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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari
To the Court of Appeals

Appeal From Sumter County
Ralph F. Cothran, Circuit Court Judge

RECEIVED

SEP 27 2010

S.C. SUPREME COURT

THE STATE,

Petitioner,

vs.

RICKY DARREN SANDERS,

Respondent.

APPENDIX

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INDEX

SC COURT OF APPEALS OPINION	1
RESPONDENT’S PETITION FOR REHEARING	4
ORDER DENYING PETITION FOR REHEARING	11

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, Respondent,

v.

Ricky Darren Sanders, Appellant.

Appeal From Sumter County
Ralph F. Cothran, Circuit Court Judge

Unpublished Opinion No. 2010-UP-362
Submitted June 1, 2010 – Filed July 12, 2010

REVERSED AND REMANDED

Appellate Defender Elizabeth A. Franklin-Best, of
Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Salley W.
Elliott, Assistant Attorney General William M.
Blitch, Jr., all of Columbia, Cecil Kelly Jackson, of
Sumter; for Respondent.

PER CURIAM: Ricky Darren Sanders appeals his conviction for first-degree criminal sexual conduct (CSC). We reverse and remand.

FACTS

In 2008, Sanders was tried on charges of kidnapping and sexually assaulting Olivia in 2002. McCrea alleged that while walking home Sanders grabbed her, dragged her into the nearby woods, and raped her.

During pretrial motions, the State sought to exclude McCrea's 1997 conviction for filing a false police report. Sanders argued the conviction would be an indication of McCrea's ability to be

truthful.[1] The court stated: "That doesn't come [in] under the rules," and after determining the maximum punishment for filing a false police report was thirty days' imprisonment, the court ruled that because the punishment was less than a year, "[i]t wouldn't be admissible [even] if it happened yesterday."

The jury found Sanders guilty only on the charge of CSC, and the trial court sentenced him to thirty years' imprisonment. This appeal followed.

ISSUE

1. Did the trial court err in excluding the victim's prior conviction for filing a false police report?[2]

LAW/ANALYSIS

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

A witness's prior conviction involving dishonesty or a false statement is admissible for impeachment regardless of the punishment. Rule 609(a)(2), SCRE; State v. Cheeseboro, 346 S.C. 526, 544, 552 S.E.2d 300, 310 (2001). However, the prior conviction is inadmissible if more than ten years have passed between the conviction or release from confinement and the testimony, "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Rule 609(b), SCRE (emphasis added).

In this case, Sanders argued the conviction was an indication of the victim's ability to be truthful and responsible; however, the trial court indicated that such a conviction was not admissible under the rules. The trial court ruled that because the potential thirty day penalty for the offense was less than one year, "it wouldn't be admissible [even] if it happened yesterday." However, Rule 609(a)(2), clearly states, "evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment." (emphasis added) Accordingly, the trial court erred in ruling the conviction inadmissible because it carried only a thirty day punishment. Therefore, we find the trial court abused its discretion, and in light of the limited physical evidence in this case, such an error resulted in probable prejudice to Sanders. See, e.g., Wise, 359 S.C. at 21, 596 S.E.2d at 478 (holding in order to warrant reversal, an abuse of discretion must be accompanied by probable prejudice).

Furthermore, although we recognize the conviction is admittedly remote in time, such convictions are not categorically inadmissible. See Rule 609(b), SCRE (stating remote convictions may be admitted if in the interest of justice the trial court determines the probative value of the evidence outweighs its prejudicial effect). However, because the trial court focused on the potential punishment being less than one year, it was never occasioned to determine if the conviction fell within the exception provided by Rule 609(b).

Accordingly, the ruling of the trial court is

REVERSED and **REMANDED** for a new trial.

FEW, C.J., THOMAS, and PIEPER, JJ., concur.

[1] Sanders also maintained he was not responsible for the two-year delay between the alleged assault and his arrest or the three-year delay between his arrest and trial.

[2] We note Sanders also lists a second allegation of error as whether the trial court erred in refusing to instruct the jury on the issue of consent. However, because our decision on the aforementioned issue is dispositive we are not occasioned to address Sanders' second allegation of error. See Hughes v. State, 367 S.C. 389, 408-09, 626 S.E.2d 805, 815 (2006) (noting that an appellate court need not reach remaining issues on appeal when a decision on another issue is dispositive).

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Sumter County
Hon. R. Ferrell Cothran, Jr., Circuit Court Judge

The State,

Respondent,

v.

Ricky Darren Sanders,

Appellant.

PETITION FOR REHEARING

On July 12, 2010, this Court reversed the trial court's ruling and remanded this case to the circuit court for a new trial. The Court found the trial court abused its discretion in ruling the victim's remote conviction was inadmissible.

Pursuant to Rule 221, SCACR, the State of South Carolina submits that in reversing Sanders' conviction, the panel overlooked or misapprehended the rulings of the trial court, especially in light of the arguments presented to the trial court. Further, the Court failed to properly consider Rule 609(b), SCRE in light of the presumption it creates regarding admissibility of remote convictions.

First, Sanders never maintained the trial court should allow the remote convictions into the record based on the "interest of justice." He merely argued the ten year time limit found in Rule 609(b) should begin in 2005 when he was arrested and not in 2008 at the time of trial. The court acknowledged the ten year time limit and found the convictions were remote in time. At no time

during the hearing did Sanders contend the convictions were admissible under Rule 609(b)'s exception to the ten year rule. Because Sanders merely argued the ten year time limit should start at a time other than trial, any argument that the conviction should be admitted in the interest of justice under the Rule 609(b) exception is not properly before this Court. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (defendant may not argue one ground below and another on appeal); State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (party cannot argue one ground below and then argue different ground on appeal).

Further, the admission or exclusion of evidence falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. State v. Morris, 376 S.C. 189, 205, 656 S.E.2d 359, 368 (2008). As well, the scope of cross-examination is within the discretion of the trial court, and the court's decision will not be reversed on appeal absent a showing of prejudice. State v. Colf, 337 S.C. 622, 625, 525 S.E.2d 246, 247-48 (2000).

Pursuant to Rule 609(b), SCRE:

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Rule 609(b) creates a presumption that remote convictions are inadmissible. See State v. Bryant, 369 S.C. 511, 516, 633 S.E.2d 152, 155 (2006). Further, in State v. Johnson, the Supreme Court explained the conviction or release from confinement must be within ten years of the date of trial. State v. Johnson, 363 S.C. 53, 57, 609 S.E.2d 520, 522 (2005). The trial court properly ruled the conviction was remote in time beyond the ten year limit imposed by Rule 609(b).

This Court seems to misapprehend the trial court's ruling in light of the arguments presented. While the trial court does veer in a tangent related to whether the conviction is from a crime of moral turpitude or whether it carries a conviction beyond one year, the court's holding was consistently the conviction was beyond the ten year time limit and was too remote to be admitted. The Court clearly found it would allow convictions within the ten year time limit, but did not believe the remote convictions should be admitted. (R.4-5; 7; 10-12).

The trial court then allowed additional argument by Sander's counsel regarding the admissibility of the conviction. The trial court never reversed its prior rulings that the ten year time limit under Rule 609(b) controlled. Instead, the trial court considered Rule 609(a), finding whether the crime was a crime of moral turpitude was not the appropriate standard and because the conviction carried a sentence of less than one year, it was not admissible. The trial court's confusion of the standards in Rule 609(a) and 609(b) does not demonstrate the trial court failed to properly exercise its discretion in refusing to admit the conviction.

Further, the Court misapprehended or overlooked the nature of the evidence in the record. The trial court allowed the victim to be impeached by convictions which fell within the ten year time limit of Rule 609(b), such as the victim's shoplifting charge. (R.10-12). Additionally, the only evidence in the record is from the victim regarding the events of the night in question. Therefore, Sanders has failed to demonstrate how he was prejudiced by the ruling of the trial court.

Finally, even if the trial court also improperly considered the length of the possible sentence in determining its admissibility, Sanders failed to meet his burden of demonstrating the conviction should be admissible for impeachment. See State v. Colf, 337 S.C. 622, 626-627, 525 S.E.2d 246, 248 (2000) (party seeking to admit remote conviction must overcome presumption the conviction is inadmissible). Sanders did not comply with the exception to Rule 609(b) because he did not

provide the trial court with specific facts and circumstances of the conviction to enable the trial court to make a determination regarding whether the probative value of the offense substantially outweighs its prejudicial nature or whether its admission would be in the interest of justice. See Rule 609(b), SCRE. The record contains no evidence regarding the underlying facts and circumstances of the conviction so the trial court, even if he had been asked to consider the exception to Rule 609(b), was presented no facts on which to base his decision. See Colf, 337 S.C. at 627, 525 S.E.2d at 248 (factors to consider include 1. the impeachment value of the prior crime; 2. the point in time of the conviction and the witness's subsequent history; 3. the similarity between the past crime and the charged crime; 4. the importance of the testimony; 5. The centrality of the credibility issue). Sanders never offered any facts regarding the conviction during argument and made no proffer of the facts after he was denied admission of the conviction. Accordingly, based on the record before the Court he cannot demonstrate how he was prejudiced because he has not shown he was entitled to have the conviction admitted by the trial court.

The trial court consistently relied on the ten year time limit in Rule 609(b) to find the conviction inadmissible. This was the trial court's primary ruling and not that it was inadmissible because the conviction carried only a thirty day punishment. Further, because Sanders never asked the trial court to admit the conviction in the interest of justice, the trial court properly relied on the presumption found in Rule 609(b) that the remote conviction was inadmissible. Accordingly, the State asks the Court to affirm the exclusion of the testimony.

Additionally, because this Court should grant the petition for rehearing and affirm the exclusion of the remote conviction, the Court should also affirm the trial court's jury charge. The State incorporates by reference and fully relies on the argument presented in its Final Brief of Respondent on this issue. The State submits the jury charge should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State requests that the panel rehear this matter, and affirm Sanders' conviction and sentence.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

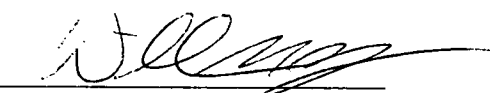
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July 19, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Sumter County
Hon. R. Ferrell Cothran, Jr., Circuit Court Judge

The State,

Respondent,

v.

Ricky Darren Sanders,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Elizabeth A. Franklin-Best, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
P. O. Box 11589
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I further certify that all parties required by Rule to be served have been served.
This 19th day of July, 2010.



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AUG 30 2010 *WG*

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August 27, 2010

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Re: The State v. Sanders, Ricky Darren

Dear Counsel:

Enclosed is a copy of an Order of the Court denying your Petition for Rehearing in the above case.

The Remittitur in this case will be held in this Court only so long as required by Appellate Court Rule 221 (b).

Please notify this office, in writing, within ten (10) days from the date of this letter, whether or not you want any of the remaining Records on Appeal and briefs we may have in this case. Also enclose a check payable to the S. C. Court of Appeals, in the amount of \$7.50, to cover mailing costs. If we have not heard from you within ten (10) days, the Record on Appeal and briefs will be disposed of.

Sincerely,

V. Claire Allen

V. Claire Allen
Deputy Clerk of Court

VCA/tf

cc: Appellate Defender Elizabeth A. Franklin-Best
Cecil Kelly Jackson, Esquire

The South Carolina Court of Appeals

The State,

Respondent,

v.

Ricky Darren Sanders,

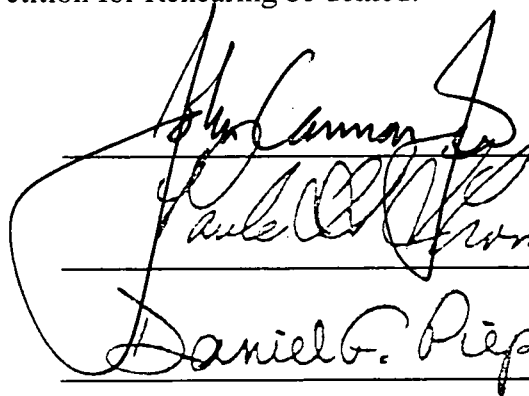
Appellant.

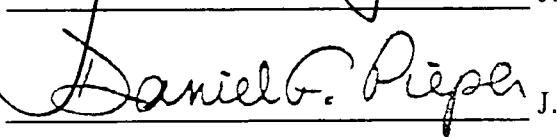
The Honorable Ralph F. Cothran
Sumter County
Trial Court Case No. 2006-GS-43-00336

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a 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.

It is, therefore, ordered that the Petition for Rehearing be denied.



Paul C. Roman C. J.


Daniel G. Pieper J.

AUG 27 2010

cc: Appellate Defender Elizabeth A. Franklin-Best
Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W. McIntosh
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STATE OF SOUTH CAROLINA
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Appeal From Sumter County
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THE STATE,

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vs.

RICKY DARREN SANDERS,

Respondent.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Appendix on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record,

Elizabeth A. Franklin-Best, Esquire
South Carolina Department of Indigent Defense
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I further certify that all parties required by Rule to be served have been served.

This 27th day of September, 2010.



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17340

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SUMTER COUNTY

R. Ferrell Cothran, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY DARREN SANDERS,

APPELLANT

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INDEX

INDEX.....	i
TRIAL TRANSCRIPT PAGES 21-26.....	1
TRIAL TRANSCRIPT PAGES 90-95.....	7
TRIAL TRANSCRIPT PAGES 101-102.....	13
TRAIL TRANSCRIPT PAGES 118-131.....	15
TRIAL TRANSCRIPT PAGES 531-560.....	29
TRIAL TRANSCRIPT PAGES 577-612.....	59
TRIAL TRANSCRIPT PAGES 616-617.....	95
INDICTMENT	97
SENTENCING SHEET	99
CERTIFICATE OF COUNSEL	100

1 of the DNA hit or match between the DNA profile from
2 the rape kit and Ricky Darren Sanders without saying
3 obviously where that led her.

4 *THE COURT:* Okay. And...

5 *MS. FANT:* I guess our -- our motion, it's just
6 something that we can agree upon now or if, you know,
7 where we stand with Mr. Finney on. We don't want--

8 *THE COURT:* I thought you worked that out.

9 *MR. FINNEY:* I don't have a problem with what
10 was just said on the record. I think my problem was
11 in the next point which is where the State wants to
12 argue that they have a right to talk about a search
13 warrant and the resulting things that happened after
14 the search warrant.

15 *MS. FANT:* Which would be his motion, not mine.

16 *THE COURT:* All right. Okay.

17 *MS. FANT:* Our next motion, Your Honor, would
18 just be exclusion of any prior record of the victim
19 in this case, Olivia McCrea, that violates the 10
20 year rule.

21 As we discussed in chambers, she does have some
22 criminal history, most of it beyond the 10 years, and
23 they are remote convictions.

24 We were -- the State is -- certainly believes
25 that the rule -- the time starts running at the time

1 of the trial and you run back 10 years from that.
2 She would have one conviction that was for
3 shoplifting as a felony. She's on probation for
4 that.

5 We would agree that that obviously is not a
6 remote conviction, but that the other ones are, and
7 that there be no mention of any other convictions for
8 Ms. McCrea.

9 *THE COURT:* What do you say to that?

10 *MR. FINNEY:* Your Honor, on behalf of
11 Mr. Sanders we feel that the record of this accuser
12 is quite substantial and it contains numerous
13 incidents of shoplifting, simple assault, and a
14 charge for filing false information -- giving false
15 information for which she was convicted.

16 Some of these occurred -- some of the
17 shopliftings, of course, occurred before 1998 as did
18 the filing false information -- occurred in 1997.

19 The reason we feel like that's important is not
20 only because it shows dishonesty and a willingness to
21 be dishonest, but it also occurred very shortly in
22 time before these alleged assaults occurred.

23 The history of this case, Your Honor, is that
24 this assault supposedly occurred in 2002 in Sumter
25 County. My client was not charged until 2005. And

1 since that time he has maintained his innocence and
2 asked for a trial which he has not able to -- to
3 schedule.

4 We have had at least three different bond
5 hearings requesting that this case be called as soon
6 as possible, and each time we get a different answer
7 as to why it hasn't been called.

8 But what has happened is three years have gone
9 by since the time of his being charged, and it has
10 now put us in a position where if you invoke the 10
11 year rule from today, we're going to miss several bad
12 acts on her part for which she has been convicted
13 that are eligible for discussion before the jury, but
14 which now -- according to the 10 year rule has -- has
15 run due to no fault of the defendant.

