THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

THE STATE,

RESPONDENT,

V.

LEONARD EUGENE JENKINS,

APPELLANT

APPELLATE CASE NO. 2013-001753

Appeal from York County

Donald B. Hocker, Circuit Court Judge

Opinion No. 2015-UP-429

PETITION FOR REHEARING

On August 19, 2015, this Court affirmed Appellant's conviction for lewd act upon a child in an unpublished opinion. State v. Jenkins, 2015-UP-429 (S.C. Ct. App. filed Aug. 19, 2015). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter in light of several points overlooked and/or misapprehended by the Court as discussed infra.

On appeal, Appellant raised a single issue – whether the trial judge erred in refusing his request to use a video recorded interview between the prosecution's key witness and a police investigator to impeach the witness regarding her prior inconsistent statements. In its opinion, this Court addressed portions of the witness's testimony separately to determine the video was not

admissible pursuant to Rule 613(b), SCRE. In doing so, this Court overlooked and/or misapprehended significant portions of the record.

Brief Factual Summary

Minor 1 and Appellant's daughter were friends. Minor 1 frequently visited daughter in Appellant's home. Minor 1 testified that one day during the summer, she and Appellant were sitting on the couch in Appellant's home. Minor 1 testified that Appellant touched her while the two sat on the couch together. R. 24, line 12 – R. 29, line 10; R. 34, line 21 – R. 35, line 8; R. 35, line 23 – R. 36, line 3; R. 42, lines 16-25. According to Minor, when Appellant's daughter walked into the room from the bathroom, Minor 1 walked outside without saying anything about the alleged touching. She and Appellant's daughter played for the rest of the day. R. 30, lines 9-17. Even after the alleged improper touching, Minor 1 and Appellant's daughter continued to play together. R. 36, lines 4-7.

(1) The time period in which the alleged incident occurred

This Court held the trial court properly ruled the video was inadmissible because Minor 1 admitted making prior inconsistent statements regarding the time period in which the alleged improper touching occurred. However, a close review of the record reveals Minor 1 failed to admit *unequivocally* that she made a prior inconsistent statement regarding a crucial issue in the case – when the alleged lewd act occurred.

Minor 1 claimed that on an unknown day during the summer of 2011 she was playing with Appellant's daughter when the two decided to enter Appellant's house to cool down. Although Minor 1 was unable to give a specific day, she recalled that she went to Georgia to stay with her grandmother approximately two weeks after summer started and remained there until about a week before school started again. Later, Minor 1 testified that the alleged incident

occurred *before* she went to Georgia for the summer. R. 24, line 12 – R. 29, line 10; R. 34, line 21 – R. 35, line 8; R. 35, line 23 – R. 36, line 3; R. 42, lines 16-25. Thus, the alleged incident had to have occurred during the first two weeks of summer.

However, when Minor 1 spoke to the investigating officer, Minor 1 claimed the alleged incident occurred "two to three months ago" meaning two to the three months before her interview with the officer. She told the officer "it happened right before school started." Minor 1's statements to the officer were in great contrast with her trial testimony because according to her testimony, the alleged incident occurred during the first two weeks of the summer, which would have been *eight or nine months* before her interview with the officer.

When asked about this inconsistency, she explained that "it slipped [her] head because [she] was so nervous." R. 39, line 10 – R. 40, line 7. Later, Minor 1 testified that she realized she had "slip[ped] up" regarding the date *after* she was interviewed by the officer or the solicitor. She did not believe that the officer or the solicitor told her she had slipped up, but she did try "to get [her] story right." R. 46, line 5 – R. 47, line 2. Although Minor 1 stated that she told the officer that the alleged incident took place two to three months prior to her interview with Neely, she explained her answer by saying "I mean, I hadn't really a good time - - I was trying to remember exactly when it happened because I tried as best as possible, but it slipped my head because I was so nervous." R. 39, line 19 – R. 40, line 2.

