STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY

Court of General Sessions

Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2014-001694

THE STATE,

Respondent,

v.

KEITH DENVER TATE,

Appellant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I.

The trial judge did not err in denying the defense's motion for a mistrial where the victim's emotional state throughout the trial did not constitute the requisite manifest necessity to warrant the declaration of a mistrial.

II.

The trial court did not err in following the established procedure of allowing the prosecution to open its closing argument on the law and argue last on the facts, and following the established procedure did not violate Appellant's constitutional rights to a fair trial and due process of law.

III.

The trial judge did not err in refusing to allow Defense Counsel to elicit testimony that the photographs on Victim's phone showed T.C.'s genitals, where the defense was still able to effectively argue that the photographs provided a motive for Victim to fabricate the allegations, the evidence was inadmissible under the Rape Shield Law, and the evidence was inadmissible under Rule 401, SCRE and Rule 403, SCRE, as the evidence was irrelevant and any potential probative value of the evidence was substantially outweighed by the evidence's potential for undue prejudice.

STATEMENT OF THE CASE

Keith Tate was indicted at the February 2011 term of the Abbeville County Grand Jury for nine counts of second-degree criminal sexual conduct with a minor (2011-GS-01-45- 2010-GS-01-54). Tate proceeded to a trial by jury from May 27-29, 2014, in Abbeville, South Carolina. At the conclusion of trial, Tate was found guilty of one count of second-degree criminal sexual conduct with a minor (2011-GS-01-46) and acquitted of the remaining counts. He was sentenced by the Honorable Donald B. Hocker to imprisonment for a period of sixteen years.

Following the jury's guilty verdict, Appellant timely filed a motion for a new trial. A hearing on the motion was commenced on July 15, 2014, before Judge Hocker. Judge Hocker denied the motion by written order. Tate timely filed a notice of appeal and subsequently submitted a brief. This brief of Respondent follows.

STATEMENT OF FACTS

In July of 2009, Mother moved to Calhoun Falls in Abbeville County with her children and Keith Tate, the appellant in this matter. Tr. p. 73. Appellant was Mother's boyfriend and the father of one of her sons. Tr. p. 74. Mother had three children: Victim, T.R., and T.R. Tr. p. 72. Appellant and Mother dated for three or four years and cohabitated for the entirety of the relationship. Tr. p. 74. Mother suffers from significant health problems including seizures, schizophrenia, bipolar disorder, fibromyalgia, rheumatoid arthritis, and neuropathy. Tr. p. 75. To treat her various illnesses, Mother took around thirty-six pills per day and had prescriptions for Xanax, Geodon, Depakote, Ativan, Seroquel, Lortab, Phenergan, Flexeril, and Zanaflex. Tr. pp. 74-75. As a result of being heavily medicated, Mother slept most of the day. Tr. p. 76. Mother would take the first dose of medication and sleep until 5:00 p.m. or 6:00 p.m., take the second dose and sleep until 9:00 p.m. or 10:00 p.m., then take a third and final dose and sleep through the night. Tr. p. 75. Due to Mother's poor health, Appellant primarily cared for the children. Tr. p. 135.

Rebecca Holland worked at Calhoun Falls Charter School, where Victim was a student, as a substitute teacher, bus supervisor, track coach, band director, and bus driver. Tr. pp. 232-233. Victim was in the color guard in the band during the 2009 season and part of the 2010 season. Tr. p. 233. Holland took Victim home from band practice every day. Tr. p. 234. Holland testified that Victim would cry on the way home and ask her not to take her back to her house. Tr. p. 235. Holland sometimes witnessed Appellant grab Victim by the arm when she would drop Victim off at home. Tr. p. 235. On August 23, 2010, Victim disclosed to Holland that she had been sexually assaulted. Tr. p. 233.

Following Victim's disclosure, pursuant to school policy, Holland reported the incident to Lori Lindler, the school's assistant principal and guidance counselor. Tr. p. 234.

Sometime earlier in 2010, Victim also disclosed the abuse to T.C., her boyfriend at the time. Tr. p. 112. Victim detailed Appellant's abuse to T.C. around five or six months after the abuse had been happening. Tr. p. 115. Victim did not want T.C. to tell anyone about the abuse because it would "mess the family up." After Victim told T.C. the abuse was continuing, he told his mother. T.C. subsequently gave a statement to police on August 26, 2010. Tr. p. 121.

