so that tacks on another few months since she had
15 these things happen to her. So here we have such a young
16 child who has moved on and our legislature also understands
17 that. That's the reason why, remember I told you at the
18 beginning of this case, that a forensic interview is a huge
19 part of these prosecutions because it gives you a snapshot
20 of the child at the time of the disclosure and it is so
21 important because by the time we get two years down the
22 road it's like you put someone up there and whether they're
23 a grown person or a child you're going to have lapses in
24 your memory. You're going to have outside influences that
25 are going to come in and mess with your memory and I will

1 tell you the adults in this case have acted very badly.
2 I don't think any one of us here can say otherwise, and
3 I'll go ahead and apologize but I'm going to say it,
4 Rebecca Ann Jarrard did not protect her child in the
5 beginning. She set her up to be in a horrible position and
6 she didn't get it right until we sat down and talked about
7 it and she knows that.

8 You know we have cases where people, and I know
9 that you've probably seen it from your own experience in
10 what you've seen, women who are victims of criminal
11 domestic violence go back to their husbands. People who
12 have been abused go back to their abusers. There is no way
13 to explain that mentality but you did hear Dr. Rahter say,
14 you know, I am not surprised that every single child who
15 has been abused doesn't recant because look what they have
16 to go through if they follow it through, alienation of the
17 family which this has happened, guilt. You saw [REDACTED], how
18 she felt guilty. Yeah, she's kept her grades up, she's,
19 thank goodness, a good kid. We don't want to see somebody
20 up there on the stand completely devastated and falling
21 apart and that's not what has to be there. What has to be
22 there is her telling you that it happened and that we have
23 a forensic interview showing you details of what happened.
24 That is the evidence in the case. Our legislature knows
25 you need that in order to make your findings, in order for

1 you to see the truth of what happened.

2 What I've done is I've prepared just a short
3 Powerpoint. If you could, Heather, lower down the, because
4 I know sometimes it's hard, it's hard for me to keep up
5 with all of the information that comes out in a case and I
6 know that one of the things that ---

7 Mr. Truslow: Your Honor, I'm going to object to
8 the first one, number one, I'll wait till she gets back to
9 it, it's shifting the burden again. It's also arguing
10 facts not in evidence.

11 The Court: I didn't see it.

12 Ms. Lively: I don't know which one you're
13 talking -- do you want to come here and tell me, Mr.
14 Truslow, before I show it to the jury?

15 Mr. Truslow: No, you can put it up.

16 Ms. Lively: Okay, now so the first thing I
17 wanted to show you is that what the charges are so that
18 you'll know exactly what I have to prove to you beyond a
19 reasonable doubt and the Judge is going to give you these,
20 the law in regards to this case. The State must prove that
21 the victim was under sixteen. I believe that that is
22 pretty obvious element of the crime that we've met our
23 burden.

24 Sexual battery occurred, penetration however
25 slight of the genital openings of the victim. It can be by

1 an object, a finger, or penis, and/or oral sex. [REDACTED]
2 told you both, she told you in her testimony and you can
3 listen to her testimony again, you can have any part of the
4 testimony replayed if you need to, and I would encourage
5 you to do that cause there's been just so much stuff that's
6 conflicting and I can understand that, but remember most of
7 the conflict has been between the adults here. It hasn't
8 been what the child has told you. That's why we do
9 forensic interviews to avoid all that hearsay and problems
10 that come out when people talk to children about what's
11 happened, so make sure you listen to her. She told you
12 that she was penetrated by his finger. In the forensic
13 interview she told you that he, she would wake up and he
14 would actually be performing, or she didn't say oral sex,
15 she said he had his mouth down there.

16 He has a prior conviction for lewd act on a
17 minor. That has been shown and is uncontested in this case
18 as well.

19 The lewd act on a minor, the perpetrator was over
20 the age of fourteen, obviously Mr. Jarrard was fifty-seven
21 at the time. He is fifty-nine now.

22 A lewd and lascivious act upon the body of a
23 child under the age of sixteen, we have a child obviously
24 under the age of sixteen.

25 And the intent, there is no other, and you can

1 use from inference in your own conclusions and in using
2 your own common sense, there would be no reason for him to
3 be fondling, touching her in that area but for sexual
4 gratification for himself and/or the child.

5 Now the time-line I think is really important,
6 too, and I like to do a time-line in my cases because, you
7 know, sometimes everything gets jumbled up together and
8 it's really hard to pull it out and know exactly how
9 everything came out. The initial, the last time, the only
10 testimony we have is that the defendant was with [REDACTED] on
11 the weekend of April 4th, 2010, which was Easter weekend.

12 Now May 17th is when [REDACTED] disclosed to Pamela
13 Gause that someone else had touched her whenever she was
14 caught with Ashlyn and they were both, you know, exploring
15 their private parts.

16 On May 20th at, the report of sexual assault
17 occurred and on the 21st is when Detective Allen Large gets
18 the case, so we're already a month and a half out from the
19 last time the defendant would have had contact with [REDACTED].

20 They meet with Detective Large and then on June
21 the 1st, and you've heard Detective Allen Large, he talked
22 about how the mother had said that there was some pressure
23 regarding the charges and in regarding concerns with the
24 grandmother, okay, but we proceeded to take the next step
25 in the investigation and that's whenever [REDACTED] was sent to

1 the forensic interview at the Children's Recovery Center.
2 So pretty close in time Detective Allen was able to
3 actually get her a, Allen was able to get her to the CRC so
4 that we could get a contained interview by a trained
5 forensic interviewer, someone who has done thousands of
6 interviews, someone who follows the protocol for a child
7 advocacy center that's certified, someone who knows the
8 right questions to ask and knows the questions not to ask,
9 not someone who's going to hold up their hand and say, show
10 me this, do that, someone, that's what we try to avoid
11 because we want the child in an environment where she feels
12 safe, where she feels no pressure. She might not disclose
13 anything and that happens but putting her in a forensic
14 interview in that environment let's the child have control
15 and then the forensic interviewer can get ---

16 Mr. Truslow: Your Honor, she's arguing facts
17 not in evidence. I mean she's going on about why they do
18 this and it's just way beyond a scope in closing argument.

19 The Court: I understand, go ahead, Ms. Lively.

20 Ms. Lively: Thank you. So the forensic
21 interview is done. August 8th the affidavits and the video
22 recantation was done, and you can look at those affidavits
23 that have been put into evidence. I put those into
24 evidence. I put in where the mama was trying to recant on
25 behalf of the child because I have nothing to hide. Like

1 I said good, bad, and ugly I want you to have everything,
2 so you have that. Then she writes a dismissal letter to
3 the Solicitor's office which you also have that in evidence
4 where she said that [REDACTED] had told her that this didn't
5 happen and she feels remorse, okay, but never did Ms.
6 Jarrard say [REDACTED] actually told her that.

7 [REDACTED] told you the only time she said it was
8 whenever her Nana told her to say it, Nana who has a lot to
9 gain and a lot to lose. Okay, and then we have the DSS
10 safety plan, which you'll also have in your possession,
11 which I told you I would do all over again if I had to to
12 protect that child.

13 So we had these witnesses and then I didn't put
14 Mr. Tony Collins on there but he was the last witness who
15 put in the certified copy of the conviction and the, and
16 then, of course, Dr. Carol Rahter, who did the interview
17 and the medical exam. Okay, next one.

18 So let's talk about what [REDACTED] and her mom would
19 have to gain from this hurricane that Mr. Truslow says got
20 out of control because you got to feel like there was a
21 reason for it and when you look at the benefit there is
22 none. This child had to wait two years, come and stand in
23 front of twelve, fourteen people she doesn't know, a judge,
24 all these people in this courtroom and talk about someone
25 touching her genitals. She had to be interviewed and get a

1 medical exam, loses her Nana and Papa, alienates the
2 family, has guilt in coming into court and testifying, and
3 what about the mom, she's also alienated the family.
4 There's no money in it for her to go forward with the case.
5 She's had to come to you and admit that she lied to get her
6 dad off the charges and she put her child through a trial.
7 Nothing to gain, everything to loose, okay?

8 All right, so I've beat up on the mom some, let's
9 talk about what she did do right. She reported the crime
10 as soon as it came out, okay, maybe she didn't have a
11 chance to think about the ramifications of, you know, what
12 I'm doing, she did what we would first do. She said she
13 wanted to kill somebody so she reported it. She did the
14 right thing then. I think she started out with the right
15 idea until she started getting pressure, cooperated with
16 the investigation, took [REDACTED] to the forensic interview
17 and was there for the medical exam, eventually chose her
18 daughter's well being over the defendant. It took time and
19 that's what happens in these cases. The delay sometimes
20 really hurts the ability for us to keep going forward to
21 protect this child. What did she do wrong? She did let
22 her parents influence her.

23 Mr. Truslow: Object to that, there's no
24 evidence that her parents influenced her, Judge, in the
25 record.

1 The Court: She testified that she did what her
2 mother asked her to do.

3 Ms. Lively: She lied -- I'm sorry.

4 Mr. Truslow: And whether she lied is a question
5 for the jury, Your Honor.

6 Ms. Lively: Okay, she told you that she lied to
7 get the charges dropped. I asked her, I said, so on those
8 affidavits was it a lie, yes, okay, and then allowed the
9 grandmother to videotape [REDACTED], made terrible choices. So
10 what does that equal, protect the child, the DSS safety
11 plan. That's what it equals, ladies and gentlemen.

12 And on the forensic interview done on June 2nd,
13 you got to see it, purpose is to get a clean account of the
14 facts without outside influences, look to the details
15 provided by [REDACTED] truth is in the details, okay? She was
16 able to talk about how old she was when this first
17 happened. She was able to tell you it was in the nighttime
18 in her bed. She was able to tell you she would be sleeping
19 and wake up because he would have his hand or mouth down
20 there. She was able to tell you it was a sexual battery as
21 the Court is going to instruct you, and specific quotes
22 from the interview, Rahter, and when you wake up what was
23 he doing, he would have either his hand or his mouth or
24 hand down there. Would he touch you on the outside or
25 inside, in, and how do you know it was inside, because I

1 felt it, because I woke up and felt it. It woke her up out
2 of her sleep. That's some detail, ladies and gentlemen.

3 Did anything hurt? Now remember Dr. Rahter said
4 we ask these questions that a child to try and promote
5 getting details from a child about something that maybe
6 they wouldn't know how to make up, maybe. She was, you
7 know, eight years old, so it's up to you to decide that.
8 How did it hurt, because he took his finger and stuck it
9 up. That sounds like something a seven-or-eight-year-old
10 child would say, doesn't it? Because if somebody was
11 telling her what to say, hypothetically speaking, maybe
12 say, you know, time that he put his finger inside your
13 peepee or do this or tell that. You know, this, these are
14 the details that you want to get in a forensic interview,
15 not someone holding up their hand saying, did he jam you
16 like this, did he do that? You know, you see the
17 difference in, in a forensic interview, and then asking
18 what did it feel like to go peepee after. That question is
19 so important because it gets you to where the child is
20 giving you a feeling after something happens, okay? It's
21 not even just say, oh, yeah, he touched me down there then
22 he did this. It's giving you a sensation that the child
23 remembers from the event. It hurt to go potty. Truth is
24 in the details, ladies and gentlemen.