16 We believe that the 2005 time period as to when
17 this lady says this account, assault happened should
18 be the correct date for looking back 10 years which
19 would take us back to 1995.

20 And our motion or our position for the record
21 would be that from 1995 through 2005 and up to the
22 present this lady would be eligible for having her
23 record brought against her.

24 THE COURT: Okay. I think -- of course, I
25 haven't seen the record. Give me -- somebody show me

1 the record.

2 MR. FINNEY: Here you are.

3 THE COURT: The crime occurred in 2005?

4 MR. FINNEY: No, 2002. He wasn't charged until
5 2005.

6 THE COURT: Okay. So the allege -- the crime
7 occurred in 2002. He was charged in 2005 and tried
8 in 2008.

9 MR. FINNEY: Going to trial in 2008.

10 THE COURT: Okay. So you're concerned about the
11 '97 shoplifting...

12 MR. FINNEY: There are several charges in '95,
13 '96 and '97, Your Honor, that I think should be -- I
14 think the Court should start the 10 year period in
15 2005 and let us look back to 1995.

16 THE COURT: And it -- and if that was the case,
17 when -- when in 2005 is he charged?

18 MR. FINNEY: When was he charged?

19 THE COURT: In what month? The first record I
20 got is an August 4th, 1995.

21 MR. FINNEY: The defendant was charged, arrested
22 September 2005 according to my understanding,
23 September of 2005.

24 THE COURT: And this occurred August of 2000 --
25 1995. So if -- if I rule that it's 10 years from the

1 time -- today's date, testimony, then the only
2 criminal record that would come in is the 2005
3 conviction, property crime conviction; right?

4 MR. FINNEY: Yes, sir.

5 THE COURT: Okay.

6 MR. FINNEY: And Your Honor, we would be moving
7 this afternoon -- that record was run in 2007. We
8 were not aware of that till this morning, but there
9 may be additional charges since that record was run,
10 so we'd like the record to be updated.

11 THE COURT: What do you say about that, Madam
12 Solicitor?

13 MS. FANT: Your Honor, there are no further
14 charges, but if he wants a copy of it, we
15 would obviously provide it. She's on probation. She
16 would have been revoked if there would have been
17 anything new, but I will be happy to have somebody
18 run it.

19 THE COURT: Okay. All right. Is there any --
20 and I -- my understanding of the law is from the time
21 of testifying court appearance -- but I'm having my
22 Law Clerk research that further and I'll let y'all
23 know before we start the trial as to whether it's --
24 what that date deals with.

25 Let's go in the other motions and I will come

1 back and rule on that one.

2 MS. FANT: The other ones are fairly short, Your
3 Honor. One is just a motion in limine to prevent the
4 defense from referring to any consensual activity
5 during opening statement.

6 We had this problem come up in the last trial
7 with Mr. Sanders where Mr. Finney told the jury that
8 there would be evidence of consent. There was no
9 evidence of consent, but the jury apparently went
10 along with Mr. Finney rather than what the law was.

11 As we do not anticipate that he's going to put
12 his client up, we would ask that he not be allowed to
13 even state that in front of the jury until there is
14 some evidence in the record that would point toward
15 consent.

16 Similarly, in the last trial Mr. Finney accused
17 the victim of being a prostitute and being angry
18 about not getting enough money for the exchange.

19 That was totally outside the record. There was
20 absolutely no record -- no evidence whatsoever. And
21 in fact, Judge James sustained my objection.

22 But I would move in limine for him to be barred
23 from questioning the victim about anything for which
24 he does not have a basis in fact to make that
25 question.

1 (Jury left the courtroom at 5:05 pm.)

2 *THE COURT:* Anything further in this case?

3 *MR. FINNEY:* Not on this case.

4 (Whereupon court was in recess for the evening.)

5 ***** May 15, 2008 *****

6 *THE COURT:* I understand all the jurors are
7 present. I apologize. That plea took longer than we
8 anticipated. The State ready to go?

9 *MS. FANT:* Yes, Your Honor. I do have a couple
10 of matters I'd like to address.

11 *THE COURT:* Okay.

12 *MS. FANT:* Regarding the motions in limine for
13 yesterday, Your Honor, there were a couple of things.
14 One of which was there was never a ruling on the
15 prior record issue, whether it was 10 years from the
16 date of the testimony.

17 *THE COURT:* My understanding is 10 years from
18 the testimony. I have -- that was always my
19 understanding of the rule. I have not been able to
20 find anything or any law to the contrary unless
21 somebody else has.

22 My understanding is 10 years from the testimony
23 because that's what you're impeaching is their
24 testimony, so you go back 10 years from the time
25 they're testifying.

1 That's my understanding of that rule unless you
2 have some cases different than that, Mr. Finney.

3 MR. FINNEY: Your Honor, I -- I am in the
4 process of having my office research that issue. I
5 have not been able to do that over the night period.

6 My position for the record is -- and I'd like to
7 hand up a copy of the four page report that was run
8 yesterday starting in 1995 and continuing through
9 2005.

10 This lady has a four page record that has
11 apparently at least nine shopliftings, a failure to
12 adequately care for a child, and a false report
13 charge and a resisting arrest charge all within the
14 10 year period between '95 and 2005.

15 The Court will remember that this allegation of
16 the assault took place in 2002 but that my client was
17 not charged until 2005.

18 It is very important, Your Honor, for us to be
19 able to show that -- to this jury that this lady from
20 the time of my client's arrest backwards 10 years and
21 continuing on even through the time of his arrest and
22 continuing forward has been violating the law.

23 It is our concerned opinion that the testimony
24 that she gives today is not the test, it is her
25 character and her ability to be truthful and accurate

1 which is the test.

2 And the way the jury can use this information is
3 to see whether she has been a good and diligent
4 person for the period of time throughout which she
5 says that she was assaulted by this client.

6 Your Honor, these are -- these are very relevant
7 cases, and the time period is very relevant. And the
8 final point I want to make on the record is that the
9 defendant has no wherewithall to call this case into
10 court and get his case heard when he wants it heard.

11 The record would reveal that he had filed
12 numerous motions for bond reduction, numerous motions
13 to have his case called.

14 The time period between 2005 and 2008 is a
15 substantial one, and it works against him if you rule
16 that she can commit crimes during a certain period of
17 time and not be cross-examined by them through no
18 fault of the defendant's, solely by the passage of
19 time.

20 I am not saying that the State delayed this case
21 intentionally. I am aware of the state of the
22 docket, as is the Court. There are a lot of cases
23 that have to be tried, and they get old. This is one
24 of the cases.

25 But it works against the defendant to have a

1 situation where he can't go back and talk about cases
2 because three years have passed since he was charged
3 and now has finally got his day in court.

4 I would ask the Court to make that four page
5 exhibit a Court Exhibit for the purpose of this
6 motion, and I will also tell the judge if -- if you
7 don't mind -- that I called Bishopville this morning.

8 There is a charge on there from September the
9 ninth, 2002, two months after this alleged incident.
10 I don't think it's going to be any question that that
11 is within the time period of the 10 years from
12 today's action.

13 But I just wanted the Court to know that that --
14 on that record, which was handed to me by the
15 Solicitor, there's no disposition on that
16 shoplifting.

17 Bishopville confirms to me that she was
18 convicted of that and had to pay a fine and
19 restitution, and those documents are being faxed to
20 my office at the present time.

21 So we'll need to be able to show the Court that
22 that is another conviction that should be...

23 *THE COURT:* And my understanding of the rule is
24 it's 10 years from the conviction or 10 -- 10 years
25 from the last confinement imposed upon the

1 conviction.

2 And so I don't know -- it's whichever the latter
3 of the laws. So some of these convictions, like in
4 '98 she's -- allegedly on here shows shoplifting
5 ninth, five years.

6 It depends on when she was released is when you
7 can go back, either the conviction date or the
8 release date. So that's something y'all may need to
9 look into. You understand what I'm saying?

10 It's not necessarily the conviction. She got
11 five years and served five years in '98, then it's
12 2003, so -- so that conviction in '98 would come in.

13 It's the release date according to the rule 609B
14 is 10 years from the -- evidence and conviction of
15 this rule is not admissible if a period of more than
16 10 years has elapsed since the date of the conviction
17 or the release of the witness from the confinement
18 imposed for that conviction, whichever is the latter.

19 So having said that, can y'all agree at least
20 from this record as to what's admissible and what's
21 not admissible?

22 MS. FANT: No, Your Honor. I think what we're
23 going to need to do is after Ms. McCrea testifies,
24 have a brief time with you to go over this.

25 We don't know and I would think the burden is on

1 him to show what the -- what the date is and that
2 there is this conviction in Bishopville which we know
3 nothing about.

4 So without some evidence on that, we certainly
5 wouldn't agree to it. I agree with your statement of
6 the law.

7 THE COURT: Okay. And all I'm saying is I
8 have -- based on what's before me is an NCIC record,
9 and it shows certain convictions in '97 and '98 where
10 she got five years for.

11 Those convictions may be admissible, but I have
12 no way to know her release dates.

13 MS. FANT: Correct. That's what I'm saying.
14 We're going to have to find that out.

15 THE COURT: And the only way you can tell I
16 assume is from the Department of Corrections. But
17 certainly the 2002 forward on the record is
18 admissible. The '98 and the '97 may be. It depends
19 on the release date.

20 MR. FINNEY: Your Honor, could I just -- while
21 we're on the record, could I just ask the Court to
22 inquire of the probation department, if I serve them
23 with a subpoena, could they get that information from
24 the Department of Corrections or whatever county -- I
25 think that was a Darlington case? The 1998 case?

1 first issue, could we have that record given to the
2 probation department so he can go ahead and check
3 that information while we are doing our opening
4 arguments?

5 *THE COURT:* Sure. Outside of that, are we ready
6 for the jury? Okay. Y'all ready for the jury?

7 *MR. FINNEY:* Yes, I, am Your Honor.

8 *MS. FANT:* Yes, Your Honor.

9 *THE COURT:* Okay. I'm going to take 30 seconds
10 before we get back. I have been in here longer than
11 y'all have, and it looks like it's going to be a
12 while.

13 (Whereupon there was a brief pause.)

14 *MR. FINNEY:* If you would please allow me to
15 make sure the record is complete that on my motion
16 for the prior record to be introduced going back
17 to -- starting in 2005 and going back to '95 -- that
18 there is at least one charge there for giving false
19 information to the police officer that I believe
20 would be very relevant and important for this jury to
21 know about and that your ruling will not allow me to
22 bring that to this court -- to this jury's attention.

23 *THE COURT:* How would that be admissible even if
24 it was within the 10 years?

25 *MR. FINNEY:* How would it be admissible?

1 Because filing the false police report and lying to
2 an officer would be a indication of her character and
3 ability to be truthful and responsible.

4 *THE COURT:* That doesn't come under the rules.
5 I didn't think that would be admissible any way.

6 *MR. FINNEY:* My understanding is if it's a crime
7 of moral turpitude, and--

8 *THE COURT:* And that's a crime of moral
9 turpitude?

10 *MR. FINNEY:* My understanding is it is.

11 *MS. FANT:* Your Honor, that's not the standard
12 any more. That went out with the rules of evidence
13 in 1995, I believe.

14 *THE COURT:* I don't -- I'm not -- it carries how
15 much time?

16 *MS. FANT:* Thirty days.

17 *THE COURT:* That's right. It's a magistrate
18 court offense. It's less than a year. It wouldn't
19 be admissible if it happened yesterday.

20 *MR. FINNEY:* I'd like to be noted on the record
21 for that, Your Honor.

22 *THE COURT:* Okay.

23 *MR. FINNEY:* Thank you.

24 *THE COURT:* Anything else?

25 *MS. FANT:* No, Your Honor.

1 result. Thank you.

2 THE COURT: Madam Solicitor, you may call your
3 first witness.

4 MS. FANT: At this time the State would call
5 Olivia McCrea.

6 OLIVIA MCCREA, after being duly
7 sworn, testified as follows:

8 DIRECT EXAMINATION

9 BY MS. FANT:

10 Q Good morning, Olivia.

11 A Good morning.

12 Q Could you tell us how old you are?

13 A Thirty-five.

14 Q And where do you live?

15 A Hartsville.

16 Q Have you ever lived in Sumter?

17 A Yes.

18 Q When was that?

19 A 2002.

20 Q And where did you live when you lived in Sumter?

21 A Brown Street.

22 Q And is that near Riley Park and Morris College?

23 A Yes.

24 Q Where did you work when you last lived in Sumter?

25 A Morris College.

1 Q And were you living and working in Sumter on
2 Saturday, June 29th, 2002?

3 A Yes.

4 Q Did you actually go out to a club that evening?

5 A Yes.

6 Q Where was it located?

7 A It's the hut on Bailey.

8 Q The hut on Bailey?

9 A Yes.

10 Q Is that the American Legion hut?

11 A Yeah.

12 Q And was this a function that was -- that the American
13 Legion put on or was it just a nightclub?

14 A It was a function that the -- another club rented to
15 the hut to have a dance.

16 Q And do you remember about what time you went to the
17 club?

18 A Between 10:30 and 11:00.

19 Q And how did you get there?

20 A A friend of mine dropped me off.

21 Q Who was that friend?

22 A Wanda Green.

23 Q Is her name Dennis?

24 A I mean Wanda Dennis.

25 Q How did you know her?

1 A From working at Morris College.

2 Q And did you have a car at that time?

3 A No.

4 Q Do you have one now?

5 A No.

6 Q Excuse me. Was Wanda supposed to pick you up from
7 the club?

8 A No.

9 Q Why not?

10 A Because I was going to meet a friend at the club.

11 Q Okay. And what friend was that?

12 A Michael Isaac.

13 Q And how were you planning to get back home to your
14 house on Brown Street?

15 A He was to take me home.

16 Q How do you know Michael?

17 A We was dating at the time.

18 Q Okay. And what did Michael do at the club? Did he
19 work there or was he just dancing?

20 A No, it was his -- his club's party. He was holding
21 the door.

22 Q And by holding the door do you mean like working
23 the...

24 A Taking up money as people come in.

25 Q The cover charge? Now, when you were at the club,

1 did you see Michael off and on?

2 A Yeah.

3 Q And did you have anything to drink?

4 A Yes.

5 Q Do you know what you were drinking?

6 A Gin and grapefruit juice.

7 Q Okay. And did you get drunk?

8 A No.

9 Q What time did you leave the club?

10 A Around 2:15, 2:20.

11 Q Okay. And what time did the club close down?

12 A 2:00.

13 Q Was -- what -- was there still a crowd there at that
14 time?

15 A Yeah, on the outside.

16 Q And what kind of -- what happened at 2:00?

17 A What happened?

18 Q Did people just leave or did they kind of mill
19 around?

20 A Some left, some just sat outside in the parking lot
21 and holding conversations.

22 Q And then what happened between you and Michael?

23 A We got in an argument.

24 Q And did he take you home?

25 A No.

1 Q What did you -- what did you do at that point? Did
2 you have a ride home at that point?

3 A No.

4 Q Did you ask anyone else for a ride?

5 A I was looking to see did I know anybody else there,
6 but I didn't, and I didn't want to just get in the car
7 with anybody that I didn't know.

8 Q So what time -- excuse me -- when you couldn't find a
9 ride, what did you decide to do?

10 A When I couldn't find a ride I know that my friend
11 that I work with lived around the corner on Maney, so I
12 started walking to her house.

13 Q Do you know where she lived on Maney?

14 A Do I know where she lived?

15 Q Yeah. Did you know where her house was?

16 A Yeah, I know her house is.

17 Q And what was her name?

18 A Betty Johnson.

19 Q And just a minute. Did you actually make it to
20 Betty's house?

21 A No.

22 Q What happened? Did you see anybody else on the
23 street that night?

24 A On the way, I was walking down the sidewalk.

25 Q And what street were you on?

1 A Maney.

2 Q Okay.

3 A And... I got down the street, I was walking on the
4 sidewalk and this guy walking on the other side of the
5 street.