On re-direct examination, the prosecutor asked "how narrow" was Minor 1's answer to the officer on the timeframe. Minor 1 responded that she was trying to narrow it down and told the officer all that she could remember. R. 55, lines 10-21. In response to the prosecutor's questioning on re-direct examination, Minor 1 testified that she could "not remember a lot of [the

video interview] because it was about maybe - - it was just a while ago" and she could "not really remember exactly." R. 58, lines 11-21.[1]

The South Carolina Rules of Evidence permit the introduction of extrinsic evidence of prior inconsistent statements of a witness when

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

Rule 613, SCRE (emphasis added); see also State v. Fossick, 333 S.C. 66, 69-70, 508 S.E.2d 32, 33 (1998)(finding error in failing to admit extrinsic evidence of a statement where the witness denied making the statement). A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982).

This Court observed that "[i]n determining whether a witness has admitted making a prior inconsistent statement and thereby obviated the need for extrinsic proof, the courts of our state and other jurisdictions have held that the witness must admit making the prior statement unequivocally and without qualification." State v. Blalock, 357 S.C. 74, 591 S.E.2d 632 (Ct. App. 2003)(citing State v. Bottoms, 260 S.C. 187, 194, 195 S.E.2d 116, 118 (1973) & C.J.S. Witnesses 727 (2002)). This Court explained that "[g]enerally, where the witness has responded with anything less than an

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[1] In addition to the argument that Minor 1's testimony on direct and cross examination was not an unequivocal admission and therefore, the video was admissible, Appellant also argues that this Court should consider the re-direct examination of Minor 1 to determine that Minor 1's responses were equivocal and the video was admissible. This Court held this argument was not presented at the trial level and is not preserved for review. In a separate part of this petition, Appellant counters this holding. Although Appellant presents this argument in a separate section, Appellant respectfully requests that the argument regarding consideration of re-direct examination be considered as to **each** of Minor 1's inconsistent statements.

unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement. Id. at 80, 591 S.E.2d at 636.

> If the witness neither directly admit[s] nor den[ies] the act or declaration, as when he merely says that he does not recollect, or, or as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember.

Id. (quoting State v. Sullivan, 43 S.C. 205, 211, 21 S.E. 4, 7 (1895)).

Nothing short of an absolute unequivocal admission satisfies Rule 613(b). In Blalock, 357 S.C. at 80, 591 S.E.2d at 636, this Court held the witness's response to questions about her prior statement did "not meet the standard of a clear and unequivocal admission that the precedent case law demands." Acknowledging that the witness did "admit that she said the portion of the statement quoted" toward the end of the examination, this Court held such an admission was not sufficient because the witness was adamant throughout her testimony that the statement as recorded by the detective was incomplete. Id. at 81, 591 S.E.2d at 636.

Similarly, in State v. Carmack, 388 S.C. 190, 201-202, 694 S.E.2d 224, 230 (Ct. App. 2010), this Court held that a prior inconsistent statement by a witness who said his prior statement was "'accurate,'" that "certain details were not in his original statement because such details were not inquired into at the time and 'everything was chaotic'" was admissible because the witness "did not unequivocally admit making a prior inconsistent statement." In State v. Moses, 390 S.C. 502, 523, 702 S.E.2d 395, 406 (Ct. App. 2010), this Court held the trial court properly admitted a prior inconsistent statement by a witness who testified she "could not remember" having made the prior statement because such was "not an unequivocal admission."

Minor 1's testimony was not an unequivocal admission regarding a central issue of the case – when the alleged improper touching occurred. When questioned about the inconsistency,

Minor 1 did not admit that she had been inconsistent. Rather, she claimed it had slipped her mind and that she was trying to get her story straight. This Court erred in concluding Minor 1's testimony was an unequivocal admission that she had given a prior inconsistent statement on this vital matter.

(2) **The position Minor 1 had her legs at the time of the alleged incident**

This Court held the trial judge properly ruled the video was inadmissible because Minor 1 admitted making the prior inconsistent statements regarding the position of her legs at the time of the alleged improper touching. Again, a careful review of the record reveals Minor 1 did not unequivocally admit to making a prior inconsistent statement regarding the position of her legs.