25 Then describing the panties, did you have them

1 on, yes, and when you would wake up because he would be
2 sticking her, where were your panties, on the bed, so they
3 would be off. Next, the medical examination done June the
4 2nd, the last contact would have been April 4th, and as Dr.
5 Rahter told you in ninety percent of these cases they do
6 come back normal medical examinations. She says it doesn't
7 rule in or out sexual abuse occurred, or sexual battery
8 occurred, because she can't. Medically a doctor is going
9 to get up there and tell you what their medical information
10 and what their training has taught them to tell you. If
11 there, trust me, if there was some medical information that
12 she could provide you she would have done it but she told
13 you a lot of times, once you get to seventy hours or even
14 three or four hours after some type of penetration, a
15 child's body heals so quickly that there's not going to be
16 anything there, and we don't know from [REDACTED] the
17 penetration, how much penetration there was. We don't know
18 but remember the statute doesn't require that I show you
19 full penetration. It just requires penetration however
20 slight, however slight. Slight enough or hard enough to
21 where it hurt her to go potty. She knew that it felt like
22 it stuck in.

23 Undisputed facts: [REDACTED] was eight at the time
24 of disclosure, defendant was fifty-seven. He would visit
25 her here in Horry County and stay at their home. Defendant

1 would sleep in the room with [REDACTED]. That shows access to
2 her, alone. That was one thing I did get him to admit and
3 I was actually kind of surprised because we hadn't really
4 had any testimony ---

5 Mr. Truslow: Your Honor, I object to the last
6 one there and I think I need another limited instruction.
7 That's going beyond what that purpose in that was brought
8 into evidence for, thank you.

9 The Court: I will.

10 Mr. Truslow: Thank you.

11 Ms. Lively: And then as the defendant testified
12 he has a conviction for lewd act on a minor. So what is
13 the reasonable conclusion and what I'm going to do in, in
14 telling you this and some of this was just me trying to tie
15 things up, listen to what the child said. She's the one
16 who understands the truth because she was the one that was
17 there. She gave us details of the abuse that no one can
18 sit here and explain and take away, no one. The interview
19 was close in time to disclosure, way before there was a
20 change in plans to recant and save Papa.

21 The defendant did it, ladies and gentlemen,
22 there's no reasonable explanation for the details of the
23 sexual act. There is no way that a child at the age of
24 eight gets caught up in this hurricane, that Mr. Truslow is
25 talking about, and is willing to take and ride that storm

1 through two years of pure heck to stand here in a courtroom
2 and testify and tell you what happened to her. It's not
3 about just pointing a finger; that's not it.

4 Mr. Truslow: Your Honor, objection, there's no
5 facts in evidence that she's been through two years of pure
6 heck; she's been through one interview and she's been
7 through trial.

8 The Court: I think it's a fair comment. I
9 think it's a fair comment. It's her opinion, go ahead.

10 Ms. Lively: You can determine whether the two
11 years have been fun for her or heck but she's here. The
12 law requires her to be here, she's on the stand. She told
13 you what happened, she told you she's never taken it back.
14 She told you she knows what it means to tell the truth.

15 Ladies and gentlemen, there's been a lot of bad
16 acts by these parents, grandparent mainly, and ya'll have
17 heard it, how Nana told her to write the letter and say she
18 lied. How Nana told her to get on the video and say that
19 she lied, okay? Don't let Nana win.

20 [REDACTED] came in here, was questioned by
21 me, questioned by Mr. Truslow, she came in here and told
22 you what happened to her. There is nothing else that child
23 can do. If I had a picture I'd give it to you but child
24 abuse happens in private. Don't let him get away with it.
25 Thank you for your patience.

1 The Court: Who's responsible for the lights?

2 **Jury Charge**

3 Ladies and gentlemen, let me remind you again
4 that there is evidence of a prior conviction for committing
5 a lewd act upon a minor presented in this trial. That
6 evidence was presented for one and one purpose alone, to
7 meet the requirements of the statute. The statute requires
8 that the State prove to you beyond a reasonable doubt that
9 the defendant has been previously convicted of one of a
10 number of offenses, lewd act is one of those included
11 offenses. You must not consider that evidence if you
12 believe it for any other purposes. You may be inclined to
13 say that he committed that act so he must have committed
14 this act; that would be inappropriate. You may say someone
15 who did that is not believable, credibility, that is not
16 appropriate. The only purpose for which you may consider
17 that evidence is whether or not the State has proven to you
18 beyond a reasonable doubt that he has a prior conviction of
19 that offense.

20 Now, I am going to now give you my general
21 charge. I do something that most judges don't do, in fact
22 I don't know any other judge who does it, and that is I
23 understand that sometimes these charges are rather lengthy
24 and it is not realistic for me to think that you as a jury
25 could remember everything that I tell you in my charge on

1 the child understood the seriousness of appearing as a
2 witness in this criminal trial, whether the child
3 understood the questions, whether the child has a good
4 memory, whether the child understands the difference
5 between lying and telling the truth. In addition, young
6 children may be influenced by the way that questions are
7 asked. It is up to you to decide whether the child
8 understood the questions asked.

9 The indictments in this case allege several
10 different offenses against the defendant. The charges are:
11 in indictment number 1, criminal sexual conduct with a
12 minor in the first degree; indictment number 2, lewd act on
13 a minor.

14 Each indictment charges a separate and distinct
15 offense. You must decide each indictment separately on the
16 evidence and the law applicable to it uninfluenced by your
17 decision as to any other indictment. The defendant may be
18 convicted or acquitted on any or all of the offenses
19 charged. You may, you will be asked to write a separate
20 verdict of guilty or not guilty for each indictment.

21 The defendant is charged with the criminal, with
22 criminal sexual conduct with a minor in the first degree.

23 The State must prove beyond a reasonable doubt
24 that the defendant engaged in a sexual battery with a
25 victim who is less than sixteen years of age, and the actor

1 has previously been convicted of, pled guilty to or nolo
2 contendere to, or adjudicated delinquent for an offense
3 listed in section 23-3-430(C) or has been ordered to be
4 included in the sexual, sex offender register pursuant to
5 section 23-3-340(D) .

6 Offenses listed in section 23-3-340(C) are as
7 follows: committing a lewd act on a minor, criminal sexual
8 conduct in the first degree; criminal sexual conduct in the
9 second degree; criminal sexual conduct in the third degree;
10 criminal sexual conduct with minors in the first degree;
11 criminal sexual conduct with minors in the second degree;
12 engaging a child for sexual performance; producing,
13 directing or proctoring sexual performance by a child;
14 assault with intent to commit criminal sexual conduct;
15 incest; buggery; peeping voyeurism; or aggravated
16 voyeurism; indecent exposure; kidnapping; trafficking in
17 persons; criminal sexual conduct where the victim is a
18 spouse; sexual intercourse with a patient or trainee;
19 criminal solicitation of a minor if the purpose was to
20 persuade, induce, entice, or coerce the minor to
21 participate in sexual activity or perform sexual activities
22 in the presence of the solicited minor.

23 A sexual battery is sexual intercourse,
24 cunnilingus, fellatio, anal intercourse, or any intrusion,
25 however slight, of any part of a person's body or of any

1 object into the genitalia or anal openings of another
2 person's body except when the intrusion is accomplished for
3 medically recognized treatment or diagnostic purposes.

4 If you find that the State has not shown beyond a
5 reasonable doubt that a sexual battery occurred you would
6 stop deliberating and your verdict would have to be not
7 guilty as to the charge of first degree criminal sexual
8 conduct. For prosecutions under this charge the testimony
9 of the victim need not be corroborated.

10 The defendant is charged with committing a lewd
11 act on a minor. A minor is a person under the age of
12 eighteen.

13 The State must first prove beyond a reasonable
14 doubt that the defendant was over the age of fourteen.

15 Next the State must prove that the defendant
16 willfully and lewdly committed or attempted a lewd or
17 lascivious act or, on or with the body or its parts of a
18 child under the age of sixteen years, with the intent to
19 arouse, appeal to, or gratify the lust, passions, or sexual
20 desires of the defendant or the child.

21 Willful means voluntary and intentionally with
22 the specific intent to do something the law prohibits.

23 Lewd means obscene, lustful, indecent, or
24 lecherous.

25 Lascivious means tending to incite lust, lewd,

1 indecent, obscene, or tending to deprave the morals in
2 respect to sexual relations.

3 Intent: in order to establish criminal
4 liability, criminal intent is required. For example, the
5 mental state required to be proved by the State for a
6 particular crime might be purpose, intent, knowledge,
7 recklessness, or criminal negligence. Criminal intent must
8 be proved by the State beyond a reasonable doubt. Criminal
9 intent is always a matter that must be determined by the
10 jury from the circumstances surrounding the situation.
11 There is no way to prove intent to a mathematical
12 certainty. There is no way medical science can dissect a
13 persons's brain and determine what the person had in mind,
14 so the law says that criminal intent may be inferred from
15 the circumstances shown to have existed. This is how you
16 make a determination of whether or not the element
17 requiring intent was present. It is not necessary to
18 establish intent by direct and positive evidence, but
19 intent may be established by inference in the same way as
20 any other fact by taking into consideration the acts of the
21 parties and all the facts and circumstances in the case.

22 Criminal intent is a mental state, a conscious
23 wrongdoing. It is up to you to determine what the
24 defendant intended to do based on the circumstances shown
25 to have existed.

1 Criminal intent can arise from action or a
2 failure to act. It may arise from negligence,
3 recklessness, or an indifference to duty or to consequences
4 that is considered by the law to be the equivalent of
5 criminal intent.

6 There are two possible verdicts which you may
7 find in this case as to each indictment or charge: not
8 guilty or guilty, and there's no significance whatsoever in
9 the order in which I state these possible verdicts. It's
10 simply that one must be stated first.

11 Ladies and gentlemen, your verdict must be a
12 unanimous verdict. Mr. Foreperson, when the jury agrees on
13 a verdict, you will write the verdict on the verdict form
14 which I have prepared for you and sign your name as
15 foreperson. Then, if you would, knock on the jury room
16 door and inform the bailiff, Mr. Ropp, that you have
17 reached a verdict and at that time we will receive you back
18 in the courtroom.

19 I ask that you now return to your jury room but
20 do not begin deliberations until you are told to do so by
21 the Clerk or the bailiff. There's some matters which must
22 be discussed with the attorneys before you begin your
23 deliberations.

24 I may have to charge you further. I'm going to
25 discuss that with the attorneys, see if they have anything

1 they want me to add, if I need to charge you further I will
2 bring you into the courtroom. If I do not I will send the
3 exhibits, my charge, and the verdict forms into the jury
4 room and that is a signal for you to begin your
5 deliberations, all right? Otherwise, as I said I will
6 bring you back out.

7 Now, Mr. Ropp, would you take them in there and
8 will you sequester the two alternates, okay?

9 (Whereupon, the jury retired to the jury room at
10 4:07 p.m.)

11 The Court: All right, any additions or
12 deletions to the charge?

13 Mr. Truslow: Nothing from the defense.

14 Ms. Lively: Not from the State.

15 The Court: All right, let's, if you would,
16 ladies and gentlemen, get your exhibits here together, make
17 sure we have them all. I have marked the charges as
18 Court's 2 and I have, have you seen the verdict form? I've
19 shown them to you, they're very simple, okay.

20 If you would take the exhibits and the verdict
21 forms and the charge into the jury and tell them they can
22 begin their deliberations.

23 (Whereupon, the verdict forms and exhibits were
24 delivered to the jury room at 4:08 p.m. with instruction to
25 begin deliberations.)

1 The Court: All right, Ms. Lively, Mr. Truslow,
2 as always you do an excellent job for your clients. I
3 appreciate trying this case with you and now we'll just
4 wait on the verdict.