6 Q Did you know him?

7 A No.

8 Q Did you speak to him?

9 A He said hey. I didn't speak to him verbally. I just
10 waved my hand and kept walking.

11 Q And do you know how far you -- how far down on Maney
12 you were at that point?

13 A About a block down from... from the stop sign and
14 Maney -- on Maney, about a block down.

15 Q Okay. And what happened when you just continued
16 walking?

17 A This man came behind me and grabbed me from behind
18 around my neck.

19 Q When you say someone came behind you, had you seen
20 him before?

21 A Not before then, no.

22 Q But is that the person you saw across the street?

23 A Yeah.

24 Q And what happened when he grabbed you around the
25 neck? Did he say anything to you?

1 A He said, if I scream he's going to kill me.

2 Q And how tight was he holding you?

3 A At first it was -- he wasn't holding me tight.

4 Q But then what happened?

5 A When I started struggling, he grabbed me and he held
6 me tighter.

7 Q And where was he holding you at that point?

8 A Around my neck.

9 Q Did he make any other threats to you?

10 A Yeah. He said if I keep moving, he'll snap my neck.

11 Q And did he have a weapon with him?

12 A At first I thought he did when he came up behind me.

13 Q Why did you think that?

14 A Because when he first grabbed me, he had his hand
15 behind my back like he had something.

16 Q Did he ever actually show you a weapon?

17 A No.

18 Q After he grabbed you around the neck, what did he do?

19 A Dragged me to some woods and tall grass.

20 Q And what did he do to you?

21 A He threw me down on the ground.

22 Q And then what did he do?

23 A Start take -- taking my clothes off.

24 Q And after he pulled your pants down, what did he do?

25 A Raped me.

1 Q Olivia, I'm going to have you to step down from the
2 witness chair because I think it's probably easier for you
3 to show us what happened to you. And we brought in a Red
4 Cross volunteer to act as a dummy, and we're going to
5 pretend it's you and have you show us what happened to
6 you. Can you step down for us?

7 A (Complied).

8 Q When he initially grabbed you from behind, can you
9 show the jury how he was grabbing your neck?

10 A (Indicated.)

11 Q And so you indicated it was kind of a loose grab at
12 that point?

13 A (Nodded.)

14 Q And when you started struggling, what happened?

15 A Got tighter, back of my head.

16 Q So he was pushing your head from behind and holding
17 the arm to your throat?

18 A (Nodded.)

19 Q Buckled her in so she wouldn't fall down. Now, she's
20 a little bit heavy, but I'm going to ask you to sort of
21 grab the dummy like he had you and show us how he dragged
22 you into the wooded area.

23 A (Complied.)

24 Q And can you just pull back a little bit to show you.

25 A (Indicated).

1 Q And when he got there into the area that was filled
2 with leaves and bushes, how did he force you to the
3 ground?

4 A Like... (indicated.)

5 Q And at that point--

6 THE COURT: Y'all can stand up if you need to.

7 BY MS. FANT:

8 Q Could you move?

9 A Not -- he had me down by the neck.

10 Q So he then pressed your arm -- his arm against your
11 neck again?

12 A (Nodded.)

13 Q And was he able to undo your pants from that
14 position? How did he do that?

15 A Reached behind, grab my pant like with one hand.

16 Q And how was he able to get them all the way down to
17 your feet?

18 A Use his feet.

19 Q So he used his foot to push it all the way down?

20 A (Nodded.)

21 Q Okay. Thank you.

22 (Witness resumed the stand.)

23 Q Now, when he had you pinned down on the ground like
24 you just showed us there, what were you doing?

25 A Crying that he didn't kill me.

1 Q I'm sorry. I couldn't hear you.

2 A I was laying down on the ground crying, looking up at
3 the stars and praying that he didn't kill me.

4 Q Did you try to scream again?

5 A Yeah.

6 Q And what happened when you did that?

7 A He pressed down hard on my neck and told me he'll
8 snap my neck if I keep screaming.

9 Q And after he had you in that position and had your
10 pants down, were your pants all the way off or were they
11 still on part-way?

12 A One leg in and one leg out.

13 Q Okay. So how did he get the one pant leg off of you?

14 A I told him I had to use the bathroom. First he
15 wouldn't let me up, so I used the bathroom on him.

16 Q And was he assaulting you at that point?

17 A Yeah.

18 Q And you indicated that when he had you on the ground,
19 that he had raped you.

20 A Yeah.

21 Q Do you mean by that that he put his penis in your
22 vagina?

23 A Yeah.

24 Q And once he had pushed the one pant leg off and you
25 were down there, what happened after that? Did he ever

1 move you at any point?

2 A I told him that I was laying in ants, and ants was
3 biting me.

4 Q And how was he able to move you?

5 A He moved the bottom part of me out the ant -- ant
6 nest.

7 Q Did he keep his arm on you the whole time?

8 A Yeah.

9 Q So he was able to pivot your bottom part off the ant
10 bed?

11 A Yeah.

12 Q Was there a time when you had to use the bathroom
13 again?

14 A Yeah.

15 Q And what did you do?

16 A I asked him could I use the bathroom.

17 Q And what did he say this time?

18 A Yeah.

19 Q And what happened?

20 A He picked me up off the ground.

21 Q And did you have a -- both -- were your pants
22 completely off or was it still one in and one out?

23 A Still had one leg in.

24 Q And what happened then?

25 A Told him I couldn't walk and use the bathroom with my

1 pants like that.

2 Q So what happened?

3 A He helped me take off my boots and that pant leg.

4 Q Did he still have his arm around you at this time?

5 A He had one. He had -- he had one arm around my waist
6 but one was taking my pant, my leg out my pants and he was
7 holding my arm.

8 Q And once he got your other boot and your other leg
9 out of the pant leg, what happened?

10 A I ran.

11 Q Were you able to get away?

12 A Not at first.

13 Q What happened?

14 A He caught up with me and grabbed me around my neck
15 again.

16 Q Where were you when he caught up with you?

17 A At a stop sign.

18 Q And when he grabbed you again, what happened?

19 A He was trying to put his arms around my neck, and I
20 bit him.

21 Q How hard did you bite him?

22 A I bit him hard. I had to spit his blood out my
23 mouth.

24 Q And when you bit him that hard, what happened?

25 A He ran down the street and I ran the other way.

1 Q And when you ran the other way, what did you do?

2 A I screamed and knocked on door -- on the door, asked
3 to please dial 911.

4 Q Did they let you in?

5 A No.

6 Q What did you do after that?

7 A I squat down on a porch, took my vest off and put it
8 around me.

9 Q Now, you say your vest. That was something you were
10 wearing up top?

11 A Yeah.

12 Q Did you go back to the scene, the -- where he had
13 assaulted you?

14 A No.

15 Q Where did you go after that?

16 A Some -- somebody holler at the house that they dialed
17 911, so I got -- I left the porch and tried to go straight
18 down Maney to get to my friend house.

19 Q So after someone hollered they had called 911, you
20 decided to go on to Betty Johnson's house?

21 A Yeah.

22 Q And that's the house at 110 Maney?

23 A Yeah.

24 Q Did you make it to Betty's house?

25 A No.

1 Q What happened?

2 A The police came.

3 Q And after the police got there, did you ever go on to
4 Betty's house or they just took care of you from that
5 point?

6 A No, I -- I sat down on the sidewalk.

7 (WHEREUPON, State's Exhibit No. 1 was marked for
8 identification only.)

9 BY MS. FANT:

10 Q Olivia, I will show you what's been marked as State's
11 Exhibit one. Do you recognize these?

12 A Yeah.

13 Q How do you recognize them?

14 A Those were the pants I was wearing that night.

15 (WHEREUPON, State's Exhibit No. 2A, 2B were
16 marked for identification only.)

17 BY MS. FANT:

18 Q I will also show you what's been marked for
19 identification as State's Exhibit 2A and 2B. Do you
20 recognize these?

21 A Yeah.

22 Q How do you recognize them?

23 A Those are boots I was wearing.

24 Q Okay.

25

1 *THE COURT:* All right. So maybe we'll get it to
2 them in time -- I'll give you an idea. Let you take
3 about 30 minutes or 20 minutes and we'll see. All
4 right. We'll be back in 20 minutes.

5 (Whereupon a recess was had.)

6 *THE COURT:* State ready?

7 *MS. FANT:* Yes, Your Honor.

8 *THE COURT:* The defense ready?

9 *MR. FINNEY:* Yes, Your Honor.

10 *THE COURT:* Bring us the jury.

11 (Jury entered the courtroom at 11:13 am.)

12 *THE COURT:* Have y'all selected a foreperson?

13 *JUROR:* Yes, sir.

14 *THE COURT:* Who is that?

15 *JUROR:* I am.

16 *BAILIFF:* Your name, please?

17 *JUROR:* Harry Hilton.

18 *THE COURT:* Now it's time for the closing
19 arguments of the attorneys. If you'll please pay
20 close attention and I will charge you on the law.
21 Mr. Finney?

22 *MR. FINNEY:* Thank you, Your Honor. Ms. Fant.

23 CLOSING STATEMENT

24 *MR. FINNEY:* It's now Thursday and I have got 30
25 minutes before I have to turn Ricky over to you. On

1 Monday I told you that no matter how you felt at that
2 time, it's going to be different when we got to this
3 time. I told you about baking that cake. And now I
4 believe that you see what I was talking about.

5 What looked and sounded like a bad situation on
6 Monday now come to the -- brought into the light.
7 This is a trial court. We are here to find the
8 truth. And the truth has not been brought to you by
9 Olivia McCrea.

10 Every person who has testified in this case for
11 the State of South Carolina as a state witness who
12 was not interested or biased has told you that this
13 lady had no symptoms that showed that she was
14 forcibly raped.

15 Who am I talking about? The 22 year veteran of
16 the emergency room, Rebecca Ekpo, the nurse who saw
17 her that night, came to this court, didn't remember
18 this lady. I have been working there 22 years, I do
19 everything by the book, I don't remember anything.

20 I wrote everything down, everything is in that
21 SLED report that's in the evidence. Read it when you
22 get to the jury room. That lady didn't care about
23 the police, the ambulance drivers.

24 She didn't care about anything except taking
25 care of her job which was the patient in her

1 emergency room.

2 The SLED report that's in evidence is five pages
3 long. One, two, three, four, and six. Remember,
4 page five, which is in evidence also, is that page
5 that has the male drawing on it and it wasn't
6 relevant. Here it is, it's a different exhibit.
7 It's called exhibit 31. That's page five.

8 They give you six pages at the hospital, but
9 page five wasn't filled out because it wasn't a male
10 that was attacked that night, it was a female.

11 First thing you should consider on page one is
12 that the lady in the emergency room was told that
13 the -- Ms. McCrea, the patient, urinated on the
14 assailant. Now, how did that happen?

15 Ms. McCrea comes in here and tells you the story
16 about her being thrown to the ground, forcibly raped,
17 and somewhere during this time she asked the guy to
18 let her get up and go to the bathroom, he doesn't let
19 her, so she urinates on him.

20 What I have found -- what I think you have found
21 in your common experience in the years that you have
22 lived is that if you're not telling the whole truth,
23 the problem is that some of the truth's going to come
24 out.

25 Some of the truth did come out in this case.

1 The truth is that they did have sex that night, Ricky
2 and that lady, or they attempted to. I don't know if
3 they had intercourse or not.

4 We don't know because the whole truth wasn't
5 told in this story that was brought to us and brought
6 to the State by Olivia McCrea. How do we know that?

7 Ladies and gentlemen, you only heard one story.
8 I'm the lawyer and I made the decision late last
9 night after I heard Michael Isaac and a few other
10 people come up here with their story -- after years
11 of sitting on the sideline, they were brought into
12 this case by the -- the officers and the Solicitors.

13 Three years ain't nobody talked to those people,
14 but now they're star witnesses, oh, Olivia changed,
15 she's changed, she is changed. She's not the person
16 she used to be.

17 Ladies and gentlemen, what would make a man at a
18 nightclub leave his girlfriend at the nightclub at
19 2:00 in the morning and go home without her? Another
20 man. Maybe that man.

21 *MS. FANT:* Your Honor, I would object. There's
22 absolutely no evidence on the record that this
23 defendant was at the club, none.

24 *MR. FINNEY:* Your Honor, this -- there's
25 testimony in the record that Olivia McCrea says she

1 saw the man that raped her at the parking lot of the
2 American Legion in a white suit.

3 MS. FANT: Your Honor, her testimony was that
4 she--

5 THE COURT: I understand. This is closing
6 arguments. I will let -- the jury heard the facts
7 and the testimony from this witness stand. They will
8 recall what the witnesses said. Mr. Finney, you can
9 continue.

10 MR. FINNEY: You recall -- if I am not telling
11 you the truth, you come back out here, you ask the
12 Judge to let you listen to the testimony that this
13 lady took down. Everything that was said in this
14 court under oath is on that record. You can listen
15 to it again.

16 I challenge you, you get back there, you talk to
17 one another, you have a problem, you write it down,
18 you hand it to the Judge. You can come and listen.

19 Ladies and gentlemen, Olivia McCrea didn't tell
20 you the truth about what happened that night. How do
21 we know that? We know that because the emergency
22 room report says that there were -- on the physical
23 examination page three by the nurse -- describe all
24 signs of trauma, bruises, scratches, bite or suck
25 marks or redness on any part of the victim's body.

1 Blank.

2 Indicate on the -- indicate the location of the
3 trauma described on the appropriate anatomical
4 drawings. Blank. The nurse didn't see anything.
5 There wasn't anything to -- to note. There wasn't
6 anything to write down.

7 Pelvic examination by the doctor. Vulva,
8 normal. Introitus, normal. Vagina, small amount of
9 blood in vagina. Cervix, normal. Uterus, normal.
10 Edema, normal. Rectum, normal. I said, doctor, did
11 you find any hair in the vagina? No, I didn't.

12 If you had found hair in the vagina, what would
13 that be consistent with? It would be consistent with
14 sex. Maybe there was sex. Listen to the evidence.

15 What did the lady nurse say she did with exhibit
16 number 21? Excuse me, number 26. If you don't
17 remember, ask the Judge to let you hear it again.
18 Twenty-six was a swab taken at the hospital of -- it
19 says right there on the vaginal swab. They check the
20 vagina. It was negative.

21 The only evidence of the contact between Ricky
22 and this lady was a spot on her leg. So maybe he did
23 have intercourse. Maybe he was trying to have
24 intercourse. Maybe they got interrupted before they
25 could have intercourse.

1 Maybe that's why her pants and boots and panties
2 were on the ground and she ran away saying, 911, I'm
3 being raped over here.

4 No evidence of any semen in the vagina. We
5 don't know if -- it occurred or not because she
6 didn't tell you the whole story. I had put in
7 evidence in this case because the officers took
8 pictures at night of these items on the ground which
9 was good, and they put those in evidence.

10 But there were no pictures showing how the place
11 looked during the daylight so you could get a actual
12 vision. The State didn't put these in. I put them
13 in because I want you to see what we're doing here.

14 I want you to see that this is a small lot on a
15 corner in the middle of this residential area. This
16 is not a place where somebody would be dragged off
17 to. This is a place where somebody would go and try
18 to hide for a few minutes to do whatever they decided
19 they wanted to do.

20 What happened at the club between 2:00 and 3:00.
21 That's all the time these people had that night.
22 Between 2:00 and 3:00. One hour. She said 2:00 I
23 left.

24 Now ladies and gentlemen, we have been over this
25 for two days. This is the lady who wants you to

1 believe that she's a good, honest, law abiding
2 person.

3 She's at the nightclub. She gets a ride there
4 with her friend. Her friend doesn't stay. She's got
5 no purse. She's got no cellphone. No evidence of
6 any money.

7 She says to you that her drinks were free. I
8 brought the American Legion President in here because
9 I knew that wasn't true. I knew the American Legion
10 President has a bar there and he's got to protect his
11 club.

12 He's not going to just let people serve drinks
13 free. He told you, yes, we maintain the bar, she --
14 somebody had to pay for the bar.

15 Then Ms. Fant says, well, isn't it possible
16 because big Mike says I was running a tab. No. The
17 man said we weren't running no tabs then. You had to
18 pay as you go.

19 Ms. Fant challenges, oh, you sure this is the --
20 you just got to be the president. They could have
21 talked to this man. He's been the president since
22 May of 2002.

23 Not one of these officers went down there and
24 talked with him. Nobody has gone to see him until
25 this week when I put him on the list. Then they

1 started working.

2 How do you think I knew about the SLED agent
3 over in Columbia who did the blood test?

4 *MS. FANT:* Your Honor, at this point I would
5 object. May we approach?

6 *THE COURT:* Yes, ma'am.

7 (Whereupon a bench conference was held.)

8 *MR. FINNEY:* So now they are saying that she
9 wasn't impaired from these drinks that she had. I
10 don't know if she was impaired or not. But I had to
11 get the SLED man here because they didn't call the
12 SLED man in their case.