Lori Lindler spoke with Victim regarding her allegations of sexual abuse on August 25, 2010. Tr. p. 248. Lindler testified that Victim came to speak with her after confiding in the parent of a student and Rebecca Holland, who subsequently referred the matter to her. Tr. p. 247. In her conversation with Lindler, Victim recounted Appellant's abuse. Tr. p. 248. Victim identified ten separate occasions where she had been sexually abused by Appellant. Tr. p. 248. Nine of the instances of assault occurred in Abbeville County and one instance took place in Greenville County. Tr. p. 248. Lindler went through a calendar with Victim in an effort to identify the dates of the assaults as closely as possible. Tr. p. 248. They used the school calendar to aid them in selecting dates because Victim could remember when certain assaults occurred based on what school events were happening at the time. Tr. p. 248. Following her conversation with Victim, Lindler contacted the Calhoun Falls Police Department. Tr. p. 249. The officers subsequently obtained a search warrant for the residence and an arrest warrant for Appellant. Tr. p. 265.

On September 28, 2010, Jessica Bell interviewed Victim at The Child's Place. Tr. p. 328. The Child's Place was a children's advocacy center whose role is to make the investigation of child abuse easier on children. Tr. p. 329. The case was referred to The Child's Place by Monique Bell of the Calhoun Falls Police Department. Tr. pp. 329. Jessica Bell testified that she did not ask Victim about specific dates, as children generally only remember things like their age at the time and what events were going on around the time of the abuse. Tr. p. 332. Bell prepared a report following her interview with Victim. Tr. p. 329. Several weeks after the forensic interview, Dr. Lyle Pritchard performed a forensic medical examination on Victim on November 23, 2010. Tr. p. 291. The forensic medical examination took place at The Child's Place. Tr. p. 296. Dr. Pritchard is part of the South Carolina Child Abuse Medical Response System. Tr. p. 290. Dr. Pritchard testified that during his examination of Victim, he noticed a transection of Victim's hymen. Tr. p. 293. A transection of the hymen is an injury that is consistent with something being forced into the vaginal opening. Tr. p. 293. Dr. Pritchard testified there is a delay in disclosure in the vast majority of child sexual abuse cases. Tr. p. 294. Dr. Pritchard also noted that any signs of physical abuse (bruising, lacerations, etc.) would have healed by the time he examined Victim. Tr. pp. 294-295. While at the Child's Place for her physical examination, Victim told a nurse that she never had sexual contact with anyone other than Appellant. Tr. p. 179. On cross examination, Defense Counsel asked Dr. Pritchard if Victim was using contraceptives at the time of the examination. Tr. p. 299. Dr. Pritchard indicated that she was using contraceptives. Tr. p. 299.

At trial, Victim fully recounted the extensive abuse she suffered at the hands of Appellant. Victim was sixteen years old at the time of trial. Tr. p. 130. In August of 2009,

Victim was twelve years old. Tr. p. 132. Appellant took care of Victim and her siblings while Mother was sleeping. Tr. p. 135. Victim testified that she referred to Appellant as "Dad." Victim testified that Appellant no longer has her trust because he sexually assaulted her. Tr. p. 136.

Some months after the abuse began occurring, Victim disclosed the abuse to her boyfriend, T.C. Tr. p. 136-137. Victim did not immediately disclose the abuse because she did not know who to tell. Tr. p. 137. Victim did not think anyone would believe her, as it would be her word against Appellant's. Tr. p. 138. Appellant also told Victim that if she told, her mother would have a seizure. Tr. p. 350.