5 Ms. Lively: Thank you, Your Honor.

6 Mr. Truslow: Yes, sir.

7 (Whereupon, the jury knocked with a question at
8 4:49 p.m.)

9 The Court: We have some questions, where's the
10 defendant?

11 Mr. Truslow: I'll go get him, Judge, he's in
12 the hall.

13 The Court: We have some questions from the
14 foreperson, "We want a copy of [REDACTED] testimony and a
15 copy of the forensic interview with [REDACTED]. Of course, the
16 testimony would have to be played back for them and the
17 forensic interview would have to be played in the courtroom
18 so it can be redacted. It says "and from the judge, what
19 is very informative answer as to what penetration is."
20 I'll hear from you on that issue?

21 Ms. Lively: In regards to the, I thought that
22 your jury charge went into penetration, however slight, of
23 the genital openings by a part of the body or an object or
24 anything.

25 The Court: I think they want a little more than

1 that. I think they want to know what the basic definition
2 of penetration is.

3 Ms. Lively: Well I don't have a problem with
4 us, you know, trying to assist the jury in determining
5 maybe something that we can agree upon if the --

6 The Court: Well that's what I'm asking you.

7 Mr. Truslow: Do it like the dictionary?

8 The Court: Yeah.

9 Ms. Lively: Yeah.

10 The Court: Do you have an on line dictionary
11 there, any of you?

12 Mr. Truslow: I'm sure we can find one.

13 The Court: They have penetration ever so
14 slight, they have it in writing, they understand what that
15 is, but they want to know exactly what the basic definition
16 of penetration is.

17 Ms. Lively: Okay, yes, sir.

18 The Court: I have here a definition that says
19 the actual process of piercing or penetrating something,
20 the act or an instance of penetrating, the ability or power
21 to penetrate, keen insight or perception, military, in a
22 business, in photography, it's a depth or feel.

23 We have a medical dictionary's definition of
24 sexual penetration which says, "a forensic term for acts
25 which include sexual intercourse, cunnilingus, fellatio,

1 anal intercourse, or any other intrusion, however slight --

2 -

3 Mr. Truslow: That's the jury charge.

4 The Court: --- of any part of a person's body
5 or of any object." It appears to be that's the definition
6 of it.

7 Mr. Truslow: But do you think, Your Honor, that
8 they want a definition from Webster of just penetrate?

9 The Court: That's what I had to begin with.

10 Mr. Truslow: Yes, sir.

11 The Court: Do you have one there?

12 Mr. Truslow: I don't.

13 The Court: We have Webster's here.

14 Mr. Truslow: What was the first, maybe the
15 first definition of Webster's.

16 The Court: The act or process of penetrating,
17 the act or process of piercing or penetrating something.

18 Mr. Truslow: That second one would work.

19 The Court: Which one is that?

20 Mr. Truslow: The act of piercing or penetrating
21 something.

22 Ms. Lively: Yeah, but see, I still think that's
23 going to be a problem. Let me see if I can get something
24 like some synonyms that might give us a little bit of
25 assistance.

1 Mr. Truslow: Well since it's in the context of
2 sexual penetration then the one you read for that was the
3 exact jury charge and they have to just go with that and
4 then the understanding of them.

5 The Court: I think what we should do is give
6 them the definition of sexual penetration as set forth in
7 the charge and tell them it should be understood in its
8 common ordinary meaning.

9 Mr. Truslow: Yes, sir, I agree with that.

10 Ms. Lively: I'm fine with that, too, because
11 everything I'm finding is the same thing that ya'll are
12 finding, Your Honor, and I don't see ---

13 The Court: Well we described it as sexual
14 battery as sexual intercourse, cunnilingus, fellatio. The
15 definition of sexual penetration is the same, intrusion.
16 All right, that's what I'm going to charge them. I'm going
17 to tell them sexual penetration is the same as sexual
18 battery, okay, that it's sexual intercourse, cunnilingus,
19 fellatio, anal intercourse, or any intrusion, however
20 slight, of any part of a person's body or any object into
21 the genitalia or anal openings of another person's body,
22 okay?

23 Ms. Lively: Yes, sir.

24 The Court: All right, Ms. Babb, do you have the
25 child's testimony?

1 Madam Court Reporter: Not yet, give me just a
2 second.

3 Ms. Lively: And they want to hear the forensic
4 interview, too; is that correct?

5 The Court: Uh-huh.

6 Ms. Lively: Let me get that.

7 The Court: Yes, they do. Bring them in.

8 (Whereupon, the jury returns to the courtroom at
9 5:03 p.m.)

10 The Court: All right, Mr. Foreperson, I have
11 your note and you tell me that you'd like to have [REDACTED]
12 testimony. We cannot provide you with a copy. What we can
13 do is replay the testimony.

14 The Foreperson: Okay, that would be fine.

15 The Court: Which we'd be happy to do, and let
16 me say this that we are prepared to replay all of it, that
17 testimony; however, if you reach a point at which you have
18 heard what you wanted to hear just raise your hand and let
19 me know and we won't make you sit through all of it, if you
20 decide you've heard what you wanted to hear, otherwise
21 we'll do it all. The forensic interview will follow with
22 that. We will let you watch that again.

23 You have asked me for an, a definition of
24 penetration. Let me say this, sexual penetration is
25 essentially the same thing as sexual battery. It is sexual

1 intercourse, cunnilingus, fellatio, that being oral sex,
2 anal intercourse, or any intrusion, intrusion being the key
3 word, however slight, of any part of a person's body or an
4 object, intrusion by any part of a person's body or any
5 object into the genitalia or anal openings of another
6 person's body, the key being intrusion, however slight, by
7 a perpetrator's body part, fingers, penis, whatever, or an
8 object, some other object, into the genitalia or anal
9 opening of another person. You think that helps you?

10 Mr. Foreman: Yes, sir.

11 The Court: All right, very much, thank you very
12 much. Okay, Ms. Babb, Heather, if you would bring down
13 the, well I tell you what let's hear the, let's, let's hear
14 the, the interview first before we do the forensic
15 interview.

16 Mr. Truslow: Send it back up.

17 Ms. Lively: You mean the testimony?

18 Mr. Truslow: Yes.

19 The Court: Yeah, the, the testimony, rather,
20 send it back up, let's hear the testimony of the child
21 first.

22 The Court: The child first?

23 Mr. Foreman: The testimony of the child first.

24 The Court: Okay.

25 (Whereupon, the testimony of [REDACTED] was

1 played in open court for the jury.)

2 The Court: All right, Ms. Lively, are you ready
3 with the forensic interview?

4 Ms. Lively: Yes, sir, I am.

5 The Court: Okay, Heather, if you would bring
6 down the screen.

7 Ms. Lively: Your Honor, do I need to, I don't
8 know whether the jury is going to request to have a copy of
9 the transcript with them again or if they're just listening
10 to it at this time.

11 The Court: Do you want to just hear it or would
12 you like to have a copy of that transcript?

13 Mr. Foreman: We just need to see a copy of the
14 transcript would be good.

15 The Court: You don't even need to see it, Mr.
16 Truslow, do you have any problem with that?

17 Mr. Truslow: No, sir, no objection to that.

18 The Court: We have twelve copies of the
19 transcript that they would have so let's let them just, do
20 you still have those, Ms. Lively?

21 Ms. Lively: I do. I'm just making sure the one
22 I'm giving them is the one that we did agree upon.

23 The Court: Okay.

24 Ms. Lively: And that there's no --

25 The Court: We can just give them the one that's

1 redacted there. All right, you want to take that in the
2 jury room with you, Mr. Thompkins?

3 Mr. Foreman: Yes, sir.

4 The Court: Okay, very well, take them back to
5 their jury room.

6 (Whereupon, at 5:53 p.m. the jury again retired
7 to the jury room and resumed their deliberations.)

8 The Court: All right, we're at ease.

9 (Whereupon, Court's Exhibit Number 3 marked for
10 identification.)

11 Ms. Lively: Your Honor, obviously they can't
12 watch this back there but they are in evidence.

13 The Court: Okay, if they ask for them we'll
14 give them to them.

15 Ms. Lively: Yes, sir.

16 (Whereupon, the jury knocked with a verdict at
17 6:17 p.m.)

18 The Court: Bring them in.

19 (Whereupon, the jury entered the courtroom at
20 6:17 p.m. to deliver its verdict as to defendant Jon Wynn
21 Jarrard, Sr.)

22 The Court: All right, let's see we have the
23 jury in, Mr. Foreman, it's my understanding that you have
24 reached a verdict; is that correct?

25 Mr. Foreman: We have, Your Honor.

1 The Court: Is it a unanimous verdict?

2 Mr. Foreman: It's a unanimous verdict.

3 The Court: All right, if you would, Heather,
4 take the verdict, please. All right, you may publish.

5 Madam Clerk: Indictment Number 2011-GS-26-
6 1335, The State of South Carolina County of Horry v. Jon
7 Wynn Jarrard, as to the charge of first degree criminal
8 sexual conduct with a minor we the jury unanimously find
9 the defendant guilty.

10 Indictment Number 2011-GS-26-00365, The State of
11 South Carolina County of Horry v. Jon Wynn Jarrard, as to
12 charge of lewd act on a minor we the jury unanimously find
13 the defendant guilty, dated June 12th, 2012, signed by
14 foreperson, Carl Thompkins.

15 Ladies and gentlemen of the jury, if this is your
16 verdict so signify by raising your right hand.

17 (Whereupon, all jurors responded affirmatively.)

18 Madam Clerk: Thank you.

19 The Court: Let the record reflect that all
20 responded affirmatively. Any requests for individual voir
21 dire from the defense?

22 Mr. Truslow: No, sir.

23 The Court: All right, very well. Any reason
24 why sentencing should not take place at this time?

25 Ms. Lively: No, Your Honor, the State is ready

1 to proceed at this time.

2 The Court: All right, I'll hear from the State
3 first.

4 Ms. Lively: Yes, sir, Your Honor, actually one
5 moment. Let me just check with the victim and the mother
6 if they wish to make a statement as well.

7 No, Your Honor, they feel like everything has
8 been ---

9 The Court: All right.

10 Ms. Lively: --- aired out with the jury.

11 Your Honor, in regards to this particular case,
12 as you know, the charges originally started out as criminal
13 sexual conduct with a minor based on the age being under
14 eleven. The State chose to proceed on the offenses and
15 Your Honor allowed us to do so for the CSC first degree
16 which carries ten to thirty, which changes the mandatory
17 minimum from twenty-five or life in prison. We felt like
18 that was a more fair statute.

19 The Court: I'm sorry, I misunderstood you
20 there, you just said what now, changes the what?

21 Ms. Lively: The mandatory sentence in a CSC
22 with a minor first degree if you go forward on a first
23 statute it requires twenty-five or life and that is not
24 what the State proceeded under. We proceeded under ---

25 The Court: You went under the ten to thirty?

1 Ms. Lively: Exactly, I proceeded under the ten
2 to thirty in regards to that charge.

3 The Court: But that ten is the minimum
4 mandatory, is it not?

5 Ms. Lively: Correct, Your Honor.

6 The Court: No part of which may be suspended or
7 probation given.

8 Ms. Lively: Exactly, and that's, and that's
9 what I wanted to make sure that clearly was on the record
10 in regards to this. It's also considered a violent offense
11 and most serious, Your Honor, and does require GPS
12 monitoring at the time of his release.