13 The SLED man got the information, the -- the
14 blood from the city police, not from me. He wasn't
15 working for me. He was working for them. Why didn't
16 they want you to know that this lady had a .124
17 alcohol? Won't help their case.

18 Why is it that every police officer every time
19 they saw Olivia asked her, are you all right? Can we
20 get anything for you, let me rub your hair.

21 Do you think Olivia might have gotten a little
22 spoiled by the treatment that she was getting from
23 the police officers and that if they had been out
24 there asking the right questions and investigating
25 this thing could have been looked at a little harder

1 before now?

2 These are excellent officers and I know this is
3 a tough job. But it seems to me that when this lady
4 got on the stand Monday morning and she just about
5 cried throughout the whole testimony with Ms. Fant
6 and then I started asking her questions, she didn't
7 cry one time.

8 As a matter of fact, she didn't even know
9 basically why I was asking her questions, that we are
10 here because of her allegation against my client.
11 That's why we're here.

12 That's why I wanted to know, ma'am, how is it
13 that you say you got scratches and there weren't none
14 in the hospital. How come you say, ma'am, this man
15 put his arm, neck, there.

16 We are talking about choke holds and wrestling
17 and air chokes and blood chokes? This lady ain't got
18 no choke marks. The only evidence of that is what
19 this lady said.

20 What I'm asking you to do is say, okay, this is
21 what you said, now let's see what the doctors, the
22 lawyers and the other people found. They didn't find
23 anything. They didn't find anything.

24 Ladies and gentlemen, this lady comes into court
25 and says that my client threw her down on the ground

1 and -- and was -- while he was on top of her he had
2 one arm, according to her, the right arm I believe,
3 on her neck.

4 No bruises now, but now -- the most amazing
5 thing was how he got the pants off of her and the
6 boots and the pants.

7 Ladies and gentlemen, go in the jury room, take
8 these blue jeans and spread them out on the table.
9 What is the condition of the boots? Do you think
10 that these boots would have been unzipped if this
11 lady had been attacked?

12 This man is going to attack her, he's just going
13 to take the time to unzip the boots, old boots?
14 Ladies and gentlemen, that's Exhibit number 2B.

15 I contend she took the boots off because I
16 contend she wanted to take her pants off because I
17 contend you can't take these pants off of that
18 lady -- this is a small-framed lady. Look at her,
19 she's -- it's a size two or one or three.

20 Look at the bottoms of them. They are not bell
21 bottoms. Look at those pants legs, ladies and
22 gentlemen. How are you going to get those pants off
23 unless you take the boots off?

24 Ladies and gentlemen, she said that they had
25 sex, he raped her with one leg on, and then after

1 talking about some fire ants, I think she got up and
2 the other lady came out. Come back and listen to it
3 again if you need to.

4 Ladies and gentlemen, there's no way for a lady
5 who doesn't want to have these pants taken off to
6 have them taken off. These panties, no tears, no
7 rips. These panties were taken off. They were taken
8 off.

9 They weren't pulled off. They weren't torn off.
10 There's no evidence of that. It's on their statement
11 by her. Now, what do we know for a fact? We know
12 for a fact that the officers found these in the
13 field. We know that.

14 We don't know how they got there. We know what
15 she said, but she also said she got fire ant bites
16 all over her and that she had scratches on her back
17 from being on some stumps. That's what she told the
18 officers.

19 And ladies and gentlemen, she didn't tell those
20 things until three days later, July the third. Not
21 even in the hospital she didn't say nothing about
22 fire ants, she didn't say nothing about stumps, she
23 didn't say nothing about other things.

24 Three days later when she gave her long written
25 statement after she had had time to figure things

1 out, fire ants, stumps, other things.

2 What do we know? We know that there was no
3 bruises. Know there was no fire ant bites. We know
4 there was no -- no evidence of any struggle.

5 I mean, of course we know that the officer went
6 out there that night and took pictures and they found
7 these things spread out over a kind of a wide area.
8 You look at the pictures. Nothing is -- nothing is
9 in a place where you could take one picture of.

10 Officers said, I don't know, trees were there,
11 whatever, he had to move around a little bit, but no,
12 one picture of anything together.

13 Was there any evidence that this lady, while she
14 was on the ground and she struggled as she dug a
15 little hole with her heel or scratched or -- what was
16 her hands doing while this man was on top of her?

17 Could she be scratching the grass and at least
18 showing -- nothing like that. No dirt under her
19 fingernails that they could have taken at the scene?
20 She didn't scratch this man who was on top of her,
21 not one time?

22 There's people that live 50 feet away, ladies
23 and gentlemen, that heard no screams. The officers
24 went by and talked to them. The only scream they
25 heard was when this lady was running down the street

1 without her pants on.

2 What happened in the lot that night I don't
3 know. What happened in the lot that night was not
4 rape. How do we know that Olivia knew this guy?

5 Well ladies and gentlemen, she drew a sketch
6 four days later that looks pretty much like the guy.
7 The guy that she had never seen before, the guy that
8 came up behind her and pulled her into the dark woods
9 where she didn't get a good look at him, that put her
10 on the ground in the dark bushes and raped her, and
11 she draws a pretty good sketch four days later, she
12 and the artist.

13 What does that say to you? That maybe the story
14 wasn't the whole story? That maybe what her version
15 of left something out? Maybe she met him at the
16 club. Maybe they had drinks. Maybe Mike -- maybe,
17 maybe, maybe. I don't know.

18 And ladies and gentlemen, I don't know because I
19 wasn't there and Catherine Fant wasn't there and
20 Angie Rabon wasn't there and Irene Culick wasn't
21 there, and we are all here because of Olivia McCrea.

22 Any evidence, any evidence in this case to
23 connect Ricky Sanders to this case, to this lady
24 except what Olivia McCrea said and the fact that the
25 doctor said that there was a spot on her leg that

1 came from Ricky.

2 We admit the spot on the leg came from Ricky.
3 We admit that Ricky was with this lady this night.
4 What does that then prove? That he raped this lady,
5 that this lady was raped?

6 No. It proves that they were together. It
7 proves that that story that you heard was partly
8 true.

9 But the part that violates the law, the part
10 that gets us into court and makes this man
11 responsible for her injuries, if you find injuries,
12 that part is missing. That part is based on medical
13 and other things that they don't have.

14 I could go on and on and talk to you about all
15 the inconsistencies. We can talk about the fact that
16 in State's Exhibit number 12 this lady left the
17 American Legion hut on Bailey Street at 2:00 in the
18 morning according to her statement going to 110 Maney
19 Street which is five or six blocks south, north, of
20 the club.

21 She left the club that had a telephone in it.
22 She left the club that would have had officers from
23 the club would have assisted her getting home. She
24 left a club where she certainly could have called her
25 good friend Wanda to come back and pick her up

1 because her mean old boyfriend Mike had decided for
2 no reason -- because you never heard a reason why
3 Mike didn't come back -- why Mike wouldn't take her
4 home. You got common sense.

5 And if you use your common sense and you talk to
6 one another, you will be able to decide that there
7 was a reason why Mike didn't want to take her home
8 that led to her being down here on the corner of L
9 and Maney Street and within just a few minutes of
10 getting there her clothes are off and Ricky Sanders'
11 DNA is on her leg.

12 And then, ladies and gentlemen, the story we
13 don't know. She was running down the street saying
14 911. When the first officer gets there, she's
15 sitting on the sidewalk. That's what he said. I saw
16 her sitting on the sidewalk, I came up and she went
17 hysterical.

18 The first lady officer, EMS person came up, she
19 was sitting on the sidewalk again where she went
20 hysterical. Tod Sims came up. He couldn't talk to
21 her, had to go get these ladies, and these ladies
22 gave her the treatment that she needed.

23 They didn't give her -- she didn't give them
24 much information. They didn't find anybody that
25 night. They start going around.

1 Now, what -- what can you do, ladies and
2 gentlemen, when the evidence is that they went to the
3 hut, the police officers looked for the -- for the
4 road, had this roadmap and they put it in evidence
5 because I guess they're saying Mr. Bridges wasn't
6 running the club right.

7 He said that there was a sign-in sheet. I don't
8 know if it was big Mike who had the sign-in sheet or
9 the club. I wasn't clear about that. You can come
10 back and listen to the testimony.

11 But they say that the club ran the sign-in
12 sheet, and this is the sign-in sheet. This isn't any
13 evidence. This doesn't even prove that -- that
14 Mr. Isaac was there.

15 Looks like to me this might not be the right --
16 we can't even tell what date this came. I mean, it's
17 not dated. We don't know the -- we don't know
18 anything about that. That's not evidence of
19 anything.

20 What I'm saying to you is this. It's pretty
21 clear that if you had been brought the right
22 information, you could have made this case without
23 having to depend so much on Ms. Isaac.

24 Ms. Isaac started -- I'm sorry -- Ms. McCrea
25 started the case. But once it got started, once the

1 allegation was made, once she said he pulled me in
2 the woods and raped me, there ought to be things in
3 the record, in the file, in the evidence that backs
4 it up. It's not there.

5 It's not Ms. Fant's fault. It's not the
6 officers' fault. It's not the EMS people's fault.
7 It wasn't there to begin with.

8 What do you know about Olivia McCrea? What
9 about her judgment that night before she got to the
10 corner of Maney and L? Her judgment about going out
11 without a pocketbook, without a cellphone.

12 Her judgment about going to the club and leaving
13 the club without having somebody take her home, call
14 a cab, go -- go get somebody to call her.

15 We never did hear from this lady that lived at
16 110 Maney Street. I don't know what happened to
17 that. I mean, we don't even know if she was home.
18 She doesn't even know if she was home.

19 She didn't call to say, hey, I'm down the block
20 five blocks, I'm coming to your house because I ain't
21 got no ride and Mike won't take me home.

22 She's going to walk down there and knock on the
23 door? She knows the ladies there. What did she
24 testify? Because she's got to go to work the next
25 morning. But she ain't worried about working the

1 at five in the morning, she might have been coming
2 down off -- off of a high or nothing.

3 Do you hear what I'm saying? At 1:30 she had
4 her last drink. She didn't have anything else to
5 drink so far as she's testified after 1:30 when the
6 club said, that's it, last call.

7 Maybe she did have something else to drink
8 outside. Maybe. What I'm saying is, that number
9 would have been going up as she continued to drink
10 through the evening, but when she gave her blood, it
11 might have been coming down.

12 She might have been much higher at 2:00 or at
13 1:30 or at 2:30. But at four or 4:30 or five when
14 she was giving the blood, it was a different number,
15 a high number, but still we don't know if it was
16 higher than that.

17 Ladies and gentlemen, allegations have been
18 made, allegations bring us to court. Proof beyond a
19 reasonable doubt is what you need to act on. There's
20 a wall that has to be climbed by these witnesses, and
21 this evidence.

22 If that wall hasn't been climbed, you have a
23 duty under the law to find my client not guilty. You
24 have a reasonable doubt about Ricky Sanders and what
25 went on at the corner of L and Maney Street that

1 night, if you have a reasonable doubt as to whether
2 you were told the whole story by Olivia McCrea, the
3 Judge will tell you you have to resolve that doubt in
4 Ricky's favor.

5 Ms. Fant will now have a chance to talk with
6 you. I will not be able to come back after she
7 finishes. Listen to what she has to say. Listen to
8 what the Judge has to say when he charges you the
9 law.

10 The law requires that Ms. Fant prove criminal
11 intent on Ricky Sanders' part. Criminal intent is a
12 requirement of a person to act in a certain way in
13 order to be found responsible.

14 We haven't heard any evidence of criminal
15 intent. We haven't seen any evidence of criminal
16 intent. We have had allegations by this lady.

17 I ask you, listen to Ms. Fant closely as she
18 argues to you the best she can with what she's been
19 brought. She's going to talk about how scared she
20 was and how she cried and how hysterical she was.

21 But ask Ms. Fant to talk about the exhibits in
22 evidence. When she talks about how Olivia must have
23 felt -- we are not here about the feelings of Olivia.

24 We're here about the proof that's been brought
25 to this court and the proof is that there isn't any

1 proof of a rape or a kidnapping and that my client
2 should be found not guilty. Thank you.

3 *THE COURT:* Ms. Fant?

4 *MS. FANT:* May it please the Court.

5 *THE COURT:* Yes, ma'am.

6 *MS. FANT:* Mr. Finney.

7 CLOSING STATEMENT

8 *MS. FANT:* Ladies and gentlemen of the jury, I'd
9 like to start by clarifying a few things from Mr.
10 Finney's closing argument to you.

11 First of all, Olivia McCrea did not bring this
12 case to you. This case was started by that man when
13 he kidnapped her and raped her as she was trying to
14 walk home to a friend's house.

15 And he indicated that this was sexual, that they
16 had met at the club. Where is the evidence of that I
17 ask. There is not one shred of evidence that she had
18 ever met this man, not a bit.

19 And if he was at that club, why didn't he bring
20 some people there to talk about it?

21 *MR. FINNEY:* Objection, Your Honor. The
22 defendant has no burden.

23 *MS. FANT:* Your Honor, I comment on other
24 witnesses.

25 *THE COURT:* You can't -- the fact this defendant

1 does not have the burden, she has comment on the --
2 the witnesses that testify.

3 MR. FINNEY: She has a--

4 THE COURT: The defendant does not have the
5 burden to proof anything. She has a right to comment
6 on the witnesses who testified.

7 MR. FINNEY: All right, sir.

8 MS. FANT: And in -- let me clarify this I guess
9 before I go forward, Your Honor. It's my
10 understanding that the State could comment on other
11 witnesses that were available allegedly that he did
12 not bring to court. There is some case law on that.

13 MR. FINNEY: No, Your Honor. I object to that,
14 Your Honor.

15 THE COURT: Y'all approach.

16 (Whereupon a bench conference was held.)

17 MS. FANT: I apologize. The bottom line is that
18 the defendant is entitled to call witnesses, too, and
19 if they were there with him, they could have come and
20 said so, and he did not do that.

21 In addition, one of the things Mr. Finney
22 pointed out was, oh, the State didn't bring you any
23 daylight photo.

24 The photos that he brought you were not taken in
25 2002. They weren't taken in 2003 or four or five or

1 six. Those photos mean absolutely nothing about what
2 happened to Olivia that night.

3 The testimony from the witness stand is that it
4 was much more wooded and brushy at the time. There
5 in fact is a photo which you can see in evidence that
6 shows there was a chimney.

7 The house had been blown down by Hugo, and there
8 was still a chimney standing, but now it's not there.
9 And that's why it's not in any photos. You cannot
10 rely on that to talk about what happened during the
11 night time.

12 And the final thing is, he got up here and said,
13 well, we admit there was consensual sex. He can't do
14 that. He is not a witness in this case.

15 The only evidence that you're to consider is
16 what came from the witness stand. And there was not
17 a single person or bit of physical evidence that
18 indicated consent in this case.

19 Ladies and gentlemen, rape is a crime about
20 power, not sex. It's about controlling that victim
21 and making them submit to your will, what you want at
22 the time.

23 It's my burden to prove my case beyond a
24 reasonable doubt. But it's not beyond all doubt.
25 And I submit to you that the reasonable evidence in

1 this case and all of the inferences from it support
2 the State's contention that Ricky Sanders did this.

3 These are two statutes that the Judge will
4 instruct you on as far as what the law is in this
5 case.

6 Criminal sexual conduct in the first degree.
7 Person is guilty of criminal sexual conduct in the
8 first degree if the actor engages in sexual battery
9 with the victim -- and he'll tell you what sexual
10 battery is -- that's any intrusion, however slight,
11 into the vaginal or anal openings or any opening of
12 another person's body and in addition the actor used
13 aggravated force or the victim submits under
14 circumstances where the victim is also the -- excuse
15 me -- the victim of forcible confinement, kidnapping
16 or other similar acts.

17 In this case we have proved it both ways. He
18 grabbed her from behind, applied a choke hold, cut
19 off her air supply and grabbed her to the ground.
20 That is both using aggravated force and confining her
21 or kidnapping her.

22 And the Judge will instruct you on kidnapping
23 and what it is. And you don't have to prove -- the
24 State is not required to prove all these things.
25 These are all different ways that you can kidnap

1 next morning apparently.

2 Listen, ladies and gentlemen. What about her
3 judgment? Well, what -- what about the fact that she
4 has been convicted of these crimes?

5 Well, I bring this up not because I'm trying to
6 say that she's a bad person, but it's not a situation
7 where the record revealed that this happened
8 afterwards, so we can say that this is like some kind
9 of post traumatic -- she got raped, she's now got
10 some kind of post traumatic stress disorder so she
11 goes out and shoplifts.