At trial, Minor 1, claimed that Appellant, his wife, and all three of his children were in the home when the alleged touching occurred. While Appellant's daughter used the bathroom, Minor 1 sat on the couch. Minor 1 claimed that at some point, Appellant sat down on the couch beside her. Appellant, who had been holding his toddler when he entered the room, placed the toddler on Minor 1's lap. Minor 1 claimed that while she was playing with the toddler, Appellant reached over and improperly touched her. R. 24, line 12 – R. 29, line 10; R. 34, line 21 – R. 35, line 8; R. 35, line 23 – R. 36, line 3; R. 42, lines 16-25. All of this allegedly occurred while Minor 1 *still* had the toddler on her lap. When Appellant's daughter walked into the room from the bathroom, Minor 1 put the toddler on Appellant's lap and walked outside. R. 30, lines 9-17.

This contrasted greatly with her video recorded interview with the investigating officer. Minor 1 told the officer that when Appellant touched her, she had her "knees almost up to [her] chest" and her legs were spread. R. 43, line 16 – R. 44, line 4. No doubt having her knees to her chest with her legs spread was a vastly different position than having a toddler on her lap.

Although on cross-examination, Minor 1 admitted she told Neely that her knees were almost to her chest and that her legs were spread when the alleged touching took place, R. 43, line 20 – R. 44, line 4, the state's re-direct examination of Minor 1 revealed that even these admissions could not be construed as unequivocal admissions due to Minor 1's lack of memory of the interview with Neely.

Essentially, the re-direct examination turned the unequivocal admissions into equivocations. The state's re-direct examination of Minor 1 reinforced and highlighted the equivocation of Minor 1's responses relative to her prior inconsistent statements. After the prosecutor made clear that Minor 1 had not seen the video, she asked, "So the video that was taken a year and a half ago - - when you are answering Mr. Hall's questions, are you just trusting he is giving you what happened or do you have a recollection of what you talked about?" Minor 1 responded that she was "pretty confused about what he was saying is what he had gotten from the report." R. 54, lines 5-11. Unabashed, the prosecutor continued: "When Mr. Hall is asking you questions about what is in the video, do you independently remember or do you understand or trust that he is telling you what he viewed on the video?" Minor 1 responded, "Um, kind of what he viewed on the video." R. 54, lines 19-23.

A party must clearly present his grounds at trial to preserve it for appeal. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). The ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial. State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (1999). In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912 – 13 (Ct. App. 2004). Appellant raised this issue with specificity

before the trial judge. There is no doubt that the judge considered the prosecutor's re-direct examination of Minor 1 in making his ruling as his ruling occurred *after* the prosecutor engaged in re-direct examination. See R. 137, line 1 – R. 138, line 23; R. 154, lines 8-23. While Appellant did not say the prosecutor's re-direct examination had transformed any "denials" into equivocations, Appellant argued that Minor 1 had testified inconsistent with her video recorded interview. This argument was made after the prosecutor engaged in re-direct examination; therefore, the argument obviously encompassed all of the testimony before the court to that point. See R. 71, line 7 – R. 75, line 1; R. 109, line 25 – R. 111, line 15; R. 112, lines 5-25; R. 119, lines 3-21. This issue was raised with sufficient specificity to alert the trial judge that consideration of the prosecutor's re-direct examination was necessary to determine whether Minor 1 had testified inconsistently with her video recorded statement.

The prosecutor's re-direct examination portrayed defense counsel as dishonest in his cross-examination by suggesting that what defense counsel said was on the video was not in fact on the video. This was particularly disingenuous in light of the prosecutor's repeated objections to Appellant's attempts to introduce the video into evidence. The prosecutor misled the jury in her questioning of Minor 1 as to what was contained on the video and how the Minor 1's statements to the officer differed from her trial testimony. The deceitful questioning created a false impression for the jury regarding the veracity of Minor 1 and of defense counsel personally.

Without question, the prosecutor's re-direct examination of Minor 1 turned each of her responses into equivocations. Further, the prosecutor's questions cast personal aspersions on Appellant's counsel by suggesting that counsel's questions were not accurate as to what was contained on the video. Consideration of the prosecutor's re-direct examination demonstrates

that Minor 1's responses were not unequivocal admissions to inconsistent statements. Therefore, Appellant should have been permitted to introduce the video to impeach Minor 1.[2]

(3) **The clothing Minor 1 was wearing**

This Court held the trial judge properly ruled the video was inadmissible because the testimony on this point concerned a collateral issue, not subject to impeachment by the admission of extrinsic evidence. The clothing Minor 1 was wearing at the time of the alleged improper touching was not a collateral issue. The clothing she was wearing when the alleged incident occurred was central to her credibility, which was the entirety of the state's case. This was a classic "he said, she said" as there were no other witnesses and no physical evidence. The only evidence that Appellant engaged in any improper conduct was Minor 1's testimony, which was contradictory and inconsistent with statements she gave to the police when the alleged event would have been fresher in her mind.