13 Your Honor, I believe that the jury's verdict
14 speaks for the child, speaks volumes to what the child has
15 had to go through. Your Honor, these cases are difficult
16 for the State as well as for the defense, and we have to
17 rely on the child to come in here and testify and that's
18 always a hard thing for us to do. So we would just ask
19 Your Honor to do what, use your discretion on what's fair.
20 I believe that from talking with (REDACTED), as well as her
21 mother, throughout the past couple of years, they just
22 wanted their opportunity to have this heard and then be
23 able to move on so she could be a normal little girl and
24 she has done quite well in keeping up her grades and trying
25 to put this behind her. So we just thank the jury for

1 their time and for listening to the child; and I've got the
2 sentence sheets here and like I said I will pretty much
3 leave it at that.

4 Your Honor, if I may approach?

5 The Court: Yes.

6 Ms. Lively: Thank you. That will be all from
7 the State, Your Honor.

8 The Court: All right, let me hear from you, Mr.
9 Truslow?

10 Mr. Truslow: Yes, sir, Judge, we would submit
11 to you that the high end of the sentence is not necessary
12 in this case. My client is ---

13 The Court: Let me ask you this, do you have
14 motions to make?

15 Mr. Truslow: Oh, I'm sorry, Your Honor, let me,
16 I would make a motion for a new trial based upon the
17 evidence in this case leading to an arbitrary and
18 capricious verdict. In the alternative we would ask for a,
19 I ask for a new trial, renew my motion for a directed
20 verdict, ask for in the alternative a new trial.

21 The Court: All right, and I would respectfully
22 deny your motion. There was certainly ample evidence by
23 which the jury could have reached this verdict. I'm going
24 to deny your motions, all right. Now, I'll hear from you
25 as to sentencing.

1 Mr. Truslow: Yes, sir, Judge, we believe that
2 the high end of the sentence would not be appropriate in
3 this case given a couple of facts. Other than the one
4 thing you heard about on his record from fifteen years ago
5 he's been a law abiding citizen, served in the military for
6 twenty years, obtained a rank of major. He's always been a
7 hard working individual and raised a family. He's been
8 married for thirty-four years. He's the major caretaker of
9 his wife who's got some serious medical issues. She's
10 going to have to find another way to deal with that but we
11 would just ask you to be as lenient as possible. I would
12 submit to Your Honor that given the fact that the CSC
13 charge is a non parolable offense that maybe the ten-year
14 mandatory minimum would be sufficient and run a sentence
15 concurrent with that.

16 The Court: How old is your client?

17 Mr. Truslow: Fifty-nine, Your Honor.

18 The Court: Okay, all right. Would your client
19 like an opportunity to address the Court?

20 Mr. Truslow: No, sir.

21 Defendant Jarrard: Well, yes, I would.

22 The Court: All right, sir.

23 Defendant Jarrard: I do appreciate you giving
24 good guidance, Your Honor, although I don't agree with the
25 verdict. I do appreciate the fact that you presided well,

1 I feel, over the court. I thank you for my day in court.

2 The Court: All right, sir. All right, the
3 sentence of the court as to the criminal sexual conduct in
4 the first degree with a minor is fifteen years. I have
5 considered this defendant's age and do not believe that a
6 high end sentence would be appropriate and I have decided
7 that fifteen years would be.

8 As to the lewd act upon a child the sentence is
9 fifteen years, these are concurrent sentences. All right,
10 thank you.

11 Ms. Lively: Thank you, Your Honor.

12 The Court: Ladies and gentlemen of the jury,
13 let me say that you have just completed probably some of
14 the most difficult times that you have ever had in, in your
15 life. It is never, never easy to judge a fellow human
16 being, particularly in a situation where that person's life
17 is at stake and in this case as you heard my sentence,
18 there was a potential for thirty years in prison which
19 would have been a life sentence essentially at his age.
20 We've looked at the mortality rates in this state and these
21 are non parolable offenses for which you don't even get to
22 have an opportunity to be paroled. So it's very serious
23 business, and, and we all try to impress that upon you
24 during the trial of this case.

25 I want to thank you for your service. You have

6/11/12 BB

CASE NO 76 GS-40

WARRANT NO

CHARGE

OFFENSE CODE

SC	STATUTE	OFFENSE	PENALTY	CODE
1	16-11-1	16-11-1	16-11-1	16-11-1
2	16-11-2	16-11-2	16-11-2	16-11-2
3	16-11-3	16-11-3	16-11-3	16-11-3
4	16-11-4	16-11-4	16-11-4	16-11-4
5	16-11-5	16-11-5	16-11-5	16-11-5
6	16-11-6	16-11-6	16-11-6	16-11-6
7	16-11-7	16-11-7	16-11-7	16-11-7
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47	16-11-47	16-11-47	16-11-47	16-11-47
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51	16-11-51	16-11-51	16-11-51	16-11-51
52	16-11-52	16-11-52	16-11-52	16-11-52
53	16-11-53	16-11-53	16-11-53	16-11-53
54	16-11-54	16-11-54	16-11-54	16-11-54
55	16-11-55	16-11-55	16-11-55	16-11-55
56	16-11-56	16-11-56	16-11-56	16-11-56
57	16-11-57	16-11-57	16-11-57	16-11-57
58	16-11-58	16-11		

RESTITUTION: YES/NO

FOR PHYSICAL INJURY \$

PAYABLE TO CLERK FOR:

PROPERTY DAMAGE

(VICTIM)

TOTAL

Other Conditions 1) Assessed and treated for substance abuse if necessary 2) Sex offender counselling t/o mental health counselling 3) All statutory requirements 4) No contact of any type with victim or their family. -- 5) Will report for beginning of sentence at or before 10:00 AM on #

DATE 8 / 11 / 97

D.O.B. 12-18-52

S.S.N. 263-02-8329

Def. Atty Heather Smith

SOL: Atty Ann Spears

B/W/O

M/F

PRESIDING JUDGE

* August 29, 1997

at the Richland County
Detention Center on Bluff Road

Barbara Scott

CLERK OF CLERK FILED

CO. 100

CHILAND COUNTY

SOUTH CAROLINA

STATE'S
EXHIBIT

6/12/11 ID
21 BB

SENTENCE

STATE OF SOUTH CAROLINA
RICHLAND COUNTY

CASE NO. 96 GS-40 10746

WARRANT NO. 5129905

CHARGE Lewd Act Upon

OFFENSE CODE Child 103

SC STATUTE OFFENSE PENALTY CODE

16-15-140

The defendant J. W. Guadalupe is committed to the State
Department of Corrections/County for a term of 1 year 11/3/95
and/or to pay a fine of \$; provided upon the service of
1 year and/or a payment of \$, plus pay
costs and assessments as applicable, the balance is suspended with
probation for 1 month 11/3/95

RESTITUTION: YES/NO

FOR PHYSICAL INJURY \$

PAYABLE TO CLERK FOR:

PROPERTY DAMAGE \$

(VICTIM)

TOTAL \$

Other Conditions

DATE 8/11/97

PRESIDING JUDGE

D.O.B. 12-18-52

S.S.N. 263-02-8329

Def. Atty. Heather Smith

Sol. Atty. Ann Spears

(W/O)

(M/F)

* August 29, 1997
Detention at the Richland County
Detention Center on 8/29/97

Barbara J. Scott
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WITNESSES

Tobias Orfan-Horry County Police Department

DOCKET NO. 2010-GS-28-04574

The State of South Carolina
County of Horry

Candice Lively

10H03487

COURT OF GENERAL SESSIONS

November, 2010 TERM

ARREST WARRANT NUMBER

M318417

CDR: 0385 18-03-0655(A)(1)

DOA: 9/3/2010

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: NOV 18 2010

VERDICT

Foreperson of Petit Jury

Date:

VS.

Jon Wynn Jarrard Sr

W / M

1788A Koon Rd

Lugoff, SC 29078-8644

DOB: 1952-12-16

SSN: 283028329

ATTORNEY: Floyd, W. Thomas

Indictment for

CRIMINAL SEXUAL CONDUCT WITH MINOR
FIRST DEGREE

ORIGINAL

J. Gregory Hembree, Solicitor

NP
07/28/12

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on November 18, 2010, the Grand Jurors of Horry County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR
FIRST DEGREE

CDR: 0385 16-03-0655(A)(1)

That Jon Wynn Jarrard Sr did in Horry County, State of South Carolina, from November 19, 2008 through on or about May 20, 2010, willfully and unlawfully commit the crime of Criminal Sexual Conduct with a Minor in the First Degree by engaging in sexual battery with a minor who is less than eleven (11) years of age, to wit: K.J., whose date of birth is 11/19/2001, in violation of Section 16-3-655(A)(1), [formerly Section 16-3-655(1)], S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


J. GREGORY PEMBREE
FIFTEENTH CIRCUIT SOLICITOR

DOCKET NO. 2011-GS-26-01335

WITNESSES

Tobias Grant Horry County Police Department

The State of South Carolina
County of Horry

Candice Lively

10H03487

COURT OF GENERAL SESSIONS

April, 2011 TERM

ARREST WARRANT NUMBER

2011GS2601335

CDR: 0385 16-03-0655(A)(2)

DOA: 9/3/2010

THE STATE

vs.

Jon Wynn Jarrard Sr
W/ M
1769A Koon Rd
Lugoff, SC 29078-9644
DOB: 1952-12-18
SSN: 263028329

ATTORNEY: Truslow, T. Kirk

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date:

APR 28 2011

VERDICT

Indictment for

CRIMINAL SEXUAL CONDUCT WITH A
MINOR FIRST DEGREE

ORIGINAL

J. Gregory Hembree, Solicitor

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on April 28, 2011, the Grand Jurors of Horry County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR
FIRST DEGREE

CDR: 0385 16-03-0655(A)(2)

That Jon Wynn Jarrard Sr did in Horry County, State of South Carolina, between November 19, 2008, and May 20, 2010, willfully and unlawfully commit the crime of Criminal Sexual Conduct with a Minor in the First Degree by engaging in sexual battery with the victim, K.J., whose date of birth is 11/19/2001, a minor who is less than eleven (11) years of age, to wit: digitally penetrate and/or performed oral sex on the victim, and the Defendant has previously been convicted of, pled guilty or *nolo contendere* to, or adjudicated delinquent for an offense listed in S.C. Code of Laws Section 23-3-430 (C), or has been ordered to be included in the sex offender registry pursuant to S.C. Code of Laws Section 23-3-430(D), to wit: Lewd Act on a Minor, in violation of Section 16-3-655(A)(2), S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


J. GREGORY AMBREE
FIFTEENTH CIRCUIT SOLICITOR

DOCKET NO. 2011-GS-26-00365

WITNESSES

Tobias Orfant Horry County Police Department

**The State of South Carolina
County of Horry**

Candice Lively

10H03487

COURT OF GENERAL SESSIONS**January, 2011 TERM****ARREST WARRANT NUMBER**

2011GS2600365

CDR: 2468 18-15-0140

DOA: 9/3/2010

THE STATE

VS.