Victim testified that Appellant touched her with his penis. Tr. p. 140. Specifically, Appellant penetrated her vagina with his penis. Tr. p. 141. When she sat down with Lori Lindler to try and ascertain the dates of the assaults, Victim identified ten dates when Appellant sexually assaulted her. Tr. p. 142. On all ten of these occasions, Appellant penetrated Victim's vagina with his penis. Tr. p. 142. Victim also testified that on the last occasion, Appellant put his penis in her mouth. Tr. p. 151. Victim also recalled Appellant penetrating her anus. Tr. p. 151. Victim testified that she bled the first time Appellant penetrated her vagina and on the occasion when he penetrated her anus. Tr. p. 152. Victim bled onto a sheet, which Appellant subsequently took away. Tr. p. 152. The dates of the nine assaults that occurred in Abbeville County were August 26, 2009, October 31, 2009, December 14, 2009, February 6, 2010, February 13, 2010, March 3, 2010, March 14, 2010, March 15, 2010, and March 18, 2010. Tr. pp. 142-143. Appellant also sexually assaulted Victim on a tenth occasion in Greenville County on December 26, 2009, at the home of Victim's aunt. Tr. p. 169.

Victim testified the first assault took place at their home in August of 2009. Tr. p. 145. The assault took place on the couch in the living room of the home while Victim's mother and siblings were home. Tr. pp. 145-146. No one else was in the room at the time of the assault. Tr. p. 149. Appellant told Victim he wanted to see what size bra and panties she wore. Tr. p. 146. Appellant then began kissing her neck and rubbing her bottom. Tr. pp. 146-147. Appellant tried to take Victim's shirt off and told her "he was helping her for her bra." Tr. p. 147. Appellant eventually took Victim's clothes off and lay on top of her, telling her "don't act like you don't want it." Tr. p. 150. Appellant then penetrated her with his penis. Tr. p. 150. Victim testified that after the first assault, she was afraid to go home from school. Tr. p. 157. Following the first incident, Victim began writing poetry about her feelings. Tr. p. 157. Following the first incident, Victim's journal read:

> So many questions. Should I stay or should I go. Should I walk away from my fears or should I be strong. Should I love him. Should I hate him. Should I keep it to myself. Should I let them know. So many questions. Would she still love me - -would she still love my [sic] for me or hate me for something that wasn't my fault. Will she kick me out because she didn't believe me. Should I run away or should I stay. So many questions that have no answers. Does he know how I feel. Do he know. Do he know. Do he know. So many questions.

Tr. p. 162.

Appellant's second sexual assault of Victim occurred on October 31, 2009. Tr. p. 189. Victim recalled the date because there was a school football game on October 30th. Tr. p. 189. Victim reported to Jessica Bell that on this particular incident, she screamed and Appellant hit her in the face, busting her lip open. Tr. p. 191. Minor's mother also recalled noticing Victim had a busted lip at some point in time. Tr. p. 80. When Mother asked why Victim's lip was busted, she was told that Victim injured herself while

playing. Tr. p. 81. After the assault on October 31st, Victim woke up to an empty house and noticed that her shorts were up, her underwear was down, and her shirt was on a lamp. Tr. p. 194.

During Appellant's final assault of Victim, Appellant put her on the couch and put his penis in her mouth. Tr. p. 208. Victim bit Appellant's penis and he began screaming. Tr. p. 209. Victim then ran down the hallway and barricaded her bedroom door with her dresser. Tr. p. 209. Victim also told T.C. about this incident, disclosing to him that one night when she was asleep, Appellant put his penis in her mouth. Tr. p. 120. Victim told T.C. that Appellant got angry with her and grounded her. Tr. p. 120. Eventually, Victim began sleeping with her mother to get away from Appellant. Tr. p. 190.

ARGUMENT

I.

The trial judge did not err in denying the defense's motion for a mistrial where the victim's emotional state throughout the trial did not constitute the requisite manifest necessity to warrant the declaration of a mistrial.

Relevant Facts

During the defense's opening argument, Victim became visibly upset. Defense Counsel briefly paused and told the court, "Your honor, it looks like – it looks like [Victim] is upset and I don't want that to distract the jury." Tr. p. 69. The judge briefly spoke with both lawyers at the bench before Defense Counsel continued her opening arguments. Tr. pp. 69-70. Victim's emotional state came about shortly after Defense Counsel referred to her as a story teller akin to Stephen King or James Patterson. Tr. pp. 68-69. During the next recess, the judge noted for the record that Victim became upset during the Defense's opening statement. Tr. p. 88. The trial judge noted the court "has no problem with that, but if that's still a recurring problem then I think we ought to agree that she needs not to be in the courtroom because of the potential nature it has to be disruptive. So just as a cautionary matter." Tr. p. 88.