12 The first one happened four years and four
13 months before 2002, in February of '98. The second
14 one happened two months and nine days after she
15 reported she was raped in 2002.

16 The last one occurred three years and 28 days
17 after she was supposedly raped in 2005, the same year
18 my client got charged with this.

19 Do you think that the police officers knew all
20 this was going on in her life when she walked into
21 that emergency room that night? No. They are
22 trained to take the information that they are given
23 and work with it, and that's what they did.

24 And the information that they were given was
25 that they were looking for a medium build, black male

1 who had on a cream colored suit who had been seen
2 next to the American Legion hut and who had short
3 hair and no hair on his face.

4 And all that information came from Olivia
5 because Olivia knew what information to give. This
6 was not an unknown assailant. She knew who she was
7 dealing with. And she told the officers and that's
8 how this sketch got done.

9 I am about out of time. I'm going to go over
10 and talk to my client and ask him if there's anything
11 that I have forgotten to talk about, and then I'm
12 going to have to sit down. And then it's going to be
13 your decision because you have two decisions to make.

14 He's charged with kidnapping. Kidnapping is
15 a -- a crime in this state as is criminal sexual
16 conduct in the first degree. Kidnapping is taking
17 somebody against their will and holding them or
18 detaining them without their consent.

19 Kidnapping is the charge that they have placed
20 on my client for taking her and placing her in a
21 wooded area.

22 And then criminal sexual conduct is the charge
23 that they put on my client for taking and having
24 sexual relations with her without consent. Serious
25 charges.

1 This is an important day for Ricky and his
2 family. It's been a long time coming, and they want
3 you to consider every piece of evidence carefully and
4 they want you to consider this is not about rewarding
5 somebody or punishing somebody.

6 This is about your relying on the evidence,
7 weighing the evidence, and deciding what to do based
8 on the evidence.

9 Ladies and gentlemen, we talked about the map.
10 My map is not as good as Ms. Fant's map. She brought
11 an areal photograph. I want you to look at that and
12 look at the distances and look at the -- the places
13 that were involved in this case that night. It's
14 better to look at the map.

15 I want you to remember the information Ms. Fant
16 went out of her way on every witness that she
17 examined on that stand to say Olivia wasn't drunk
18 that night, was she? She wasn't having any trouble
19 communicating with you that night, was she?

20 Well, everybody said -- the first thing out
21 their mouth was, she was balled up crying, she didn't
22 want to talk, she didn't say much, she didn't give us
23 much information.

24 I don't know if she was drunk or not. They seem
25 like they say no, but there's the toxicology report.

1 The man says she would have been somewhat impaired at
2 a .06. Hers was twice as much.

3 And remember this. This blood sample was given
4 at four or 5:00 in the morning, three hours after she
5 had her last drink. The medical report will show you
6 what time they drew the blood.

7 The blood was taken at about four or 5:00 in the
8 morning. The last drink was at 1:30 in the morning.
9 She said of her own volition that she had four gin
10 and juices.

11 She says they were free. If they were free, do
12 you think people remember how many free drinks they
13 had? Could have been more. This number, which is
14 a -- an impaired number, that's what they say under
15 the law, if it was a 10 you'd be impaired, she blew a
16 12.

17 MS. FANT: Objection, Your Honor. That is not a
18 correct statement on the law.

19 THE COURT: The jury will recall what they
20 remember from the facts. Go ahead.

21 MR. FINNEY: Thirty to 90 minutes he said for
22 that drink to absorb into your body. I'm not a
23 calculation or a statistician.

24 I'm not an expert in this, but I'm saying if she
25 had four drinks or more, by the time they tested her

1 someone.

2 Seizure, confining, abducting, carrying away.
3 If somebody grabs you and moved you from spot A to
4 spot B against your will, that is a kidnapping.
5 There is no time requirement. There is no distance
6 requirement. And the Judge will instruct you that
7 there is no ransom requirement.

8 A lot of people think kidnapping has to be
9 calling somebody up like on TV, we got your daughter,
10 pay me a million dollars. No. You kidnap somebody,
11 you grab them and hold them down against their will.

12 Now, one of the other things that we have to
13 prove that's not in the statute but it is our burden,
14 and that is that a sexual battery occurred, occurred
15 without the consent of the victim.

16 And if this is not a case where there was no
17 consent, I don't know what is. You heard every
18 witness get up there and say that Olivia McCrea was
19 absolutely devastated and traumatized by what
20 happened to her, that she ran around calling 911
21 without any underwear or other clothes on, that she
22 just sat down on the curb oblivious to everyone
23 around her.

24 Mr. Finney's statement to you as I said is not
25 evidence. Him saying, oh yeah, they were there and

1 they had consensual sex, that is not evidence. Mr.
2 Finney's attempts to impude the character of Olivia
3 McCrea is not evidence.

4 In fact, nothing he has said to you directly or
5 me, that I say to you directly for that matter, is
6 evidence.

7 I ask that you go back to the jury room and look
8 at all of the evidence, and I believe you will agree
9 that there is absolutely none, no evidence of any
10 consent by the victim in this case.

11 In South Carolina in a criminal sexual conduct
12 case if sufficient proof of first degree criminal
13 sexual conduct is just the victim takes the stand and
14 tells you that. We don't have to put up any other
15 evidence. We could simply have Olivia stand up there
16 and tell you that.

17 But we didn't do that. We brought every bit of
18 evidence that we had. The police worked hard on this
19 case and we brought it to you and showed it to you.
20 But you did begin by hearing from Olivia.

21 I can't imagine how hard it was for her to get
22 up there and have to tell you what happened to her.
23 But she did it. She told you about what happened at
24 the club. She admitted she had a few drinks. We
25 weren't trying to hide that.

1 their lives.

2 In opening statement Mr. Finney asked you not to
3 be swayed by sympathy or compassion. We're not
4 asking you to do that. We're asking you to base your
5 decision on the facts of this case.

6 Mr. Finney does not have any evidence that this
7 was consent. And of course, in these types of cases
8 if all else fails, just blame the victim, attack her
9 character, say she should have done this, she should
10 have done that, she should have called.

11 Well, you don't think Olivia McCrea beats
12 herself up every day for making the mistake for
13 trying to walk home that night? She has to live with
14 this for the rest of her life, but it is not -- it is
15 not her fault.

16 It was not Olivia's actions in this case but
17 those of the defendant that created the trauma to her
18 and the case before you.

19 When you took your jurors' oath on Monday you
20 swore to set aside any personal feelings and decide
21 this case solely on the facts and evidence. And it
22 is your duty to convict the defendant if in fact
23 those facts support his guilt.

24 Mr. Finney indicated that he thought Detective
25 Culick, Lieutenant Rabon and I have some kind of

1 bias. We feel sorry for victims so we're biased
2 about this case.

3 Well, I'll tell you right now I am biased. I
4 think every woman in Sumter County has a right to
5 walk on the street whatever time of night, wherever
6 she is, without being kidnapped and raped.

7 Ladies and gentlemen of the jury, because the
8 evidence in this case overwhelmingly supports the
9 crimes charged, that the defendant Ricky Darren
10 Sanders without any consent whatsoever seized and
11 abducted Olivia McCrea by putting her in a choke hold
12 and dragging her into a wooded area, holding her down
13 forcibly, and then committing a sexual battery upon
14 her, I ask that you find him guilty of kidnapping and
15 criminal sexual conduct in the first degree as
16 charged. Thank you.

17 JURY CHARGE

18 *THE COURT:* Now ladies and gentlemen, you have
19 heard the evidence in this case and the arguments of
20 both the State and the defendant and now I will
21 charge you on the law that applies to this case.

22 And under our constitution and code of laws only
23 the jury can make the findings of fact in this case.
24 I am not permitted to indicate to you how I might
25 feel about the facts.

1 So if I have said anything or done anything
2 throughout this trial that indicates that I have an
3 opinion about the facts, you're to disregard that
4 because I'm not allowed to have an opinion about the
5 facts. That is your job and your job only.

6 So you're not to try to read anything that I
7 have said or done in any way that I may have an
8 opinion about the facts in this case.

9 The same constitution and code of laws that
10 designates you the exclusive judge of the facts also
11 makes me the exclusive judge of the law.

12 Therefore, if you have an idea of what the law
13 is, what the law ought to be, and that idea differs
14 from what I now tell you the law is, you must
15 disregard your idea and apply the law that I give to
16 you exactly in your deliberation throughout this
17 trial.

18 The fact that the defendant was arrested,
19 charged and indicted in this case is not evidence in
20 this case and cannot be considered by you as evidence
21 of guilt in this case. Nor does it create any
22 presumption or inference of guilt.

23 The indictment is a formal written instrument
24 which contains the charges made against this
25 defendant and it serves as a document which brings

1 those charges to this court.

2 To this indictment the defendant has pled not
3 guilty. And that puts plea -- passed upon the
4 burden -- the burden upon the State of South Carolina
5 to prove him guilty beyond a reasonable doubt.

6 A person charged with committing a criminal
7 offense in South Carolina is never required to prove
8 himself or herself innocent.

9 Now, I instruct you and emphasize to you the
10 fact that the defendant did not testify is not a
11 factor to be considered by you in any way in your
12 deliberation and in your consideration of the
13 question of guilt or innocence of this defendant.

14 It must not be considered by you in any manner
15 whatsoever. A defendant has the constitutional right
16 to remain silent, and the assertion of this right
17 must not be considered by you in your deliberations.

18 I repeat. Under your oath you're to draw no
19 conclusions whatsoever from the fact that the
20 defendant in this case did not testify. The fact
21 that the defendant did not testify should not even be
22 discussed in the jury room.

23 The burden of proof as I have stated to you is
24 on the State. The defendant is not required to prove
25 his or himself innocent. The burden is on the State

1 to prove him guilty beyond a reasonable doubt.

2 It's an important rule of law in this country
3 that a defendant in a criminal trial will always be
4 presumed innocent of the crime for which he is
5 charged and indicted unless and until his guilt has
6 been proven by evidence which satisfies you the jury
7 of that guilt beyond a reasonable doubt.

8 The presumption of innocence is not a mere legal
9 theory. It is not just a legal phrase. It is a
10 substantial constitutional right to which every
11 defendant is entitled.

12 This presumption of innocence accompanies a
13 defendant from the time of his charge throughout the
14 trial until you reach a verdict based on the evidence
15 that satisfies you of his guilt beyond a reasonable
16 doubt.

17 A reasonable doubt is a doubt which makes an
18 honest, sincere, conscientious juror in search of the
19 truth in a case to hesitate to act.

20 Proof beyond a reasonable doubt must therefore
21 be proof of such convincing character that a
22 reasonable person would not hesitate to rely and act
23 upon it in the most important of his or her own
24 affairs.

25 Reasonable doubt can also be described as proof

1 that leaves you firmly convinced of the defendant's
2 guilt.

3 There are very few things in this world that we
4 know with absolute certainty. And in a criminal case
5 the law does not require proof to overcome every
6 possible doubt.

7 If based on your consideration of the evidence
8 you're firmly convinced that the defendant is guilty
9 of the crime charged, you must find him guilty.

10 On the other hand, if you think there's a real
11 possibility that he is not guilty, you must give him
12 the benefit of that doubt and find him not guilty.

13 In determining what facts in the case, you must
14 necessarily pass upon the credibility, which simply
15 means the believability of the witnesses, and the
16 value or weight to be given to their testimony.

17 You alone must decide the force and effect and
18 the truth of that testimony. In making this
19 decision, there are many things that you may
20 consider, you should take into consideration, such as
21 the appearance and the manner of the witness on the
22 witness stand, sometimes referred to as the demeanor
23 of the witness.

24 Was the witness forthright or hesitant. Was the
25 witness's testimony consistent or did it contain

1 discrepancies.

2 What was the ability of the witness to know the
3 facts about which he or she testified? Did a witness
4 have cause or reason to be biased and prejudiced in
5 favor of the testimony he or she -- he or she gave or
6 not?

7 Was the testimony of a witness corroborated or
8 made stronger by other testimony and evidence or was
9 it made weaker or impeached by other testimony or
10 evidence.

11 And the rules of evidence ordinarily do not
12 permit a witness to testify to opinions or
13 conclusions.

14 An exception to this rule is -- exists for
15 witnesses we call expert witnesses. A witness who by
16 education and experience has become an expert in some
17 art, science, profession or calling may state an
18 opinion as to relevant and material matters to which
19 the witness claims to be an expert and may also state
20 the reasons for that opinion.

21 You should consider an expert's opinion received
22 in evidence in this case like any other evidence,
23 give it the weight you think it deserves.

24 If you decide the opinion of the expert is not
25 based on sufficient education and experience or if

1 you conclude that the reason given in support of that
2 opinion are not sound or that opinion is outweighed
3 by other evidence, you may disregard the opinion
4 entirely.

5 An expert's testimony is to be given no greater
6 weight than that of any other witness simply because
7 that person is an expert.

8 Further, you're not required to accept an
9 expert's opinion even though it is uncontradicted.
10 As jurors you have a right to believe a small portion
11 of a witness's testimony and disregard the larger or
12 vice versa.

13 You may believe all of a witness's testimony or
14 none. You may believe the testimony of a single
15 witness against that of many witnesses or the other
16 way around.

17 There are two types of evidence that you're
18 presented during a trial, direct evidence and
19 circumstantial evidence.

20 Direct evidence is the testimony of a person who
21 asserts -- excuse me -- or claims to have actual
22 knowledge of a fact such as an eye witness.

23 Circumstantial evidence is proof of a chain of
24 facts and circumstances indicating the existence of a
25 fact.

1 The law makes absolutely no distinction between
2 the weight or value given to either direct or
3 circumstantial evidence.

4 Give you an example of circumstantial evidence.
5 I go to bed one night, look out my front window and
6 my lawn is clear. I wake up the next morning and the
7 lawn is covered in snow.

8 I did not see it snow, but I can infer from the
9 circumstances that existed the next morning that it
10 must have snowed that night while I was asleep. That
11 is circumstantial evidence. Direct evidence is I saw
12 it snow.

13 And after weighing all of the evidence, if
14 you're not convinced beyond a reasonable doubt of the
15 defendant's guilt, you must find him not guilty.

16 Now, criminal intent is a necessary element to
17 which each crime must be proven by the State beyond a
18 reasonable doubt. Criminal intent is always a matter
19 that must be determined by the jury from the
20 circumstances surrounding the situation.

21 There is no way to prove intent to a
22 mathematical certainty. There is no way medical
23 science can dissect a person's brain and determine
24 what he or she had in mind.

25 So the law states criminal intent may be

1 inferred from the circumstances shown to have existed
2 before and after the fact.

3 This is how you the jury make a determination of
4 whether or not the element requiring intent was
5 present. Criminal intent is a state of mind that
6 operates jointly with an act or omission in the
7 commission of a crime.

8 Criminal intent is a mental state of conscious
9 wrongdoing. So it is up to you the jury to determine
10 what the defendant intended to do based on
11 circumstances shown to have existed.

12 I tell you that the State must prove criminal
13 intent beyond a reasonable doubt just as the State
14 must prove every element beyond a reasonable doubt.

15 Now, the defendant is charged with kidnapping.
16 The State must prove beyond a reasonable doubt that
17 the defendant knowingly and unlawfully seized,
18 confined, decoyed, kidnapped, abducted or carried
19 away another person without authority of law.

20 To do a thing unlawful is to do it willfully
21 against the law. Knowingly means knowledge,
22 consciously, not accidentally. Seize means to take
23 hold of suddenly or forcibly.

24 Confine means to limit, restrict or enclose
25 within bounds, imprison or shut or keep in. Kidnap

1 is to remove a person against his or her will by
2 unlawful force or by fraud. Abduct means to carry
3 off secretly or by force for an illegal purpose.

4 Carry away means to remove. The State does not
5 have to prove that the defendant did all of these
6 things. Instead, if you find beyond a reasonable
7 doubt that the defendant did any of these things, you
8 may find the defendant guilty of kidnapping.

9 Something done without authority of law is
10 something which the law does not sanction, permit,
11 allow, condone or provide justification for.

12 Kidnapping does not have to be for any personal
13 or monetary gain or for any illegal purpose, but may
14 be for any reason whatsoever.

15 The defendant is charged with criminal sexual
16 conduct in the first degree. The first element which
17 the State must prove beyond a reasonable doubt is the
18 defendant engaged in a sexual battery with the
19 victim.