ACTION OF GRAND JURY**TRUE BILL**Foreperson of Grand Jury
Date: JAN 27 2011**VERDICT**Foreperson of Petit Jury
Date:Jon Wynn Jarrard Sr
W/M
1768A Koon Rd
Lugoff, SC 29078-8844
DOB: 1952-12-18
SSN: 263028329**ATTORNEY: Floyd, W. Thomas****Indictment for****LEWD ACT ON A MINOR CHILD****ORIGINAL****J. Gregory Hembree, Solicitor**

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on January 27, 2011, the Grand Jurors of Horry County present upon their oath:

LEWD ACT ON A MINOR CHILD

CDR: 2468 16-15-0140

That Jon Wynn Jarrard Sr, being over fourteen years of age, did in Horry County between November 19, 2008, and May 20, 2010, willfully and lewdly commit a lewd or lascivious act upon or with the body of a child, less than sixteen (16) years of age, to wit: K.J., age 9, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of said defendant or of the victim, in violation of Section 16-15-0140, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


J. GREGORY HEMBREE
FIFTEENTH CIRCUIT 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."

June 9, 2014



Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Post Office Box 11589
Columbia, SC 29211
ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JON WYNN JARRARD, SR.,

APPELLANT

FINAL BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err when it allowed the State to proceed under §16-3655(A)(2) for the sole purpose of circumventing the traditional rules of evidence and to use the Defendants prior conviction, as propensity evidence in violation of due process?

STATEMENT OF THE CASE

On November 18, 2010, the Horry County Grand Jury indicted Appellant for criminal sexual conduct (CSC) with a minor, pursuant to §16-3-655(A)(1), docket number 2010-GS-26-04574.

On January 27, 2011, Defendant was indicted for the offense of lewd act on a minor child, pursuant to §16-15-140, docket number 2011-GS-26-00365.

On April 28, 2011, the State re-indicted Appellant, based upon the same incident alleged in the first indictment, for the offense of CSC with a minor, pursuant to §16-3-655(A)(2), docket number 2011-GS-26-01335.

On June 11, 2012, Appellant proceed to jury trial before the Honorable Larry B. Hyman relating to lewd act on a minor child charge, and CSC with a minor child, pursuant to §16-3-655(A)(2). Tr. 1; R. 1. Attorney T. Kirk Truslow represented Appellant at trial. Attorney Candice A. Lively prosecuted the case on behalf of the state. On June 13, 2013 the jury returned verdicts of guilty. On the same date, Judge Hyman sentenced Appellant to serve (1) fifteen years imprisonment for the CSC with a minor conviction and (2) fifteen years imprisonment for the lewd act upon a child conviction. The sentences to run concurrently.

This appeal follows.

STATEMENT OF FACTS

Appellant was charged with having committed a lewd act and criminal sexual conduct upon his eight year old granddaughter, Minor Child. Tr. p. 66 l. 5- 67 l.10; R. p. 39 l. 5-40 l. 10. During the week of May 17th, 2010, Pamela Gause, Minor Child's baby sitter, discovered that Minor Child and Gause's six- year old daughter were in bed under the covers touching each other's vaginas. Tr. p. 80, l. 23-81, l.1; R. p. 53, l. 23- 54 l. 1. Pamela Gause called Rebecca Ann Jarrard (hereinafter "Rebecca Ann"), Minor Child's mother, and proceeded to question Minor Child. When Gause asked if anyone had touched her before, Minor Child first remained quiet for a time. Tr. p. 82, l. 13-17; R. p. 55 l. 13-17. Upon continued questioning, Minor Child remained silent but later identified her grandpa as someone who had touched her in the past. Tr. p.162 l. 6; R. p. 90 l. 6.

The following day Rebecca Ann took Minor Child to the police station in Ayer, South Carolina where Minor Child gave a statement. Tr. p.105 l. 12-17; R. p. 65 l. 12-17. A week to two weeks later, Detective Allen Large of the Horry County Police Department interviewed Minor Child. *Id.* Approximately two weeks later, Minor Child was taken to the Children's Recovery Services where she was interviewed and examined by Dr. Carol Rather. Tr. p. 105 l. 25; R. p. 65 l. 25. At trial, Dr. Carol Rather testified that she found no physical evidence of abuse. Tr. p. 234 l. 6; R. p. 159 l.6.

After the opening of the investigation, Rebecca Ann made multiple statements stating that Minor Child recanted her initial accusations and asked for the charges to be dropped. Tr. p 110-12; R. p. 70-72. On August 8th, 2010 Rebecca Ann dropped off a notarized statement stating that Minor Child's story had changed, accompanied by a video recording of Minor Child

recanting her story to the Horry County Solicitors Office. *Id.*; State's Exhibit 2. Later on August 27th, 2010, Rebecca Ann went to the Horry County Solicitors Office and signed an affidavit that stated that what Minor Child had originally told police and investigators was false and that she wished that the charges would be dropped. Tr. p. 113 l. 7-25; R. p. 73 l. 7-25. At trial, Rebecca Ann disclaimed both of those statements saying that she felt pressure from her mother and brother to have Minor Child's story changed. *Id.*

Prior to trial, Appellant moved on a number of grounds to have any reference to his 1997 prior conviction of lewd act on a minor barred or suppressed as evidence in the case. Pretrial Motion April 13th, 2012 (hereinafter "PTM") p. 3-10; R. p. 3-10. This objection was renewed at trial. Tr. p. 276 l. 22-25; R. p. 201 l. 22-25. A redacted version of Appellant's sentencing sheet from his prior conviction was introduced. Tr. p. 277 l. 3-4, State's Exhibit 11; R. p. 202 l. 3-4, 269. In the Appellant's redacted prior conviction, the entire section of "Other conditions" was blacked out in a non-uniform manner. See State's Exhibit 11; R. p. 269. In total the jury deliberated for approximately one hour before convicting Appellant. Tr. p. 347-354; R. p. 254-261.

ARGUMENT

I. Did the trial court err when it allowed the State to proceed under 16-3-655(A)(2) for the sole purpose of circumventing the traditional rules of evidence and to use the Defendants prior conviction, as propensity evidence in violation of due process?

The most fundamental consideration must be due process. A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice. *State v. Hornsby*, 326 S.C. 121, 484 S.E.2d 869 (1997). The court erred when it allowed the State to proceed under 16-3-655(A)(2), allowing the introduction of Appellants' remote 1997 conviction. This conviction was not relevant to his current charge except to unduly prejudice the jury in their determination of the Appellant's guilt. Prior to trial, Appellant moved on a number of grounds to have any reference to Appellant's prior conviction to be barred or suppressed including under the constitutional grounds that due process has been violated and that the conviction would be inadmissible under the traditional rules of evidence. PTM p.3-11, Tr. p 276 l. 22-25; R. p. 3-11, p. 201 l. 22-25.

Under S.C. Code §16-3-655(A) a person is guilty of CSC with a minor first degree if:

- (1) the actor engages in sexual battery with a victim who is less than eleven years of age; or
- (2) the actor engages in a sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to...an offense listed in Section 23-3-430(C)...

Appellant was initially charged with CSC with a minor under subsection (A)(1) above as the accuser in this case was eight (8) years old at the time of the incident. This indictment was nolle prossed after the State received a conviction in this case. Subsequently, after the Appellant obtained a new attorney and exercised his constitutional right to a jury trial, the State indicted the Appellant to subsection (A)(2) of the statute making the Appellant's prior conviction a required statutory element of the offense. The trial court allowed evidence of Appellant's prior

conviction through the introduction of a redacted sentencing sheet from his 1997 Lewd Act on a Minor plea. Tr. p. 277 l. 3-4, State's Exhibit 11; R. p. 202 l. 3-4, p. 269. The Court did provide a limiting instruction involving the redaction, but did not conduct an on the record balancing test required by SCRE 403. Tr. p. 281, l. 5-18; R. p. 203 l. 5-18.

Due process under the Fourteenth Amendment of the United States Constitution guarantees a defendant the fundamental right to a fair trial. *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691 (1976); *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968); *Chambers v. Mississippi* 410 U.S. 673, 106 S.Ct. 1431 (1986). Article I §3 of the South Carolina Constitution contains our state counterpart to the due process clause. Our courts have likewise recognized the fundamental right to a fair trial. *State v. Kennedy*, 272 S.C. 231, 250 S.E.2d 338 (1978). What defines the parameter of a fair trial is generally understood to be our rules of evidence and case law precedent. The relationship between the United States Constitution and South Carolina Constitution is that the "[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." *State v. Easler*, 327 S.C. 121, 131 n. 13, 489 S.E.2d 617, 625 n. 13 (1997); *see also State v. Forrester*, 343 S.C. 637, 541 S.E.2d 837 (S.C. 2001) *State v. Austin*, 306 S.C. 9, 409 S.E.2d 811 (Ct.App.1991). This relationship is often described as recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling. *See Segura v. Texas*, 826 S.W.2d 178, (Tex.App.1992).

The United States Supreme Court has not reached, and instead has expressly reserved, the question of whether a state law admitting propensity evidence violates the Federal Due Process Clause. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 484 n. 5 (1991). In *Spencer v. Texas*, the United States Supreme Court assessed the constitutionality of a Texas procedure where the State could introduce proof of prior offenses in indictments and could introduce proof of prior convictions so long as the court issued a limiting instruction that these prior convictions were not to be taken into account to assess the guilt or innocence of the Defendant under the current charge. *Spencer v. Texas*, 385 U.S. 554, 87 S. Ct. 648 (1967). In a 5-4 decision, the Court concluded that due process did not require a two-stage jury trial, where

the jury would determine guilt as to the initial matter and later determine the penalty in light of the defendant's prior conviction. *Id.* at 567-69. The majority grounded its approach in an extremely deferential approach to the state's criminal procedure. *Id.* at 564. However, the majority did note that this evidence would likely have been admissible under a common exception to the introduction of propensity evidence. *Id.* at 560.

In a partial dissent, Chief Justice Warren challenged the majority's due process conclusions stating:

While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause.

Id. at 572-74 (Warren, C.J., concurring in part and dissenting in part)(footnotes omitted).

Like the majority, Chief Justice Warren agreed that the admission of propensity evidence is not absolutely barred by due process. *Id.* at 576. Propensity evidence has been traditionally admitted for non-propensity purposes, like for impeachment or to counter defense evidence of the defendant's good character. *Id.* When evidence is admitted for non-propensity purposes, a defendant's due process rights can be protected by balancing the probative value of the evidence against the danger of unfair prejudice. *Id.* at 577-578. However, when evidence is introduced for pure propensity purposes, Chief Justice Warren concluded that its admission would necessarily violate the Due Process Clause and require categorical exclusion. *Id.* at 578. Chief Justice Warren reasoned that the admission of this evidence would threaten the foundation of three fundamental due process principles: the presumption of innocence, proof beyond a reasonable doubt, and prohibition against status crimes. *See On a Collision Course: Pure Propensity*

Evidence and Due Process in Alaska, Alaska Law Review, Dropkin, D and McComas, J. 2001 at 193-196.

In *Spencer*, the Chief Justice observed “[e]vidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged.” *Spencer* at 575. The presumption of innocence is a core component of due process. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). The use of pure propensity evidence undermines the jury’s conceptual ability to meaningfully presume the innocence of the accused and predisposes the mind of juror to believe the accused is guilty. It “compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it.” *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), quoting *Com. v. Jackson*, 132 Mass. 16; 44 Am. Rep. 299 note; 8 R. C. L. 198, § 194.

The admission of prior convictions also invariably lowers the states burden of persuasion. Chief Justice Warren recognized “the prejudicial effect of prior convictions evidence has traditionally been related to the requirement of our criminal law that the State prove beyond a reasonable doubt the commission of a specific criminal act.” *Spencer* at 575.

Lastly, Warren was concerned that “A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a ‘bad man,’ with regard to his guilty of the crime currently charged.” *Spencer* at 575. An accused cannot be found guilty because of his criminal status.

In other cases United States Supreme Court has been concerned that the admission of propensity evidence raises questions of fair play:

Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt.... The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.

Michelson v. United States, 335 U.S. 469, 475-76, 69 S.Ct. 213, 218, (1948).