Minor 1 testified at trial that she had on a blue and white top when the incident allegedly occurred, but on the video she told the officer she was wearing the top she had on at the time of the interview. R. 40, lines 16-24.[3] When Appellant asked if the top she had on during her interview with the officer was an olive green t-shirt, Minor 1 responded, "I mean, I can't remember exactly what the top was. It was - - it was either blue or green. I can't really remember." R. 40, line 25 – R. 41, line 7. Concerning her response about the telling the officer she was wearing the same top on the date of the interview as she wore on the date of the alleged incident, Minor 1 responded, "I believe so, yes." R. 40, lines 20-24. When Appellant queried Minor 1 on the color of the shirt she wore on the date of the interview, Minor 1 responded, "I

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[2] Appellant respectfully requests his argument that consideration of re-direct examination is preserved for review and that it supports his position that Minor 1's responses were not unequivocal admissions be considered as to **each** of Minor 1's inconsistent statements.

mean, I can't remember exactly what the top was. It was - - it was either blue or green. I can't really remember." R. 40, line 25 – R. 41, line 7. Quite clearly, this was not an unequivocal admission that she gave a prior inconsistent statement.

The color of Minor 1's shirt on the date of the alleged incident was not a collateral matter. According to this Court, "[t]he color of the shirt worn by Minor [1] at the time of the alleged incident had no evidentiary value and was not relevant to any issue of consequence in this case." However, Minor 1's statements about the color of her shirt were very relevant to the case. "[T]he credibility of a witness with respect to a material issue in a case is not a collateral, immaterial or irrelevant matter." State v. Galloway, 263 S.C. 585, 593, 211 S.E.2d 885, 889 (1975)(internal citation omitted). Thus, "if a prior statement bears upon the story of a witness with such force and directness as to give it appreciable value in determining whether or not that story is true, such statement may be introduced against him." Id. Minor 1's prior inconsistent statement about the color of her shirt at the time of the alleged improper touching was central to Minor's credibility. The entire case boiled down to whether Minor 1 was telling the truth. While it is true that the actual color of her shirt had little to do with whether Appellant touched her improperly, the fact that Minor 1 gave inconsistent statements on the matter was very material to her credibility, which was the only issue in the case. This Court erred in finding Minor's prior statement regarding the color of her shirt was a collateral matter.

(4) **The way Appellant allegedly touched Minor 1**

This Court found Minor 1's statement in the video was not inconsistent with her testimony at trial regarding how Appellant allegedly touched Minor 1. The record reveals otherwise.

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[3] The top she wore during the video statement was not blue and white.

At trial, Minor 1 claimed that Appellant put his hands "right in front where the zipper is" underneath her shorts and underwear. She elaborated that this was "right in the front, not between the legs but just like right down there in the front." Minor 1 referred to this area as "the privates." R. 29, line 11 – R. 30, line 6; R. 32, lines 19-24. Specifically, Minor 1 claimed that three of Appellant's fingers went into the front of her shorts. R. 24, line 12 – R. 29, line 10; R. 34, line 21 – R. 35, line 8; R. 35, line 23 – R. 36, line 3; R. 42, lines 16-25.

On the video, Minor 1 told the officer Appellant's hand had touched her. When questioned about this inconsistency, Minor 1 claimed she *did not remember* telling the officer that she thought *only* Appellant's hand had touched her. R. 48, lines 2-9. Minor 1 unequivocally denied telling the officer that only Appellant's hand had touched her:

> Q. Do you remember telling Detective Neely on the video that - - I think your words were, I think that his hand was touching - - do you remember saying that? You don't remember that?
>
> A. No.