On direct examination, Victim became emotional while describing the first instance of sexual assault by Appellant. Tr. p. 147. The Solicitor asked if Victim would like to take a break and she indicated that she would. Tr. p. 147. After the jury exited the courtroom, the Solicitor asked the court how it would like to handle Victim's testimony during the spells where she became emotional. Tr. pp. 147-148. The trial judge replied:

> Well, evidently it's very difficult for her to testify. She's just going to have to - - she's going to have to do the best job she can and, you know, we'll just have to, you know, muddle our way through it. Possibly you

> could, without discussing her testimony, just maybe talk with her, and she's going to have to, you know, try to - - you know, try not to be emotional. Easy for me to say.

Tr. p. 148.

The judge instructed Victim, "I know this is difficult for you to testify. I understand that. But it's really important that you do the very best that you can and there is a lot to cover in questions that will be asked of you. So you just need to do the very best that you can so we can get through your testimony." Tr. p. 148. Victim was able to get through the remainder of her direct testimony without any more periods where she was visibly emotional.

During the lengthy cross-examination by Defense Counsel, Victim indicated that she did not want to keep talking about the incident. Tr. p. 218. When asked by Defense Counsel whether she could keep going, Victim requested a break. Tr. p. 218. After Victim stepped down from the witness stand, the trial judge told the solicitors, "I realize she's emotional. I understand that. But I don't want this - - and this is - - I'm not commenting on - - but it's being disruptive. Okay? So I want both of you all to go out there and talk to her." Tr. p. 218. After a brief recess, prior to the jury returning to the courtroom, the trial judge stated:

> I don't want any perception of anyone to think that I'm not being unsympathetic. But I've got to maintain decorum in this courtroom. And regardless of the nature of the allegations and the emotions involved and everything, I've still got to maintain decorum, and I just can't tolerate the witness storming out of the courtroom in the manner in which she did. I think the vast majority, if not all of the jurors, were back in the courtroom, or most of them at least were back in there when that took place. But I just - - and I hope both Solicitors have talked with her. And I know this has not been an easy experience for this witness to be testifying. But nonetheless, she's got to be aware that we can't allow that sort of conduct.

Tr. p. 219.

Defense Counsel moved for a mistrial, asserting that it was warranted "because of the pretty extreme display of emotion that was going on while [Victim] was sobbing as the jury left the jury box and while the door back there behind the jury box was still open she started yelling out for her mother . . ." Tr. p. 220. The trial judge denied the defense's motion, ruling:

> In light of the fact that we've had a lot of emotion displayed by this witness throughout her testimony, a lot of crying, I think she's gone through a good many Kleenexes. We have had to take a break or two. I think in light of that then I don't see where that necessarily would create the type and amount of prejudice, if any. But certainly not the amount and type of prejudice that would justify a pretty severe remedy of declaring a mistrial. So I'm going to deny it.

Tr. p. 221. The trial judge later noted "[T]his is just inherent in a case like this that there is going to be a lot of emotion." Tr. p. 222. The trial judge further stated, "We may have some other witnesses get very emotional, too, when it's all said and done in this case. I don't know that. But taking everything into consideration I don't think the justification is there to grant a mistrial." Tr. p. 222. Defense counsel did not request a curative instruction at any point in the proceeding.

During her closing argument, Defense Counsel highlighted Victim's emotional state in order to further her assertion that Victim was a "storyteller," stating:

> They're calling him a child molester. So yes, he gets to have an advocate who gets up and says that's a story. That is not true. And if it really isn't true, is it worse to be called a storyteller than it is to be called a child molester? The first time you see [Victim's] emotional reaction is when I was giving you my opening statement and telling you how I was going to be talking about these different versions of her story. And when she knew that was going to happen she got upset. And you can interpret that, I guess one of two ways. She was crying because what happened to her was so horrible and she doesn't like having to go through it again or she's crying because somebody is pointing out the problems with the things she's

> saying and the reason that you shouldn't believe it, and that - - and that is difficult for her. And there may be other ways to interpret it. I don't know.