Similarly, in *Old Chief*, the Supreme Court held a trial court abused its discretion by admitting the name and factual circumstances of a previous conviction, even though a prior felony conviction was an element of the crime charged. *Old Chief v. United States*, 519 U.S. 172, 191, 117 S.Ct. 644, 655(1997). The defendant was charged with being a felon in possession of a firearm. *Id.* At trial the defendant offered to stipulate the fact that he had suffered a prior conviction making him a prohibited possessor. *Id.* The reason defendant wished to stipulate to his conviction was to preserve his right to be convicted beyond a reasonable doubt on the charge that he was in front of the court for, and moved that any evidence of his prior conviction would be unfairly prejudicial under FRE 403. *Id.* The court, citing *Michelson*, held the evidence was unfairly prejudicial, explaining, " [t]here is, accordingly, no question that propensity would be an ' improper basis' for conviction." *Id.* at 181-82. The Court explained that the term "unfair prejudice" in the context of a criminal case "speaks to the capacity of some concededly relevant evidence to lure the fact- finder into declaring guilt on the grounds different from proof specific to the offense charged." *Id.* at 180. The majority explained that the prosecution could not introduce propensity evidence as it "generaliz(es) a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or worse calling for preventive conviction even if he should happen to be innocent momentarily)." *Id.* at 180-181. While not explicitly rooting analysis in due process analysis, it is important to note that FRE 403 has been cited as the means for the courts to assure due process.

See, e.g., United States v. Castillo, 140 F.3d 874, 883 (10th Cir.1998)(“[A]pplication of Rule 403 to Rule 414 evidence eliminates the due process concerns posed by Rule 414.”)

Historically, courts have wanted a person to be tried for their acts, not for their bad character. This approach has its roots in Anglo-American jurisprudence prior to the Revolutionary War. *See Hampden's Trial* 9 Cob. St. Tr. 1053 (K.B. 1684), *Harrison's Trial* 12 How, St. Tr. 834 (old Bailey 1692). In 1692, Lord Chief Justice Holt rejected the solicitors admission of propensity evidence in *Harrison's Trial* stating, “Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought to not to be; that is nothing to the matter.” 12 How, St. Tr. 834 (old Bailey 1692). The leading case exemplifying American common law in this area is *People v. Molineux* where the New York Court of Appeals developed a framework for the admissibility of uncharged misconduct evidence. *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (NY 1901). This case has been cited with approval in almost every state in the union and almost every federal circuit. *See Lyle* 118 S.E. 803 at 808. *Molineux* was accused of sending a medicine bottle containing the poison cyanide of mercury to a rival. The rival's security took the mislabeled poison and died within twenty four hours. At trial, the government introduced evidence that *Molineux* poisoned a different rival in a similar fashion. *Molineux* was found guilty and sentenced him to death.

In reversing the trial court, The *Molineux* court first noted “[t]he general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not allege in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the charged.” *Id.* at 293. The court also found that if there was a substantial question of motive, defendants identify or intent, the possibility of the defendant's participation in a general criminal plan or scheme to commit similar crimes, the prosecution could offer special prior acts of the defendant, provided the prejudicial value of the evidence did not outweigh its probative value. *Id.* at 302.

Other federal and state courts have also addressed the admission of these prior bad acts evidence. In 1995, Congress adopted Federal Rules of Evidence Rules 413 and Rule 414 which apply to sexual assault and child molestation cases, respectively, and permits evidence of the defendant's commission of other offenses of sexual assault and child molestation. Fed.R.Evid.

413 and 414. While, the United States Supreme Court has not addressed the constitutionality of these rules (see *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 484 n. 5 (1991)) federal courts have generally upheld the admission of evidence under Rules 413 and 414. See, e.g., *United States v. Castillo*, 140 F.3d 874, 881-83 (10th Cir.1998). *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir.1998). In both *Castillo* and *Enjady*, the courts had reservations about the rule but held admitting prior sexual abuse does not violate due process on its face because of the safeguard of Federal Rule of Evidence 403, which directs the court to exclude the evidence if it “concludes the probative value of the similar crimes evidence is outweighed by the risk of unfair prejudice.” *Enjady*, 134 F.3d at 1433. In *Castillo*, the Tenth Circuit held that when evidence is “so prejudicial that it violates the defendant's fundamental right to a fair trial “[a]pplication of Rule 403 . should always result in the exclusion of [such] evidence.” *Castillo*, 140 F.3d at 883. Similarly, the Ninth Circuit held in *United States v. LeMay*, determined the admission of the defendant's other instances of molestation did not violate his due process rights. *United States v. LeMay*, 260 F.3d 1018 (9th Cir.2001)260 F.3d at 1026-27. In holding Rule 414 does not violate the Due Process Clause of the Constitution, the court stated, “[a]s long as the protections of Rule 403 remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded.” *Id.* at 1026.

State courts have also addressed the issue. In *State v. Cox*, the Iowa Supreme Court held that the admission of prior bad acts evidence involving a different victim in a sexual assault case when admitted solely for the purpose of demonstrating propensity was a violation of the due process clause of Iowa Constitution. *State v. Cox*, 781 N.W. 2d 757 (Iowa 2010). The Iowa Legislature, like the National Congress in FRE 413 and 413, had enacted a provision in their rules of evidence which provided:

In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

The Iowa Supreme Court narrowed a previous decision holding that previous incidents involving the same victim may be relevant to show the passions and nature of the relationship between the

accused and the victim. See *State v. Reyes*, 744 N.W.2d 95 (Iowa 2008). In echoing Chief Justice Warren's dissent in *Spencer v. Texas*, the court held

"the rejection of propensity evidence on "fundamental" concerns of fairness and the presumption of innocence. The policy against admissibility of general propensity evidence stems from a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds" (internal citations omitted)

Id. at 767

Similarly, the State of Missouri (*State v. Ellison*, 239 S.W.3d 603, 607-08 (Mo.2007)) and the State of Washington (*State v. Gresham* 269 P.3d 207 173 Wn.2d 405 (Wash. 2012) have found the introduction of this type of propensity evidence was in violation of their state constitutions.

South Carolina

South Carolina courts have held that while generally inadmissible, propensity evidence is not prohibited. *State v. Benton* 338 S.C. 151, 156, 526 S.E.2d 228, 230. "Propensity evidence is admissible if offered for some purpose other than to show the accused is a bad person or he acted in conformity with his prior convictions." *Id.*, see *Rule 404 SCRE*. Clear and convincing evidence of other relevant crimes is admissible to prove: (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan that embraces several previous crimes so closely related to each other that proof of one tends to establish the other; or (5) identity. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), *Rule 404(b)*, *SCRE*. The comments to S.C. Rule of Evidence 404(b) note that South Carolina rule is different from the federal rule in that the South Carolina rule limits the admission of evidence to those purposes enumerated in *Lyle*.

In *Lyle*, South Carolina's landmark case on the admission of prior bad acts, the Defendant was charged with forgery and during the trial the state introduced evidence that the

Defendant had forged other checks on that same day and on prior occasions. *Id.* at 806. The South Carolina Supreme Court held that the forgeries committed on the same day were admissible to rebut the Defendant's alibi defense. *Id.* at 808. However the forgeries that were committed on the other dates in other locates, even though they were all committed in the exact same way, were not admissible, because no connection between the offenses made them a "continuous transaction." *Id.* at 812. In citing *People v. Molineux* with approval, the Lyle Court went on to state "[p]roof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of a juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence." *Id.* at 808.

However, even if propensity evidence is otherwise admissible, the evidence is still subject to the traditional rules of evidence. See *Benton* at 156, *State v. James*, 335 S.C. 25, 34, 583 SE2d 745, 748 (2003). Neither the trial judge's traditional role in weighing the probative value of evidence versus its prejudicial effect under Rule 403, nor Rule 401, is displaced by the operation of a statute where an element of an offense is a prior conviction. *Id.*

The issue of the State proving a criminal offense where an element of that offense is a prior conviction has been addressed in the context of the State's burglary statute. South Carolina Code of Laws 16-11-311(A)(2), provides a person may be convicted of first degree burglary if a person enters a dwelling without consent, with an intent to commit a crime and "the burglary is committed by a person with a prior record of two or more convictions for burglary..." The Supreme Court held in *Benton* that the admission of two prior burglary convictions offered to prove a statutory element of the first degree burglary charge, "not to suggest the defendant was a bad person or committed the present burglary, because he had committed prior burglaries."

Benton at 156. The court's holding in *Benton* set forth protective steps to limit the chance of improper conviction where prior acts are admitted as an element of the offense charged. *Benton* at 231. In *James*, the State entered into evidence certified copies of seven prior burglary convictions of the defendant, under the theory that 16-11-311(A)(2) read "two or more" prior convictions. The Court held that this was error, and that the probative value of the introduction of an additional five convictions decreases beyond the sufficient evidence to prove the element of the crime. *James* at 750.

Case law supports that the State cannot be forced to accept a defendant's stipulation to prior convictions because that would interfere with the State's right to prove its case with evidence of its own choosing. *State v. Hamilton*, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997). However, while "the State is entitled to submit evidence of "its own choosing" it must do so within the confines of the established rules of evidence." *James* at 750. In *James*, the Court cautioned that the potential for undue prejudice, for the impermissible interpretation of such evidence as propensity or character evidence, warrants great caution. *Id.*

Like Chief Justice Warren in his partial dissent in *Spencer v. Texas*, South Carolina courts have also recognized the fundamental due process concerns in the context of the presumption of innocence (see *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (S.C. 1998) at 723 citing *State v. Melcher*, 140 N.H. 823, 678 A.2d 146 (1996)), proof beyond and reasonable doubt (see *State v. Baker*, 309 S.C. 436, 424 S.E. 2d 492 (1992), held that the improper definition of reasonable doubt could "cause a reasonable juror to interpret the charge to allow a finding of guilt based on a degree of proof below that required by the due process clause." at 437) , and the prohibition against status crimes (*State v. Bostick*, 307 S.C. 226, 414 S.E.2d 175 (Ct. App. 1992)- evidence

of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate an accused is a bad individual).

South Carolina courts have found that the introduction of remote prior bad acts in sexual misconduct cases unfairly prejudicial and a reversible error. See *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (S.C. 1998), *State v. Fonseca*, 383 S.C. 640, 681 S.E.2d 1 (S.C.App. 2009) (affirmed by *State v. Fonseca*, 393 S.C. 229, 711 S.E.2d 906 (S.C. 2011)). These cases also echo the relationship between Rule 404(b) and Rule 403 as well as the critical importance of the balancing test under Rule 403. *Id.* While not having an explicit due process analysis, South Carolina jurisprudence has recognized how unfairly prejudicial the introduction of this type of evidence is.

In *Nelson*, the Appellant was accused of a sexual offense against a minor where motive was not made a material issue for trial. In finding that physical evidence of "childlike items" that were introduced to show the defendants propensity to be a pedophile were inadmissible, the Court noted "[a] necessary corollary to the presumption of innocence is that a defendant must be tried for what he did, not for who he is." *Id. citing* *State v. Melcher*, 140 N.H. 823, 678 A.2d 146 (1996). In *Fonseca*, the Supreme Court affirmed the Court Appeals reversal against the introduction of testimony two year old bad act against the same victim in a lewd act on a minor. In rejecting the trial courts analysis that the older act served to demonstrate the Appellants motive, intent, or common scheme or plan the Court of Appeals stated:

Thus, as in *Nelson*, because Appellant denies that the contact ever occurred, intent was not made a material issue. Furthermore, because intent is an element of most crimes, if we hold this evidence admissible, prior sexual acts would be admissible to prove the required intent in all prosecutions of subsequent sex crimes. Such is a thin disguise for impermissible character evidence and would undermine the protections of Rule 404. Without motive or

intent being a material issue, it is error to admit prior bad acts as evidence of the same in a sexual crime.