20 A sexual battery is sexual intercourse,
21 cunnilingus, fellatio, anal intercourse or any
22 intrusion, however slight, of any part of a person's
23 body or of any object into the genital or anal
24 openings of another person's body except when the
25 intrusion is accomplished for medical recognized

1 treatment or diagnostic purposes.

2 If you find that the State has not proven beyond
3 a reasonable doubt that a sexual battery occurred,
4 you would stop deliberating and your verdict would be
5 not guilty.

6 If you find that the sexual battery did occur,
7 you must then decide whether the State has proven
8 beyond a reasonable doubt that the defendant used
9 aggravated force to accomplish the sexual battery.

10 Aggravated force means the use of physical force
11 or -- or physical violence of a high and aggravated
12 nature to overcome the victim. This includes the
13 threat of using a deadly weapon.

14 The defendant -- number two. The victim
15 submitted to sexual battery while the victim was also
16 the victim of forcible confinement, kidnapping,
17 robbery, extortion, burglary, housekeeping, or -- I'm
18 sorry -- housebreaking or any other similar act or
19 offense.

20 Now ladies and gentlemen, you are not partisans
21 or advocates for the State of South Carolina or this
22 defendant. You're not here to reward your friends or
23 punish your enemies. Obviously that system of
24 justice would not be tolerated.

25 You have been selected by both the State and

1 this defendant as fair and impartial jurors. And it
2 is your duty by your joint deliberation to determine
3 the truth in this case giving to this defendant the
4 benefit of every reasonable doubt on each and every
5 issue.

6 Then to the facts which you determine to be true
7 you're to take and apply the law that I have given
8 you in this case and arrive at a verdict which speaks
9 the truth.

10 When you have accomplished these
11 responsibilities, you will have satisfied your oath
12 as jurors and you will have discharged your duty to
13 this court.

14 Now I am going to instruct you, Mr. Foreman, on
15 the form of the verdict. I had my law clerk type up
16 this verdict form. It's simply the caption of the
17 case, State of South Carolina and the county of
18 Sumter, the State of South Carolina versus Ricky
19 Darren Sanders, and it's the indictment.

20 And it's jury verdict. One, we the jury
21 unanimously find the defendant, Ricky Darren Sanders,
22 guilty of kidnapping or not guilty of kidnapping.

23 Two, we the jury unanimously find the defendant,
24 Ricky Darren Sanders, guilty of criminal sexual
25 conduct in the first degree or not guilty of criminal

1 sexual conduct in the first degree.

2 The order that I put these on this piece of
3 paper you should draw no inference from whatsoever.
4 I simply had to put them in some order. You are to
5 consider each verdict in this case.

6 You have to -- your decision has to be
7 unanimous. All 12 of you have to decide on each
8 verdict. When you have reached that verdict, you're
9 to check the appropriate box that the jury has
10 reached and then sign your name and date it and knock
11 on the door and let the bailiff know that you have
12 reached a verdict and we'll bring you back out to
13 receive the verdict.

14 Now, during your deliberation if any of you have
15 to be excused to go to the restroom or do anything,
16 Mr. Foreman, you have to stop your deliberation till
17 that person returns. You cannot deliberate this case
18 until -- unless all 12 of you are at the table or in
19 the room discussing.

20 If somebody has to leave to go to the restroom,
21 you have got to stop. When they come back, start
22 back. Once you have reached a verdict and it's a
23 unanimous verdict, which means that all 12 of you
24 have agreed on the verdict you're to reach, the
25 appropriate boxes, sign it, knock on the door and let

1 us know.

2 Now, I have got to confer with the lawyers to be
3 sure that I have not left out any part of my charge.
4 So what I'm going to do is send you to the jury room.
5 I will talk to them, see. If I have left out
6 anything, I will bring you back out and charge you
7 further.

8 If I have covered all of the issues that they
9 think the law requires me to cover, then I will send
10 the evidence in to you. When I send the evidence in
11 along with this verdict form, it will be your
12 indication to start your deliberation.

13 But don't start until you get the verdict form.
14 Now, it looks like all my original 12 are healthy.
15 So my two alternates, I will not need y'all to go to
16 the jury room. I will only needed y'all if I had
17 lost one of my original 12, IE, to some emergency.

18 So if y'all will just hang with me. The rest of
19 you go to the jury room. I will either bring you
20 back out or send the evidence in. When you get the
21 evidence, that means you can start.

22 (Jury left the courtroom at 12:46 pm.)

23 *THE COURT:* Anything from the State?

24 *MS. FANT:* No, Your Honor.

25 *THE COURT:* From the defense?

1 MR. FINNEY: No, Your Honor.

2 THE COURT: All right. If y'all will be sure
3 that the evidence is together correctly, we'll send
4 it in. Have y'all looked at this verdict form?
5 Y'all want to look at it?

6 MR. FINNEY: Yes.

7 THE COURT: As a matter of fact, I have got
8 copies. Both of you can have one. Got any issues
9 with the verdict form, you need to let me know now.

10 (Jury began deliberations at 12:54 pm.)

11 (Whereupon there was a recess in this case.)

12 THE COURT: Okay. Counsel, I have received a
13 note from the jury with three questions on it.
14 Question number one, how did Ricky Sanders' DNA
15 become available to SLED. Was he convicted before or
16 records of DNA from another job.

17 Number two, we request the big charge that has
18 the kidnapping law that was on the easel. Number
19 three, what is the vaginal vault.

20 Well, I can't answer -- my understanding -- any
21 of these questions. The charge -- the closest thing
22 I can come to answering number two is re-charge them
23 on the law of kidnapping.

24 And I can ask them if they want me to do that.
25 I can't answer number one. And I'm simply going to

1 say you have heard all -- that is not into evidence,
2 you have heard all the evidence that you're going to
3 hear on this case and you must decide this case based
4 on the evidence that you have heard.

5 I can tell them that the chart was not
6 introduced into evidence so they can't have it, but I
7 can re-charge them on the law of kidnapping if they
8 want me to.

9 And I don't know how, you know, number three, I
10 can't give them a -- I didn't give them a charge on
11 vaginal vault, it's not a legal definition, so I
12 don't know that I can answer them.

13 What -- just like I couldn't define any term
14 that any of y'all used throughout this testimony, so
15 I'm not going to be able to define vaginal vault to
16 them. They're going to have to do the best they can
17 with them unless it's -- I don't know anything
18 contrary. The State or the defense want to be heard
19 on any of this?

20 MS. FANT: No, Your Honor. I think that's all
21 you can do.

22 THE COURT: Okay. bring them in, please sir.

23 (Jury entered the courtroom at 1:41 pm.)

24 THE COURT: Mr. Foreman, I have received a note
25 from you with three questions. One is, how did Ricky

1 Sanders' DNA become available to SLED, was he
2 convicted before or -- or record of DNA from another
3 job.

4 I can't answer that question in that you have
5 heard all of the evidence that you're going to hear
6 in this case. And so I can't come back now and have
7 the parties present additional evidence to answer
8 that question.

9 That's an evidentiary question that I can't
10 answer. That is -- that question has not been
11 presented to y'all, so it's not evidence in this
12 case.

13 Number two was, you wanted the big charge that
14 has the kidnapping law on there. I can't give you
15 the charge because it was not introduced into
16 evidence. It was used in closing argument.

17 I can re-charge you on the law of kidnapping. I
18 can re-charge you on the law, but I can't give you
19 the charge if that's what you'd like me to do.

20 And the third question is, what is the vaginal
21 vault. I can't answer that either because that's an
22 evidentiary question. It's not a legal definition.
23 So I can't give you that. You're going to have to do
24 the best you can with that.

25 Would you like me to re-charge you on

1 kidnapping? That's the only thing I can do out of
2 these three questions.

3 FOREMAN: And both--

4 THE COURT: And criminal sexual conduct?

5 FOREMAN: Yes.

6 THE COURT: Okay. Kidnapping -- the defendant
7 is charged with kidnapping. The State must prove
8 beyond a reasonable doubt that the defendant
9 knowingly and unlawfully seized, confined, decoyed,
10 kidnapped, abducted or carried away another person
11 without authority of law.

12 To do it -- to do a thing unlawful is to do it
13 willfully against the law. Knowingly means with
14 knowledge consciously, not accidentally. Seize means
15 to take hold of suddenly or forcibly. Confine means
16 to limit, restrict or enclose within bounds, imprison
17 or shut or keep in.

18 Kidnap is to remove a person against his will or
19 her will by unlawful force or by fraud. Abduct means
20 to carry away -- to carry off secretly or by force
21 with an illegal purpose. Carry away means to remove.

22 The State does not have to prove that the
23 defendant did all of these things. Instead, if you
24 find beyond a reasonable doubt that the defendant did
25 any of these things, you may find the defendant

1 guilty of kidnapping.

2 Something done without authority of law is
3 something which the law does not sanction, permit,
4 allow, condone or provide justification for. Excuse
5 me.

6 The kidnapping does not have to be for any
7 personal or monetary gain or any illegal purpose, but
8 for -- but may be for any reason whatsoever. That's
9 the law on kidnapping.

10 Now criminal sexual conduct. The first element
11 which the State must prove beyond a reasonable doubt
12 is the defendant engaged in sexual battery with the
13 victim.

14 A sexual battery is sexual intercourse,
15 cunnilingus, fellatio or anal intercourse or any
16 intrusion, however slight, of any part of a person's
17 body or of any object into the genitalia -- genital
18 or anal openings of another person's body except when
19 the intrusion is accomplished for medical or
20 recognizable treatment or diagnostic purposes.

21 If you find that the State has not proven beyond
22 a reasonable doubt that a sexual battery occurred,
23 you would stop deliberating and your verdict would be
24 not guilty on criminal sexual conduct first degree.

25 If you find that a sexual battery did occur, you

1 must then decide whether the State has proven beyond
2 a reasonable doubt that, one, the defendant used
3 aggravated force to accomplish the sexual battery.

4 Aggravated force means to use a physical force
5 or physical violence of a high and aggravated nature
6 to overcome the victim. This includes the threat of
7 use of a deadly weapon.

8 Number two, the victim submitted to a sexual
9 battery while the victim was also a victim of
10 forcible confinement, kidnapping, robbery, extortion,
11 burglary, housebreaking or any other similar act.

12 Now that's the legal definition of criminal
13 sexual conduct in the first degree. So I'm going to
14 send you back to the jury room now. If you have any
15 further questions of law, I can answer those.

16 I cannot answer questions of fact because you
17 have heard all of the evidence that you are going to
18 hear in this case. So you must decide it based on
19 the evidence you have heard. I can instruct you
20 further on the law.

21 Okay. If you'll go back to the jury room and
22 let us know when you reach a verdict, or if you have
23 another question, you can send it out in writing.

24 (Jury left the courtroom at 1:46 pm.)
25

1 (WHEREUPON, Court's Exhibit 2 was admitted into
2 evidence.)

3 THE COURT: Any exception or deletions from the
4 State?

5 MS. FANT: No, Your Honor.

6 THE COURT: From the defense?

7 MR. FINNEY: Your Honor please. The first time
8 you charged criminal sexual conduct I kept listening
9 for you to say something else and then you re-charged
10 it just now and you said the same thing, and I
11 realized what I was waiting on is that you have read
12 the statute as I see it in the book and it says that
13 sexual battery is sexual intercourse or other things.

14 THE COURT: Right.

15 MR. FINNEY: But I don't remember you reading
16 this time -- maybe you read it the first time -- that
17 it has to be without the victim's consent. The actor
18 causes the victim -- without the victim's consent.

19 THE COURT: I did not read that. It's not in
20 our charge book that way. It is not part of the
21 definition of -- I understand that, but it's not
22 anywhere in the statute about consent.

23 It has to be -- it has to be first a sexual
24 battery, then it has to be with aggravated force or
25 sexual battery while forcibly confined, kidnapped,

1 robbery, et cetera.

2 And I have looked at that three times. It's not
3 a part of the charge. I understand that. And it's
4 not a part of the statute. Is it? I couldn't--

5 MR. FINNEY: Well--

6 THE COURT: I understand your concern, but it's
7 not a part of the charge in our charge book. It's
8 not a part of the statute.

9 MR. FINNEY: Well, Your Honor, I think that the
10 Court has the duty to charge the fact that have been
11 brought out in the case. And the fact that have been
12 brought out in the case were that the proof in this
13 case would require that there was no consent by the
14 victim as to this sexual intercourse.

15 THE COURT: I understand.

16 MR. FINNEY: The defense contends that there was
17 sexual intercourse with consent. And the jury in my
18 opinion should be charged that they have to first
19 stop and consider whether or not there was evidence
20 of the victim's consent or lack of consent before
21 they can find him guilty of criminal sexual conduct
22 in the first degree.

23 I would cite as authority 163652 subsection C
24 which requires in that subsection the actor causes
25 the victim without the victim's consent to become

1 incapacitated or physically helpless.

2 *THE COURT:* I know, but that's -- but in that
3 case -- it doesn't apply in this case because that's
4 where the -- that's where you slipped the victim a
5 mickey, that you had made the person without their
6 consent incapacitated.

7 I -- other than that's where two people are
8 sitting in a bar, you slip a pill in the female's
9 drink and she's -- without her consent is
10 incapacitated versus if she consents to get drunk,
11 that doesn't apply.

12 So that consent issue is my understanding of
13 that law deals with her incapacitation. And I didn't
14 think that that -- that CRD applied in this case at
15 all or see -- because it's not any facts about her
16 being unconscious or mentally or physically
17 incapacitated in this case.

18 *MR. FINNEY:* Well, Your Honor, I -- I remember
19 having a conversation with you somewhere, either
20 pretrial or during the trial, as to the necessity for
21 them to prove consent or lack of consent --

22 *THE COURT:* You--

23 *MR. FINNEY:* -- in this case.

24 *THE COURT:* Yeah. I don't recall that
25 conversation with you, but you said that in opening

1 and you have -- you have addressed that to the jury
2 that -- about the consent issue.

3 MR. FINNEY: Yes, sir. And I have addressed in
4 closing that -- or not in closing but in the
5 preparation -- in the presentation of the defense
6 that there was a need for the jury to understand and
7 find that this lady did not consent to the sexual
8 conduct because if she did consent, then it wasn't a
9 crime and that they couldn't consider his actions to
10 be a violation of the law.

11 But under the -- just the technical reading that
12 you just read them, that he had sexual intercourse
13 with this woman, that's sexual battery, and he --
14 he's guilty of violation of the law.

15 And I don't think that's what the -- it's not
16 what the law stands for, Your Honor. And more
17 importantly, it's not a correct reading of the facts
18 that have been addressed in this case.

19 THE COURT: Okay. What says the State? But my
20 only -- I wish you had objected to that on the first
21 charge.

22 MR. FINNEY: Well, Judge, I --

23 THE COURT: I understand that.

24 MR. FINNEY: I thought that--

25 THE COURT: Part of the charge in our book and

1 it's not a part of the statute.

2 *MR. FINNEY:* But it is part of the -- the facts
3 that were made up in the case, and I believe that the
4 charge to the jury has to properly contain all of the
5 evidence that was brought before the jury.

6 *THE COURT:* Okay. What says the defense -- I
7 mean the State?

8 *MS. FANT:* Your Honor, I personally believe that
9 you are correct. But it is the statute itself which
10 is to be charged.

11 Obviously the sexual battery is the intrusion,
12 but if it is accomplished through aggravated force or
13 kidnapping or any other type of crime -- now
14 obviously it is criminal and there is no consent.

15 I think if it were required to be in this
16 charge, frankly that it would be in the statute.

17 *THE COURT:* And I understand that and that
18 was -- I looked at this charge two or three times
19 because consent wasn't in there.

20 And this is the charge that -- in the judges'
21 books that are -- all the materials that I think
22 almost every Circuit Judge charges.

23 It is not a part of the statute, IE, first they
24 must find that a sexual battery occurred and then
25 they must find one, two, or three in the statute of

1 those circumstances. I guess it's --

2 MR. FINNEY: Judge--

3 THE COURT: -- it's inferred that if it -- if it
4 was done with aggravated force, therefore consent
5 wasn't a part of it and it -- if she -- she consented
6 but her consent -- if the victim submitted to sexual
7 battery while the victim was also the victim of
8 forcible confinement and that scenario, it's -- it's
9 plenty of cases where you have someone who kidnaps a
10 victim, puts them in a hole in the ground, and had
11 sex with them over a period of time and those --
12 national case not long ago a little girl could -- IE
13 consented, IE did not, but her consent dealt with the
14 fact that she was kidnapped and in the hole, that
15 consent was not a defense.