R. 48, lines 2-5. Despite the stark contrast between her trial testimony and her video interview, Minor 1 testified that she told the officer "exactly what happened." R. 45, lines 17-19. This *denial* required introduction of extrinsic evidence of the inconsistent statement pursuant to the plain language of the statute and controlling case law. See Rule 613, SCRE; see also Fossick, 333 S.C. at 69-70, 508 S.E.2d at 33; Copeland, 278 S.C. at 572, 300 S.E.2d at 63; Blalock, 357 S.C. at 80, 591 S.E.2d at 636; State v. Carmack, 388 S.C. at 201-202, 694 S.E.2d at 230; Moses, 390 S.C. at 523, 702 S.E.2d at 406.

(5) **The reason Minor 1 delayed making allegations of the sexual assault**

This Court held the trial court properly found the video inadmissible on this point because Appellant "was not seeking to prove a prior inconsistent statement but rather a prior statement was

never made." While it is true that Appellant was trying to prove that Minor 1 had *not* told the officer that she did not want to lose her friends and that was the reason she had not revealed the alleged improper touching, Appellant was also trying to prove a prior inconsistent statement. Minor 1 claimed she had told the officer of her alleged reason for not revealing the improper touching; however, the video was incontrovertible evidence otherwise. Thus, Appellant was trying to prove an inconsistent statement. The entire case centered on whether Minor 1 was believable. Appellant should have been permitted to explore her prior inconsistent statements – even those were Minor 1 had made no statement, but claimed that she had.

The undisputed facts were that Minor 1 never revealed this alleged encounter to Appellant's daughter, her friend. R. 33, lines 14-24. In fact, Minor 1 testified that she told no one because she "didn't want to lose one of [her] friends that [she] had on that road." R. 35, lines 9-19. When Minor 1 turned thirteen in February of 2012, she and her mother were watching a television program about a sexual assault. When her mother advised Minor 1 to confide in her if something like that ever happened, Minor 1 "blurted it out." Her mother called the police immediately. R. 36, line 19 – R. 37, line 13; R. 39, lines 16-18. When the police arrived, Minor 1 did not write a statement; instead, her mother wrote the official statement to police without Minor 1 even present. R. 37, lines 14-20; R. 45, lines 4-14.

At trial, Minor testified that she *thought* she had told the officer that she did not tell anyone what happened because of her friendship with Appellant's daughter, but she was unable to give a definitive answer because she had not seen the video. R. 47, lines 16-23. Specifically, when Appellant asked if Minor 1 had told the officer that she had not told anyone about the alleged incident because of her friendship with Appellant's daughter, Minor responded, "I thought I had." R. 47, lines 16-22.

Quite clearly, Minor 1's testimony on this point contradicted what she had told the officer. Thus, Appellant should have been permitted to introduce evidence of her statement to the officer in which she did not say that she did not tell anyone what happened because of her fear of losing friends. See Rule 613, SCRE; see also Fossick, 333 S.C. at 69-70, 508 S.E.2d at 33; Copeland, 278 S.C. at 572, 300 S.E.2d at 63; Blalock, 357 S.C. at 80, 591 S.E.2d at 636; State v. Carmack, 388 S.C. at 201-202, 694 S.E.2d at 230; Moses, 390 S.C. at 523, 702 S.E.2d at 406.

Finally, Appellant requests rehearing concerning this Court's prejudice determination. The testimony by Minor 1 was the only evidence in the record to support a conviction. Minor 1's credibility was central to the case. Although Appellant cross-examined Minor 1 and the police officer who interviewed her, Appellant's cross-examination was cut short by the judge's ruling that he could not present video evidence of contradictory statements by Minor 1. The video was powerful evidence because it was incontrovertible. See State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012); State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006); State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002); State v. Fossick, 333 S.C. 66, 508 S.E.2d 32 (1998); State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995); State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004).

Appellant respectfully requests rehearing in this case to review the points misapprehended and/or overlooked by this Court in issuing its opinion. The case law is clear that unless a witness unequivocally admits to making the prior inconsistent statement, then extrinsic evidence of the prior inconsistent statement is admissible.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

This 3rd day of September, 2015.

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Leonard Eugene Jenkins, at 2794 Aziza Road, Rock Hill, S.C. 29732, this 3rd day of September, 2015.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 3rd day
of September, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.