Fonseca at 649 (S.C. App).

At the time of the trial in the instant action, the State would have not been able to introduce this evidence but for the fact that the State elected to disregard his original indictment and proceed under section (A)(2) of the statute. The State cannot articulate any exception under Rule 404(b) or *Lyle*. Here, the State would not have been able to show a common plan or scheme in a subsequent trial because the connection between the prior bad act and the crime must be more than just a general similarity. *See State v. Stokes*, 279 S.C. 191, 304 S.E.2d 814 (1983) (noting the connection between the prior bad act and the crime must be more than just a general similarity); *see also State v. Rivers*, 273 S.C. 75, 254 S.E.2d 299 (1979). It would not fit into a common scheme exception as the prior conviction was fifteen years removed and involved an older child. PTM p. 9-11; R. p. 9-11. Even if the State could have convinced the trial judge that this evidence did fit an exception, under *Lyle* the conviction would have been subject to a Rule 403 balancing test.

Prior to the original indictment being presented to the grand jury in November of 2010 under section (A)(1), the State had knowledge of Appellant's prior conviction that would qualify under section (A)(2), but chose to proceed under the statute with a more significant penalty. No new facts came to light in the case, other than the fact that Appellant exercised his right to a jury trial. There is no dispute that the accuser in the case was under eleven years old, and that an indictment under (A)(1) was proper. No other justification can be given by the State for proceeding under (A)(2) other than its desire to convict Appellant based upon his prior conviction. The only reasonable inference on the State's election to proceed under 16-3-655(A)(2) is that the State would be able to allow into evidence an otherwise prohibited

conviction. Indeed, the State believed that Appellants prior bad acts were so important that it was referenced in both their opening and closing arguments.

While the trial court was correct to provide a jury instruction and limit the disclosure of the prior conviction, the manner in which the court chose to allow the State to disclose the conviction was highly prejudicial. In the Appellant's redacted prior conviction, the entire section of "Other conditions" is blacked out in a non-uniform manner. See State's Exhibit 11; R. p. 269. It is clear from the manner of redaction that the entire section of the conditions space for the form was used. The only inference the jury could give this evidence is that the sentence in Appellant's prior condition was substantial. This inference is only enhanced by the fact that the term "years" circled in multiple places.

The trial court also erred in not following the traditional rules of evidence by not conducting an on the record balancing test of the prior conviction under Rule 403. As the Court in *James* noted, there must be an interplay between Rule 403 and the statute providing the prior conviction as an element of the crime. *James* at 748. The court is performing its responsibility as a gate keeper when the trial court does not balance this type of evidence or feels that because of the nature of the statute he is not required to. Particularly with sex crimes, where the danger for prejudice is so great, the court should not be allowed to be forced to shirk its responsibility.

With no physical evidence of the alleged crime introduced at trial and with some questions of credibility relating to the accuser, the introduction of a prior conviction for lewd act on a minor was fundamentally prejudicial. The introduction of Appellant's prior conviction was fundamentally unfair and stripped him of any of the protections provided by SCRE 403, SCRE 404(b), and the South Carolina Constitution. If the General Assembly is allowed to create a giant

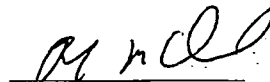
exception to our state's history against the introduction of propensity evidence what is stopping them from allowing the exception to swallow the rule? If this court allows the exception to continue, why wouldn't the legislature create a crime called "aggravated DUI" and define it as one having one or more DUI within the past 10 years. What about "aggravated drug sales" by defining it as having one or more drug sales within the past 10 years. "What about "aggravated shoplifting" by the same type law? The General Assembly simply cannot take away the fundamental right to a fair trial by such tactics. The Constitution prohibits it and only the courts can enforce the constitution.

CONCLUSION

Appellant's conviction should be reversed.

Respectfully submitted,

Craig Stanley


Robert M. Dudek

ATTORNEYS FOR APPELLANT

Date: JUNE 14, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JON WYNN JARRARD, SR.,

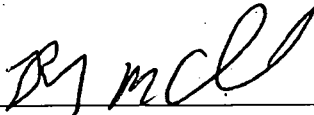
APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCARCR, 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."

June 30th, 2014

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

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THE STATE,

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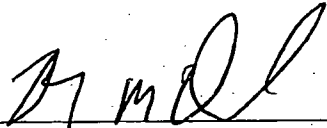
JON WYNN JARRARD, SR.,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of June, 2014.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Larry B. Hyman, Circuit Court Judge
Appellate Case No. 2012-212269

THE STATE

Respondent,

v.

JON WYNN JARRARD, SR.,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly allowed the State to present its case as indicted, and the certified copy of Appellant's prior conviction was offered as evidence of a specific statutory element of the offense rather than propensity evidence.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In May 2010, an eight year old child (the Victim”) in Horry County disclosed her grandfather, Appellant Jon Wynn Jarrard, Sr., molested her on multiple occasions in her bedroom. In November 18, 2010, the Horry County Grand Jury indicted Appellant on one count of first degree criminal sexual conduct with a minor under S.C. Code §16-3-655(A)(1) (Supp. 2013). In January 2011, the Grand Jury indicted Appellant on one count of lewd on a minor under S.C. §16-15-140 (2003).

Appellant had a prior conviction for lewd act on a minor, and he was on the sex offender registry. On April 2, 2011, the Grand Jury indicted Appellant on one count of first degree criminal sexual conduct with a minor pursuant to S.C. Code §16-3-655(A)(2) (Supp. 2013). Thereafter, the State *nolle prossed* the November 2010 criminal sexual conduct indictment, and proceeded on the January 2011 lewd act indictment and the April 2011 criminal sexual conduct indictment.

The case was scheduled for trial the week of June 11, 2012. On April 3, 2012, Appellant moved to prevent the State from proceeding on the April 2011 indictment, or in the alternative, to suppress evidence of his prior lewd act conviction and the required sex offender registration. Appellant argued the State’s sole purpose for re-indicting him was retaliation for his decision to go to trial. The prosecutor responded the decision to re-indict was not in retaliation, but the case was simply her first opportunity to use §16-3-655(A)(2) because most of the defendants in her cases did not have prior convictions. The circuit court ruled the State could proceed on the April 2011 indictment, but did require the State to elect whether to proceed with the prior conviction prong or the sex offender registry prong, and the State indicated it would only present evidence of the

prior conviction. (April 3, 2012 Hearing Transcript [4/3 HT], pp. 1-17; Record on Appeal [R.], pp. 1-17).

The trial commenced on June 11, 2012, before the Honorable Larry B. Hyman, Circuit Court Judge. Prior to opening statements, the State confirmed it only intended to show Appellant's prior lewd act conviction by introducing a certified copy of the conviction, and did not intend to mention the sex offender registry. Upon Appellant's motion, the sentencing judge's handwritten notes regarding conditions of the sentence, and the actual number of years of Appellant's sentence, were redacted. (Trial Transcript [TT], pp. 35- 43; R., pp.24-32).

During opening statements, the State indicated it had to prove a sexual battery occurred on a minor under the age of sixteen by a person with a prior conviction for lewd act, and stated there would be evidence presented showing the Victim was under the age of sixteen and Appellant had a prior conviction for lewd act. Appellant's counsel also referenced the prior conviction as an element the State had to prove beyond a reasonable doubt, and stated he did not "think that's going to be too difficult to do." He then stressed the prior conviction had nothing to do with the current case. (TT, pp. 62-76; R., pp. 35-49).

Pamela Gause ("Gause") testified she babysat for the Victim and her younger sister in 2010-2011, and kept them about 150 times during that time. In May 2010, the Victim and Gause's six year old daughter were caught in the daughter's bed with their pants down and touching each other's genitalia. When Gause spoke to her daughter and the Victim about the incident, she asked the Victim if anyone had ever touched her that way, but the Victim did not respond immediately. The Victim eventually disclosed she had been molested, and told Gause who had molested her. Gause then contacted the

Victim's mother (Appellant's daughter), and told her to come from work right away. Gause had no further involvement in the matter. (TT, pp. 76-88; R., pp. 49-61).

The Victim's mother testified Gause called her at work one day and said there was a problem with the Victim. When the mother arrived at Gause's home, Gause told her about the Victim's disclosures. The next day, she took the Victim to the police and reported the molestation. (TT, pp. 102-108; R. pp. 62-68).

The mother also admitted she thereafter gave the solicitor's office affidavits and a video of the Victim purporting to recant the allegations, but testified at trial the Victim never recanted. She stated the affidavits were prepared by her mother, Appellant's wife and the Victim's grandmother, and she signed them because the situation was tearing her family apart and the grandmother (her mother) asked her to sign them. She further stated the grandmother coached the Victim to make the statements on the video. (TT, pp. 108-117, 121, 126-127; R., pp. 68-77, 81, 86-87).

The Victim testified Appellant touched her on her "privacy" with his hands. She stated the incidents occurred in her bedroom, she woke up when Appellant put his fingers "inside of it," and it felt "gross" and "uncomfortable." The Victim further testified she did not tell her mother about what happened because it would get her grandfather in trouble and she loved him. (TT, pp. 157-170; R., pp. 88-101).

The Victim stated her grandmother made her say on the video that she made the allegations up, and she "didn't feel right" about having to say it. (TT, pp. 170-171; R., pp. 101-102). She also testified her grandmother also told her to write a letter to her grandfather saying she was sorry she lied and got him in trouble. (TT, pp. 184-185, 193-194; R., pp. 115-116, 124-125).

Carol Rahter, M.D., was qualified as an expert in child sexual assault examinations. She testified she interviewed the Victim in June 2010 at the request of the Horry County Police Department, and performed a medical examination. The Victim told her about an incident of sexual assault when the Victim was seven years old, and said it occurred in Horry County. The physical examination did not reveal any abnormalities, which Dr. Rahter testified was normal given the Victim's age and the length of time since the assault occurred. (TT, pp. 208-225, 232-258; R., pp. 133-150, 157-183).

An investigator with the Horry County Police Department testified he did a background check on Appellant during the investigation of this case, and discovered Appellant had a prior conviction for lewd act on a minor. (TT, p. 201; R., p. 132). The State introduced, over Appellant's objection, a certified copy of Appellant's prior lewd act conviction. (TT, pp. 275-277, State's Exhibit 11; R., pp. 200-202, 269). The circuit court instructed the jury the prior conviction was admitted "for one purpose and one purpose only and that was to establish or go to establish, whether it establishes it or not entirely up to you, but to establish one of the elements of the offense [Appellant] is charged with," and admonished the jury to "consider it for no other purpose." (TT, pp. 291-292; R., pp. 210-211).

During closing argument, Appellant's counsel acknowledged the prior conviction was an element of the offense because "the legislature, in all their knowledge, upped the ante and said that we're going to make that an element of the crime." He also argued the jury would not do justice if it convicted Appellant of the current charge because of the prior conviction. (TT, pp. 300-301; R., pp. 214-215).

The solicitor referenced the prior conviction twice very briefly during closing argument. The first reference regarded why the legislature passed the law, and the second reference was strictly in connection with the evidence in the record as to each element of the offense. (TT, pp. 319, 322-323; R., pp. 233, 236-237).