16 That even if she consented to it, it was still
17 criminal sexual conduct because she was kidnapped.
18 So--

19 MR. FINNEY: Wasn't that because she was under
20 age and couldn't give consent?

21 THE COURT: No. Any woman kidnapped, any -- my
22 understanding of the law, any woman that is kidnapped
23 and confined or if she -- if someone burglarizes a
24 woman's home and comes in on her in the night time,
25 consent is not an issue.

1 If she -- if sexual battery occurs as a result
2 of a burglary, my understanding is consent is not an
3 issue at that point because it's presumed that
4 somebody burglarized your home unlike two consenting
5 adults going out on a date.

6 MR. FINNEY: All right.

7 THE COURT: But--

8 MR. FINNEY: But now, the situation that we have
9 as far as the record is concerned is that the jury
10 could believe that she left the club with my client,
11 had sex with my client.

12 THE COURT: Well, there's absolutely nothing in
13 the record to that. It is no evidence in the record
14 whatsoever that she left with your client.

15 The only thing that is in the record that your
16 client and her had sex. Right? I mean, there's
17 no -- nobody testified they left together, nobody
18 testified they were dating. Nobody testified.

19 So there's nothing in the record other than some
20 implications maybe you may have made, but there's no
21 evidence in the record that she left with him, dated
22 him, knew him, had anything to do with their
23 encounter, that it... you know, they may -- there's
24 no evidence to that effect.

25 MR. FINNEY: Well --

1 THE COURT: And so it--

2 MR. FINNEY: -- it would still be my contention
3 that based on the evidence that was adduced at trial,
4 in order for him to be -- to have violated her,
5 her -- her rights and him to have violated the State
6 statute, she would not -- in other words, what I'm
7 saying, Judge, is I understand you're telling me that
8 if she was kidnapped--

9 THE COURT: Consent is not an issue.

10 MR. FINNEY: All right. What if she wasn't
11 kidnapped?

12 THE COURT: Then as long as force wasn't used.
13 See, the way the charge reads and the way that law
14 reads is that first they got to find a sexual battery
15 occurred.

16 MR. FINNEY: Okay. But the sexual battery--

17 THE COURT: Sexual battery occurred, IE,
18 intercourse is sexual battery. They have to first
19 find that some sexual act occurred.

20 MR. FINNEY: Sexual battery is intercourse
21 without consent.

22 THE COURT: No, it's not. Sexual battery
23 according to this evidence is intercourse. Then the
24 question is they have to -- based on my charge and
25 based on that statute, they have to first find sexual

1 battery.

2 If they find sexual battery, then they have to
3 find beyond a reasonable doubt one of two things
4 happened, either the defendant was -- used aggravated
5 force to accomplish sex, sexual battery, they have to
6 find the defendant used aggravated force to
7 accomplish that sexual battery.

8 And aggravated force means the use of physical
9 force or physical violence of a high and aggravated
10 nature to overcome the victim. And that includes the
11 threat of a deadly weapon.

12 They either have to find that or that they got
13 to find that the victim submitted to sexual battery
14 while the victim was also the victim of forcible
15 confinement, kidnapping, rape, robbery, et cetera.

16 So if they didn't find the use -- aggravated
17 force and they found that -- and they didn't find
18 that she was kidnapped, then they can't find him
19 guilty of the sexual battery according to the way
20 this was written.

21 *MR. FINNEY:* I would request at this time that
22 you bring the jury out and that you tell them that in
23 conjunction with what you have read that if they find
24 that the victim was not forcibly confined and that
25 she consented to sexual intercourse, that is not

1 sexual battery and the defendant cannot be found
2 guilty.

3 *THE COURT:* Okay. And I don't think that's the
4 law. And at this --

5 *MR. FINNEY:* They have already shown and --

6 *THE COURT:* They--

7 *MR. FINNEY:* -- at least a question, the written
8 question pertained to your reading kidnapping again.
9 The juror requested that you read both statutes
10 again.

11 And I'm requesting that because on two occasions
12 nothing was said about the consent issue and it was
13 addressed throughout the trial that my -- my charge,
14 my addition to the charge be added at this time so
15 that they can have a complete picture.

16 *THE COURT:* All right. And I understand what
17 you want. I don't know -- I charged the law is my
18 understanding of the State of South Carolina. I will
19 do some further research and check on that and get
20 back with you in a few minutes.

21 I don't know at this point how I can charge it
22 without -- well, the facts. The problem is, I have
23 given them the case.

24 If you had made this request initially -- but
25 now that I have given them the case, to bring them

1 back out and re-charge them on something that I
2 didn't charge them on, I don't think I can do that
3 unless some unusual question comes up.

4 MS. FANT: Well, in addition, Your Honor, the
5 request that Mr. Finney just asked is -- is not the
6 law of the state under any circumstances.

7 He asked you to charge them that if they found
8 that a kidnapping didn't occur, that a sexual battery
9 didn't occur, and that is not correct.

10 MR. FINNEY: I asked you to charge if a
11 kidnapping did not occur, then if they found she gave
12 consent, a sexual battery did not occur because
13 intercourse without the kidnapping can be -- can be a
14 sexual -- I mean, you're telling me intercourse can
15 be a sexual battery.

16 THE COURT: Intercourse is a sexual battery.

17 MS. FANT: And consent is not an issue. It
18 always is.

19 THE COURT: And so based on the way the statute
20 is written, they define sexual battery as
21 intercourse, and the whole other 9-yards, and that if
22 an intrusion, however slight in any part of a
23 person's body -- intercourse is the normal
24 understanding of intercourse.

25 So they must -- the State must first prove that

1 a sexual battery occurred. If they haven't proved
2 that, they don't go any further.

3 If they proved a sexual battery occurred, then
4 they have to prove beyond a reasonable doubt it was
5 done by force or threat or intimidation of a high and
6 aggravated nature.

7 Under this particular charge it's first degree,
8 that they have to prove that the -- that the
9 aggravated force was used to accomplish the sexual
10 battery, IE that defines consent. If -- if
11 aggravated force wasn't used and consent was there,
12 so he's not guilty.

13 So they got to first find there was a sexual
14 battery. If they do, then they get to find it was
15 done by aggravated force or as a result of
16 kidnapping, robbery, burglary, et cetera.

17 MR. FINNEY: Judge, we have the benefit of law
18 degrees and we have the benefit of the statute in
19 front of us. They don't. They didn't even
20 understand apparently the first charge.

21 And I am saying that the reason they didn't is
22 because I believe that they are trying to interpret
23 if I have already admitted under the presentation of
24 my case that there was sexual intercourse and you say
25 sexual intercourse is sexual battery, I'm afraid--

1 THE COURT: That's what the law says.

2 MR. FINNEY: I understand. But I believe that
3 the -- under the terms and the -- the evidence that
4 was adduced at trial, that is not a complete
5 statement of the law.

6 THE COURT: Okay. All right. I will study on
7 that and get back with you.

8 MR. FINNEY: Thank you, Your Honor.

9 THE COURT: We'll be in recess.

10 (Whereupon a recess was had.)

11 THE COURT: Okay. On your request for charging
12 on the consent issue, first of all if it wasn't made,
13 you know, when I gave my charge -- I requested from
14 both the State and the defense if you had any
15 exceptions or deletions, and none were made at that
16 time, I gave the jury that charge.

17 I gave the jury the charges from the judge's
18 charge book. Then when they had a question wanting
19 to look at the charge of kidnapping, I charged them
20 again at that request.

21 But I think that -- I think I have charged them
22 appropriate on the law of the State of South Carolina
23 defining criminal sexual conduct in the first degree.

24 If I bring them out and comment any further on
25 consent, I'll be commenting on the facts. The -- the

1 law is they first must find that a sexual battery --
2 and sexual intercourse is a sexual battery under the
3 law, but it's not illegal unless they find one or two
4 of the following things.

5 One is the defendant used aggravated force to
6 accomplish that act. Aggravated force in itself
7 deals with the lack of consent. You have consent,
8 would be no reason whatsoever to using aggravated
9 force.

10 So in -- even when you start having consensual
11 sexual act and the woman wants to stop it and then
12 you using aggravated force to proceed further than
13 that, you have violated the law.

14 So think number one accomplishes the situation
15 of aggravated force as well as number two because in
16 many cases where the victim has been subject to
17 kidnapping and or burglary, the consent issue, many
18 of the victims have consented as far as the defendant
19 was concerned simply because they were in fear of
20 their life, but the law does not recognize that.

21 So I think I have described it according to the
22 law, and so I will -- decline your motion to
23 re-charge them any further and to add the word
24 consent.

25 MR. FINNEY: All right, Your Honor. Subject to

1 your ruling, I -- I just want the record to reflect
2 the language that I proposed earlier should be added
3 at this point in light of the fact the jury has a
4 question about --

5 *THE COURT:* I understand.

6 *MR. FINNEY:* -- the statute.

7 *THE COURT:* And your -- your record is
8 preserved. You certainly argued consent issues and
9 that they can -- that they -- assuming they're going
10 to take the language and understand it, but I find --
11 but your position is preserved.

12 If I'm wrong, the Supreme Court will straighten
13 it out. So we'll be in recess until we hear from the
14 jury.

15 (Whereupon a recess was had.)

16 *THE COURT:* Counsel, I have received another
17 note from the jury. Says, we the jury are split on
18 both kidnapping and sexual assault, 4:30 pm,
19 April 17th, 2008. The foreman signed it.

20 What -- I propose to bring them back out and
21 give them an Allen Charge, send them back, let them
22 try one more time unless y'all got some other
23 suggestions.

24 *MS. FANT:* That is probably what the State would
25 request, Your Honor.

1 (Whereupon there was a recess in this case.)

2 THE COURT: I understand we have a verdict. Is
3 the State ready to receive the verdict?

4 MS. FANT: Yes, Your Honor.

5 THE COURT: The defense ready?

6 MR. FINNEY: Yes, Your Honor.

7 THE COURT: Bring us the jury.

8 (Jury entered the courtroom at 5:09 pm.)

9 VERDICT

10 THE COURT: Mr. Foreman, I understand you have
11 reached a verdict?

12 FOREMAN: Yes.

13 THE COURT: Is it a unanimous verdict?

14 FOREMAN: Yes, sir.

15 THE COURT: All right. If you'd pass it up,
16 please sir.

17 (Bailiff approached the foreman then approached
18 the Court.)

19 THE COURT: All right. You may publish the
20 verdict.

21 BAILIFF: Case number 2006-GS-43-336, the State
22 of South Carolina versus Ricky Darren Sanders, we the
23 jury by unanimous -- we find as to count one --
24 unanimously find the defendant, Ricky Darren Sanders,
25 not guilty of kidnapping.

1 As to count two, we the jury unanimously find
2 the defendant, Ricky Darren Sanders, guilty of
3 criminal sexual conduct in the first degree.

4 Signed Harry Hilton, foreperson, dated
5 April 17th, 2008. This be your verdict so say so ye
6 all by raising your right hand.

7 (All complied.)

8 BAILIFF: Thank you.

9 THE COURT: Anything before I release the jury?

10 MR. FINNEY: Please poll the jury, Your Honor.

11 THE COURT: All right, sir. Mr. Clerk, if you
12 will poll the jury.

13 BAILIFF: Ladies and gentlemen, when I call your
14 name, will you please stand and answer two questions
15 I'll ask you. Randall May, is this your verdict and
16 still your verdict?

17 JUROR: Yes, sir, it is.

18 BAILIFF: Thank you. Shearlyann Rock, is this
19 your verdict and still your verdict?

20 JUROR: Yes.

21 BAILIFF: Thank you. James Rowe, is this your
22 verdict and still your verdict?

23 JUROR: Yes, it is.

24 BAILIFF: Thank you. Casonia Sanders, is this
25 your verdict and still your verdict?

WITNESSES

SUMTER PD

Sanders

ARREST WARRANT NUMBER

H980125 (1); H980124 (2 & 3)

D/A: 9/28/05

ACTION OF GRAND JURY

True Bill

Larry Holloman

Foreperson of Grand Jury

Date: *7/19/07*

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2006-GS-43- 336

The State of South Carolina

County of SUMTER

COURT OF GENERAL SESSIONS

JULY TERM 2007

THE STATE

vs.

RICKY DARREN SANDERS

Indictment for

CRIMINAL SEXUAL CONDUCT
(1st Degree) (TWO COUNTS)
AND KIDNAPPING

C. KELLY JACKSON, SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT
(1st Degree) (TWO COUNTS)
AND KIDNAPPING

At a Court of General Sessions, convened on July 19, 2007, the Grand Jurors of SUMTER County present upon their oath:

COUNT ONE – CRIMINAL SEXUAL CONDUCT (1st Degree)

That RICKY DARREN SANDERS did in Sumter County on or about June 17, 2001, violate Section 16-3-652 of the Code of Laws of South Carolina (1976), as amended, in that the said RICKY DARREN SANDERS did engage in sexual battery against Neketra James while using aggravated force to accomplish the sexual battery.

COUNT TWO – CRIMINAL SEXUAL CONDUCT (1st Degree)

That RICKY DARREN SANDERS did in Sumter County on or about June 30, 2002, violate Section 16-3-652 of the Code of Laws of South Carolina (1976), as amended, in that the said RICKY DARREN SANDERS did engage in sexual battery against Olivia McCrea while using aggravated force to accomplish the sexual battery.

COUNT THREE – KIDNAPPING

That RICKY DARREN SANDERS did in Sumter County on or about June 30, 2002, violate Section 16-3-910 of the Code of Laws of South Carolina (1976), as amended, in that he did unlawfully seize, confine, abduct, and carry away, without the authority of law, and by the use of force Olivia McCrea by dragging her into a wooded area against her will.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

CERTIFIED TRUE COPY
OF ORIGINAL FILEDJames C. Campbell

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF SUMTER
STATE VS.CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

INDICTMENT/CASE#:

Ricky Darren Sanders2006 -GS- 43 - 0336

AKA: _____

A/W#: H980124Race: Black Sex: Male Age: 38Date of Offense: 06/30/2002DOB: 05/12/1967 SS#: _____S.C. Code §: 16-03-0652

Address: _____

CDR Code #: 0 / 1 / 6 / 0City, State, Zip Sumter SC 29153☐ CASE RESTORED

DL# _____ SID# _____

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Criminal Sexual Conduct 1st (COUNT 2)
in violation of § 16-3-652 of the S.C. Code of Laws, bearing CDR Code # 0 / 1 / 6 / 0☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: Catherine Sant
Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____

\$14-1-206 (Assessments 107.5%) \$ _____

\$14-1-211(A)(1) (Conv. Surcharge) \$100 \$100.00

\$14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

\$56-5-2995 (DUI Assessment) \$12 \$ _____

\$35.13 (Public Def/Prob) \$500 \$ _____

\$73.3, 1B TP (Law Enforce. Funding) \$25 \$25.00

\$33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

\$50-21-114(BUI Breath Test Fee) \$50 \$ _____

\$56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ 3.75TOTAL \$128.75

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.PRESIDING JUDGE R. L. SmithJudge Code: 2 1 1 14 14Sentence Date: April 17, 08Court Reporter: M. Winfield / K. Richardson

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Amended 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."

March 6th, 2009

Elizabeth A. Franklin-Best

Elizabeth A. Franklin-Best
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

R. Ferrell Cothran, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY DARREN SANDERS,

APPELLANT

FINAL BRIEF OF APPELLANT

ELIZABETH A. FRANKLIN-BEST
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ATTORNEY FOR APPELLANT.

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUES ON APPEAL.....	3
STATEMENT OF THE CASE	4
ARGUMENT.....	5
CERTIFICATE OF COUNSEL	6

TABLE OF AUTHORITIES

Cases

<u>Todd v. State</u> , 355, S.C. 396, 585 S.E.2d 305 (2003)	7
<u>CEL Products, LLC v. Rozelle</u> , 357 S.C. 125, 591 S.E.2d 643 (Ct. App. 2004).....	9
<u>In re Winship</u> , 397 U.S. 358 (1970)	7
<u>State v. Aleksey</u> , 343 S.C. 20, 538 S.E.2d 248 (2000)	7
<u>State v. Smith</u> , 276 S.C. 494, 280 S.E.2d 200 (1981)	9
<u>State v. Smith</u> , 315 S.C. 547, 446 S.E.2d 411 (1994)	7

STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court judge err by not instructing the jury on the issue of consent in a prosecution for Criminal Sexual Conduct when Sanders asked the judge to, the judge admitted he had some concern about the charge, and when the Solicitor, repeatedly, during closing argument, shifted the burden onto Sanders to prove that the victim *did not* consent?