Before going into the general jury charges, the circuit court again charged the jury regarding its use of the prior conviction.

Ladies and gentlemen, let me remind you again that there is evidence of a prior conviction for committing a lewd act upon a minor presented in this trial. That evidence was presented for one and one purpose alone, to meet the requirements of the statute. The statute requires that the State prove to you beyond a reasonable doubt that the defendant has been previously convicted of one of a number of offenses, lewd act is one of those included offenses. You must not consider that evidence if you believe it for any other purposes. You may be inclined to say he committed that act so he must have committed this act; that would be inappropriate. You may say someone who did that is not believable, credibility, that is not appropriate. The only purpose for which you may consider that evidence is whether or not the State has proven to you beyond a reasonable doubt that he has a prior conviction of the offense.

(TT, p. 333; R. p. 247).

After approximately forty minutes of deliberations, the jury asked to rehear the Victim's testimony and the forensic interview. It also requested a definition of penetration. The testimony was read to the jury, and without objection, written transcripts of the forensic interview were provided to the jurors, and additional information regarding penetration was provided. (TT, pp. 347-354; R., pp. 254-261).

After another twenty minutes of deliberation, the jury convicted Appellant of both charges, and the circuit court sentenced him to concurrent prison terms of fifteen years. (TT, pp. 354-360; R., pp. 261-267). This appeal followed.

ARGUMENT

The circuit court properly allowed the State to present its case as indicted, and the certified copy of Appellant's prior conviction was offered as evidence of a specific statutory element of the offense rather than propensity evidence.

Appellant contends the circuit court erred in allowing the State to proceed under S.C. Code §16-3-655(A)(2) and introduce his 1997 lewd act conviction. He asserts the conviction's only relevance was to unduly prejudice the jury, and allowing its introduction constituted a denial of due process. While Appellant's lengthy discussion of due process accurately reflects the due process requirements, there are two fundamental flaws in his assertions relative to the application in the case.

As a threshold matter, Appellant ignores the well-established principle that the prosecutor has discretion to determine what charges to bring against a defendant.

"In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." Wayte v. United States, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) (*quoting* United States v. Goodwin, 457 U.S. 368, 380, n. 11, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982)). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

State v. Geer, 391 S.C. 179, 705 S.E.2d 441, 449 (Ct. App. 2010) (quotations and citations in original); *see also* United States v. Batchelder, 442 U.S. 114, 123-124 (1979) ("This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants."); Strickland v. State, 276 S.C. 17, 274 S.E.2d 430, 432 (1981) (fact that prosecuting attorney may select which of several offenses to charge is not unconstitutional) (*citing* Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 [1975]).

"An accused person's protection lies in the fact that he may not be convicted unless upon a fair trial he is found guilty beyond a reasonable doubt of all of the elements of the offense of which he stands charged." Simmons, 215 S.E.2d at 884-885.

This discretion does not end when charges are filed. Rather, it continues through the pre-trial proceedings, including plea negotiations, discovery and motions, until the case is actually tried. United States v. Goodwin, 457 U.S. 368 (1982) footnotes omitted).

In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized.

....

In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some "burden" on the prosecutor. Defense counsel routinely file pretrial motions to suppress evidence; to challenge the sufficiency and form of an indictment; to plead an affirmative defense; to request psychiatric services; to obtain access to government files; to be tried by jury. It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.

.... A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. As we made clear in Bordenkircher, the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.

Id. at 381-382 (1982) (footnotes omitted).

In this case, the solicitor initially charged Appellant under S.C. Code §16-3-655(A)(1), which provides that a person is guilty of first degree criminal sexual conduct with a minor if he commits a sexual battery on a victim less than eleven years of age. A conviction under that code section carries a mandatory minimum sentence of twenty-five

years in prison, no part of which can be suspended and no probation granted, or life in prison. S.C. Code §16-3-655(D)(1) (Supp. 2013).

Approximately four months later, and well over a year before the case was called for trial, the solicitor re-indicted Appellant under §16-3-655(A)(2), which provides that a person is guilty of first degree criminal sexual conduct with a minor if he commits a sexual battery on a victim less than sixteen years of age, and has previously been convicted of an offense listed in S.C. Code §23-3-430(C), or been included in the sex offender registry pursuant to S.C. Code §23-3-430(D). A conviction under this code section carries a mandatory minimum sentence prison sentence of not less than ten years or more than thirty years, no part of which may be suspended or probation granted. S.C. Code §16-3-655(D)(2) (Supp. 2013). At trial, the solicitor elected to proceed only on the prior conviction prong, and never introduced evidence indicating Appellant was also included in the sex offender registry. (4/3 HT, pp. 16-17, TT, pp. 35-36; R., pp. 16-17, 24-25).

There is no dispute the Victim was under the age of thirteen at the time of the incident, and a charge under §655(A)(1) was appropriate. On its face, however, §655(A)(2) includes victims under thirteen years of age, and even though the charging decision was the solicitor's to make, she determined the sentencing parameters of §655(A)(2) were more fitting under the circumstances of the case. (State's Response to Defendant's Motion to Prevent State from Proceeding under 16-3-655(A)(2), p. 3, TT, p. 356; R., pp. 3, 263). The solicitor acted well within her discretion in determining what charges to bring in the case, Appellant had ample notice of the charges, and there was no due process violation in relation to the charges.

Appellant argues the sole reason the solicitor elected to proceed under §16-3-655(A)(2) was to circumvent the prohibition against propensity evidence. In advancing his position, however, Appellant glosses over the case law regarding evidence of prior convictions in first degree burglary cases, which is directly on point with the instant case regarding the admissibility of prior convictions when the conviction itself is an element of the offense.

While generally inadmissible, propensity evidence is not prohibited, and it is admissible if offered for a purpose other than to show the defendant is a bad person, or acted in conformity with his prior conviction.¹ State v. Benton, 338 S.C. 151, 526 S.E.2d 228, 230 (2000). “[E]vidence of other crimes is admissible to establish a material fact or element of the crime charged.” *Id.* The State is still required to prove all elements of the offense charged beyond a reasonable doubt, and “due process does not bar the admission of prior crimes simply because there is an accompanying prejudicial effect.” *Id.*; *see also State v. Cheatham*, 349 S.C. 101, 561 S.E.2d 618, 622 (Ct. App. 2002) (same).

Under S.C. Code §16-11-311(A) (Supp. 2013), a person commits first degree burglary if he enters a dwelling without consent and with the intent to commit a crime therein, and one or more delineated aggravating circumstances exists. The statutory aggravating circumstances include presence or use of a deadly weapon, or causing physical injury to a non-participant in the crime, or the defendant has two or more prior convictions for burglary and/or housebreaking, or the entering or remaining occurs in the

¹ “Propensity” is defined as a “natural inclination” or “bent.” Webster’s II New Riverside Dictionary, 549 (Rev. Ed. 1996). Thus, if the evidence at issue is not offered to show the defendant acted in conformity with his prior conduct, it is not “propensity” evidence by definition.

nighttime. The legislature chose to include the “two or more” prior convictions element of first degree burglary as a deterrent to repeat offenders. Benton, 526 S.E.2d at 230.

If the defendant has two or more prior convictions, he cannot require the State to stipulate to the convictions, or to one of the other delineated aggravating circumstances, in lieu of presenting evidence regarding the prior convictions. Benton, 526 S.E.2d at 230 (State cannot be required to accept defendant’s stipulation to the existence of his prior convictions) (*citing* State v. Hamilton, 327 S.C. 440, 486 S.E.2d 512 [Ct. App. 1997]); Cheatham, 561 S.E.2d at 622 (State not required to accept defendant’s stipulation that burglary occurred in the nighttime in lieu of presenting evidence of defendant’s prior convictions). Allowing the State to present the prior convictions evidence does not dilute its burden of proof in violation of due process. Benton, 526 S.E.2d at 230; Cheatham, 561 S.E.2d at 622. When prior convictions are offered to prove an element of the charged offense, the evidence’s probative value is not outweighed by its prejudicial effect as a matter of law. Benton, 526 S.E.2d at 230 (*citing* Rule 403, SCRE).

Appellant contends the Supreme Court’s holding in State v. James, 355 S.C. 25, 583 S.E.2d 745 (2003), somehow changed the Benton analysis. On the contrary, the Court reiterated the Benton holding, specifically regarding the interplay between Rule 403 and the first degree burglary statute, and the conclusion that admission of the two prior convictions in a first degree burglary case was more probative than prejudicial. *Id.* at 748.

The issue in James, however, was admission of seven prior convictions, five more than required by the statute to prove first degree burglary. The Court noted that under the rule of Old Chief v. United States, 519 U.S. 172 (1997), “the probative value of the convictions entered beyond the two required by the statute decreases because of

the already sufficient evidence submitted to prove that element.” *Id.* at 750 (emphasis supplied). Acknowledging “there may be rare occasions where the admission of more than two prior burglary convictions is more probative than prejudicial,” the Court found the “very great potential for prejudice” outweighed the probative value of “all seven prior convictions.” *Id.* In short, the probative value of the number of prior convictions required under the applicable statute outweighs the prejudicial effect, but admission of any prior convictions beyond that number requires a Rule 403 probative/prejudice analysis.

In this case, the State only introduced the one prior conviction required by §16-3-655(A)(2), and as a matter of law, the probative value of that evidence outweighed its prejudicial effect. The circuit court twice properly instructed the jury regarding the limited purpose of the evidence, and admonished the jury not to use it for any other purpose.² Therefore, Appellant’s conviction should be affirmed.

²Appellant’s contention the manner in which the conviction was disclosed was highly prejudicial because of the way the document was redacted is meritless. Appellant specifically requested that the entire “Other Conditions” section and the actual sentence be redacted, and did not object to the way the redactions were done. (TT, pp. 38-43, 276-277; R., pp. 27-32, 201-202). Thus, he cannot now argue the redactions themselves made the document more prejudicial.

CONCLUSION

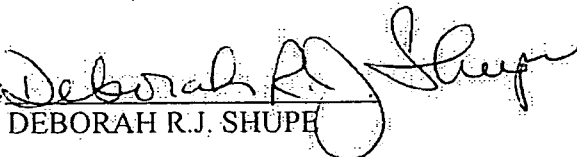
Based on the foregoing, Respondent respectfully submits Appellant's conviction should be affirmed.

Respectfully submitted,

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June 23, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Horry County
The Honorable Larry B. Hyman, Circuit Court Judge
Appellate Case No. 2012-212269

THE STATE,

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JON WYNN JARRARD, SR.,

Appellant.

CERTIFICATE OF COUNSEL

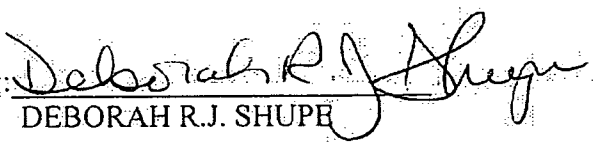
The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings:

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ATTORNEYS FOR RESPONDENT

June 23, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Horry County
The Honorable Larry B. Hyman, Circuit Court Judge
Appellate Case No. 2012-212269

THE STATE,

Respondent,

v.

JON WYNN JARRARD, SR.,

Appellant.

PROOF OF SERVICE

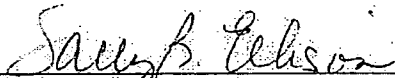
I, Sally B. Ellison, certify I served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing copies in the United States mail, postage prepaid, addressed to:

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I further certify all parties required by Rule to be served have been served.

This 23rd day of June, 2014.


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