- II. The victim was convicted of lying to police officers in the past. Did the trial court judge err in finding that since this was a magistrate level offense, it could not be used to impeach the witness?

STATEMENT OF THE CASE

Ricky Darren Sanders was indicted by the Sumter County Grand Jury of Criminal Sexual Conduct, 1st degree, and Kidnapping (2006-GS-43-336). He was tried before the Honorable R. Ferrell Cothran, Jr. and a jury between April 14th and 17th, 2008. He was represented by Ernest Finney, Esquire. He was convicted of CSC; acquitted of Kidnapping, and sentenced to thirty (30) years in prison.

This appeal timely follows.

ARGUMENT

I. The trial court judge erred by not instructing the jury on the issue of consent in a prosecution for Criminal Sexual Conduct when Sanders asked the judge to, the judge admitted he had some concern about the charge, and when the Solicitor, repeatedly, during closing argument, shifted the burden onto Sanders to prove that the victim *did not* consent.

The trial court judge instructed the jury as follows as he initially charged the jury. The jury asked to hear the instruction again, and it was given to them again (Tr. page 596, line 10 to page 597, line 20):

The defendant is charged with criminal sexual conduct in the first degree. The first element which the State must prove beyond a reasonable doubt is the defendant engaged in a sexual battery with the victim.

A sexual battery is sexual intercourse . . . except when the intrusion is accomplished for medical recognized treatment or diagnostic purposes.

If you find that the State has not proven beyond a reasonable doubt that a sexual battery occurred, you would stop deliberating and your verdict would be not guilty.

If you find that the sexual battery did occur, you must then decide whether the State has proven beyond a reasonable doubt that the defendant used aggravated force to accomplish the sexual battery.

Aggravated force means the use of a physical force or—or physical violence of a high and aggravated nature to overcome the victim. This includes the threat of using a deadly weapon.

The defendant—number two. The victim submitted to sexual battery while the victim was also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housekeeping, or-- I'm sorry—housebreaking or any other similar act or offense.

(Tr. page 587, line 15 to page 588, line 19).

Sanders was also charged and tried on a count of Kidnapping, but he was acquitted of that charge. (Tr. page 616, lines 21-25).

After the second charge was given, Sanders discussed, at length, with the judge the fact that the charge did not include any language concerning the issue of consent. (Tr. page 598, lines 7 to page 612, line 14). Essentially, Sander's position was that the jury instruction was ambiguous as to the consent issue. Clearly, the burden is on the State to prove that Sanders had sexual intercourse with the victim *without* her consent. Precisely how the jury was to consider the consent issue was difficult to discern from the jury instruction given. The judge conceded that he understood Sanders's concern. (Tr. page 599, lines 2-8; Tr. page 602, lines 8-19). Even the judge admitted he found the charge confusing to understand. (Tr. page 606, lines 16-20). Despite Sanders's request to have the jury instructed on the issue of consent, the judge did not do so. (Tr. page 611, line 25 to page 612, line 14). This was error.

Compounding the judge's error was the Solicitor's closing statement that impermissibly shifted the burden of onto Sanders to prove himself innocent of the crime. She stated:

And if he was at that club, why didn't he bring some people there to talk about it? (Tr. page 555, lines 19-22).

Sanders objected to this, but the judge ruled that the Solicitor had the right to comment on the facts. (Tr. page 555, line 21 to page 556, line 15). The Solicitor then continued:

MS. FANT: I apologize. The bottom line is that the defendant is entitled to call witnesses, too, and if they were

there with him, they could have come and said so, and he did not do that.

(Tr. page 556, lines 17-20).

And then,

I ask that you go back to the jury room and look at all the evidence, and I believe you will agree that there is absolutely none, no evidence of any consent by the victim in this case.

(Tr. page 560, lines 7-10).

And then,

Mr. Finney does not have any evidence that this was consent. And of course, in these types of cases if all else fails, just blame the victim, attack her character, say she should have done this, she should have done that, she should have called.

(Tr. page 577, lines 6-10).

The Solicitor's remarks, in conjunction with the failure of the judge to give the jury an instruction on the critical consent issue, deprived Sanders to his right to a fair trial. Under these facts, there is a "reasonable likelihood" that the jury understood the jury instructions to allow conviction based on proof insufficient to meet the *Winship* standard—that the Due Process Clause mandates that the government prove every element of the charged offense beyond a reasonable doubt. Todd v. State, 355, S.C. 396, 400, 585 S.E.2d 305, 307 (2003); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000). See also In re Winship, 397 U.S. 358 (1970).

The problem is that the jury was not given any instruction on the issue of consent at all after the Solicitor informed the jury that it was Sanders's responsibility to prove that the victim consented. It is this combination of factors that caused the jury charge to be

confusing as a whole. See Todd, *supra*, and State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994) (jury charges should be examined in their entirety and not in isolation in analyzing whether a defendant's due process rights have been violated). There is a "reasonable likelihood" that the jury instructions allowed a conviction based on less than the *Winship* standard, as evidenced by the fact that the jury had to be re-instructed on both charges. Further evidence is the fact that the jury acquitted on the kidnapping charge. It is difficult to conceive how a conviction for rape would not necessarily entail a conviction for kidnapping, so the verdict raises the question that either the jury compromised during their deliberations, or they were actually confused about the charges themselves. Given that both the judge and the attorneys were confused by the instructions, there is a reasonable basis to conclude the latter. Respectfully, Sanders asks this Court to reverse his conviction.

II. The victim was convicted of lying to police officers in the past. The trial court judge erred in finding that since this was a magistrate level offense, it could not be used to impeach the witness.

The charges that formed the basis of the indictment occurred in 2002, but Sanders was not charged until 2005. See Indictment; Tr. page 91, lines 15-17). It was then another three (3) years before the State tried the case. The alleged victim was convicted in 1995 of giving false information to police officers. (Tr. page 101, lines 14-22).¹ Sanders sought to be able to impeach the victim with her prior convictions, including this one, but was not allowed:

¹ At page 22, lines 16-18, it appears this conviction occurred in 1997.

THE COURT: How would that be admissible even if it was within the 10 years?

MR. FINNY: How would it be admissible? Because filing the false police report and lying to an officer would be a (sic) indication of her character and ability to be truthful and responsible . . .

THE COURT: I don't—I'm not—it carries how much time?

MS. FANT: Thirty days.

THE COURT: That's right. It's a magistrate court offense. It's less than a year. It wouldn't be admissible if it happened yesterday.

MR. FINNEY: I'd like to be noted on the record for that,
Your Honor.

(Tr. page 101, line 14 to page 102, line 21).

The trial court judge applied the wrong analysis to this conviction, and Sanders should have been allowed to use this conviction in this case that came down to his word versus the victim's. It was error for the judge to hold otherwise. According to Rule 609(a)(2), SCRE:

[E]vidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Rule 609(b) allows that:

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

The judge, then, was empowered to consider whether the interests of justice would have allowed the use of this conviction. The court's failure to exercise this discretion, based on its misapprehension of 609(a)(2), amounts to an abuse of it. See CEL Products, LLC v. Rozelle, 357 S.C. 125, 591 S.E.2d 643 (Ct. App. 2004); State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981). He may have weighed two (2) factors, especially, that militated in favor of its use: (1) that the State waited three years to try the case that was already three (3) years old, thus, by their actions, placing this conviction beyond the statutory period, and (2) that the *only evidence* that Sanders raped the victim came from the victim herself. Her credibility, frankly, was the very heart of the State's case. And, apparently, the jury did not credit her testimony during the first trial. (Tr. page 26, lines 6-10). In a he-said-she-said case such as this, information indicating that the victim had a history of lying to police officers cannot possibly be harmless. Sanders was denied his right to a fair trial by the exclusion of this conviction. Respectfully, he asks this Court to reverse his conviction.

Respectfully submitted,

EA Franklin-Best

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

This 17th day of March, 2009.

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
ARGUMENT	3
I. The trial court properly charged the jury on the law of the case.	3
II. The trial court properly excluded the victim's 1995 conviction.	7
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:

<u>State v. Adkins</u> , 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003)	4
<u>State v. Bryant</u> , 369 S.C. 511, 633 S.E.2d 152 (2006)	7
<u>State v. Colf</u> , 337 S.C. 622, 525 S.E.2d 246 (2000)	7
<u>State v. Cox</u> , 274 S.C. 624, 266 S.E.2d 784 (1980)	4, 5
<u>State v. Johnson</u> , 363 S.C. 53, 609 S.E.2d 520 (2005)	7
<u>State v. Knighton</u> , 334 S.C. 125, 512 S.E.2d 117 (Ct. App. 1999)	3
<u>State v. Lee-Grigg</u> , 374 S.C. 388, 649 S.E.2d 41 (Ct. App. 2007)	4
<u>State v. Morris</u> , 376 S.C. 189, 656 S.E.2d 359 (2008)	7
<u>State v. Rayfield</u> , 369 S.C. 106, 631 S.E.2d 244 (2006)	4

Other Authorities:

S.C. Code Ann § 16-3-651	4-6
S.C. Code Ann § 16-3-652	4,6
Rule 20(b), SCRCrimP	3
Rule 609(a)(2), SCORE	8
Rule 609(b), SCORE	7, 8

STATEMENT OF ISSUES ON APPEAL

- I. The trial court properly charged the jury on the law of the case.
- II. The trial court properly excluded the victim's 1995 conviction.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court properly charged the jury on the law of the case.

Appellant maintains the trial court erred in failing to charge the jury that the State had to prove Appellant had sexual intercourse with the victim without her consent. The issue, however, is not properly preserved for review on appeal because Appellant did not raise it after the court initially charged the jury. Further, the court charged the jury with the appropriate law in South Carolina so there is no error in the charge as given. Finally, the burden of proof was never shifted to Appellant to prove there was consent versus the State being required to prove the elements of criminal sexual conduct.

First, this issue is not properly preserved for review on appeal. Appellant did not request a charge on consent or object to the failure by the trial court to give the jury a charge on consent when first given the opportunity. After the court originally charged the jury, both sides were given the opportunity to raise any issues before the jury retired, but both the State and Defendant indicated they did not. (T.591-592; R. 73-74). As a result of Appellant's failure to contemporaneously object to the trial court's jury charge, the issue is not preserved for review. See State v. Knighton, 334 S.C. 125, 136-137, 512 S.E.2d 117, 123 (Ct. App. 1999) (failure to object to charge as given or to request additional charge when given opportunity to do so constitutes waiver of right to complain on appeal); Rule 20(b), SCRCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires,

but out of the hearing of the jury Failure to object in accordance with this rule shall constitute a waiver of objection”).

Further, the charge given was clearly sufficient to instruct the jury on the applicable law related to the charge of criminal sexual conduct. Generally, a trial court is required to charge only the current and correct law of South Carolina. State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006). A jury charge is correct if it contains the correct definition of the law when read as a whole. Rayfield, 369 S.C. at 119, 631 S.E.2d at 251. “The substance of the law is what must be charged to the jury, not any particular verbiage.” State v. Adkins, 353 S.C. 312, 318-19, 577 S.E.2d 460, 464 (Ct. App. 2003). On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. State v. Lee-Grigg, 374 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007).

In State v. Cox, 274 S.C. 624, 266 S.E.2d 784 (1980), the South Carolina Supreme Court addressed a similar argument posited by Appellant. In Cox, the Court found the definition of “aggravated coercion” provided in section 16-3-651 was “meant to provide that the sexual battery occurred under circumstances where the victim’s consent was lacking.” Id. at 628, 266 S.E.2d at 786. The Court found where the judge charged the statutory language and “[g]iven the adequacy of the statutory language, appellant’s request to charge was unnecessary” and found no error in the court’s refusal to charge lack of consent. Id.

In the instant case, the trial court fully explained the elements of criminal sexual conduct in the first degree. The trial court charged the jury with the applicable language from sections 16-3-651 and -652 of the South Carolina Code. (T.587-588; 596-597; R. 69-70; 78-79). The trial court properly explained Appellant can be found guilty only if the jury

concluded the State proved beyond a reasonable doubt that Appellant “used aggravated force to accomplish the sexual battery” or “the victim submitted to a sexual battery while the victim was also a victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar act.” (T.588; 597; R. 70; 79). Further, the court twice defined “aggravated force” pursuant to the definition provided in section 16-3-651(c) of the South Carolina Code. (T.588; 597; R. 70; 79). Specifically, the court stated: “Aggravated force means to use a physical force or physical violence of a high and aggravated nature to overcome the victim. This includes the threat of use of a deadly weapon.” (T.597; R. 79).

The definition of “aggravated force” is clearly sufficient to apprise the jury regarding lack of consent. The definition, just like the definition of “aggravated coercion” in Cox, is “meant to provide that the sexual battery occurred under circumstances where the victim's consent was lacking.” Cox, 274 S.C. at 628, 266 S.E.2d at 786. Accordingly, this Court should find the statutory language charged was sufficient and the trial court did not err in refusing to charge the jury regarding lack of consent.

Finally, it is clear that nothing in the charge or during the case shifted the burden onto Appellant to prove consent or to prove his innocence. During his closing argument, Appellant’s counsel insinuated numerous times that the sex between Appellant and the victim was consensual. (T.534-545; R. 32-43). The State responded by indicating there was no evidence presented indicating consent. (T.557-560; 577; R. 55-58; 59).

The court charged the jury that they State had the burden to prove each and every element beyond a reasonable doubt. (T.580-582; R. 62-64). The court specifically stated: “A person charged with committing a criminal offense in South Carolina is never required

to prove himself or herself innocent.” (T.580; R. 62). The court also instructed the jury that they were responsible for making findings of fact and weighing the evidence presented. (T.578-579; R. 60-61).

Accordingly, this Court should find the issue regarding the jury charge is not properly preserved for review on appeal because Appellant did not object or offer a charge after the trial court first charged the jury. On the merits, the jury charges given by the trial court were sufficient and properly explained the substance of the law to be charged. A charge specifically related to lack of consent was not necessary given the clear definition of “aggravated force” in the statute and the trial court’s full instruction to the jury regarding sections 16-3-651 and -652.

II. The trial court properly excluded the victim's 1995 conviction.

Appellant maintains the trial court erred in excluding the victim's 1995 conviction for filing a false police report. However, the conviction was clearly beyond the ten-year time span of Rule 609(b), SCRE, and the trial court properly ruled it was not admissible.

The admission or exclusion of evidence falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. State v. Morris, 376 S.C. 189, 205, 656 S.E.2d 359, 368 (2008). As well, the scope of cross-examination is within the discretion of the trial court, and the court's decision will not be reversed on appeal absent a showing of prejudice. State v. Colf, 337 S.C. 622, 625, 525 S.E.2d 246, 247-48 (2000).

Pursuant to Rule 609(b), SCRE:

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Rule 609(b) creates a presumption that remote convictions are inadmissible. See State v. Bryant, 369 S.C. 511, 516, 633 S.E.2d 152, 155 (2006). Further, in State v. Johnson, the Supreme Court explained the conviction or release from confinement must be within ten years of the date of trial. State v. Johnson, 363 S.C. 53, 57, 609 S.E.2d 520, 522 (2005).

In the instant case, the trial occurred in 2008 and the conviction Appellant sought to introduce to impeach the victim occurred in 1995. (T.22-23; 90-91; R. 2-3; 7-8). Clearly

this is beyond the ten-year time frame allowed in Rule 609(b). While Appellant focuses on the trial court's comments about the test for admissibility no longer being whether it was a crime of moral turpitude, the court had previously found the conviction needed to be within the ten-year time frame to be admissible. (T.25; 90-91; 101-102; R. 5; 7-8; 13-14). Even if the conviction fell under the purview of Rule 609(a)(2), SCRE ("evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment."), it is indisputable that it occurred more than ten years before the witness testified.

The trial court properly exercised his discretion and determined the conviction should not be allowed to impeach the victim. The court never contended he could not allow the conviction into evidence, merely that he would not allow the conviction based on its remoteness. Accordingly, the trial court did not abuse its discretion in refusing to allow the testimony to be used to impeach the victim.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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March 31, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Sumter County
Hon. R. Ferrell Cothran, Jr., Circuit Court Judge

The State,

Respondent,

v.

Ricky Darren Sanders,

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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PROOF OF SERVICE

I, ELLEN DuBOIS, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 31st day of March, 2009.



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