Tr. p. 386.

During the State's closing argument, the Solicitor noted the heinous nature of sexual abuse crimes involving the parent of a child and stated, "And I can't imagine the emotional trauma of coming in here and having to talk about it four years later." Tr. p. 398. The Solicitor then told the jury that one of the greatest tasks before them as jurors in these case was to judge credibility. Tr. pp. 398-399. The Solicitor stated:

> And the one thing you got is you get to judge the demeanor of the people in the courtroom. Their manner, their body language, how they testified to you. You saw the raw emotion of that young lady. You saw her to say to Ms. Nelson (Defense Counsel), I don't want to think about it. You're making me go back and back through and I don't want to think about it. I don't want to relive it. Don't you understand that. That's what this child said to this lady. Now, I understand as a grown attorney, having done this over and over again, maybe it's not a big deal. To that child, it was a very, very big deal.

Tr. p. 399. The Solicitor later noted "You look at what those witnesses said and you decide if you're convinced this man did penetrate that child. Was that a emotion you watched real. Because if she's made all this up and she's put on that kind of act, she deserves an Academy Award, because that was compelling." Tr. p. 402.

Discussion

Appellant asserts the trial judge erred in refusing to declare a mistrial due to Victim's shows of emotion during trial. Specifically, Appellant contends the show of emotion by Victim disrupted the trial and improperly influenced the jury to decide the case on emotion. The State submits this argument is without merit, as the trial judge

properly denied the motion for a mistrial where there was no showing of manifest necessity to warrant the declaration of a mistrial.

"The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." State v. Wilson, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010) (citation and quotation marks omitted). Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). "A mistrial should only be granted when 'absolutely necessary,' and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005). "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

South Carolina Courts have repeatedly found displays of emotion to be insufficient grounds for a mistrial. In State v. Anderson, 322 S.C. 89, 470 S.E.2d 103 (1996), the South Carolina Supreme Court was faced with the question of whether a mistrial was warranted where the victim's sister had an emotional outburst while on the witness stand. Specifically, when asked to identify the defendant in the case, she addressed the defendant, stating, "Why, Shawn? Why did you do it? ... He didn't have to take her life." Id. at 90. The judge immediately sent the jury away from the courtroom

and called a short recess. Id. at 90-91. The Court found the trial judge did not abuse his discretion in declining to declare a mistrial. The Court stated, "Given that the trial judge was in the best position to assess the degree to which the jury may have been prejudiced by the outburst, he did not abuse his discretion in denying Anderson's mistrial motion." Id. at 93. The Court emphasized the fact that the judge dismissed the jury and called a recess as soon as the outburst occurred in order to give the witness time to calm down. Id. The Court also opined the jury likely understood the witness's outburst as an expression of grief over the death of her sister. Id. Finally, the Anderson Court noted that a curative instruction was unnecessary in the case and would have actually called the jury's attention to the issue and increased the risk of unfair prejudice to the defendant. Id. at 94.

In reaching its decision that a mistrial was not warranted in the case, the Anderson Court cited the opinion of the South Carolina Supreme Court in State v. Wagstaff, 202 S.C. 443, 25 S.E.2d 484 (1943). In Wagstaff, the mother of a rape victim was testifying at the trial of the alleged rapist. At the conclusion of her testimony, the mother rushed toward the defendant screaming, "I could tear your eyes out." After noting the general rule that a court should grant a mistrial only when there is "manifest necessity" to do so, the Court stated:

> We believe the jury could readily understand that the witness in question might have a hostile attitude toward the accused, because of the natural effect of the circumstances on her emotions, although there was nothing whatever in her testimony tending to show his guilt, and hence her attitude was based solely upon the testimony of others. . .When all the circumstances of the instant case are considered we believe it is clear that even if a motion for a mistrial had been made the trial Judge would not have been justified in granting it, in the proper exercise of his discretion. There was certainly no manifest or absolute necessity for such action.

Id. at 453-54.

In State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999), the victim's mother and aunt loudly stormed out of the courtroom during the cross examination of the defense medical expert. Id. at 596. The South Carolina Supreme Court found that the trial judge did not abuse his discretion in denying the defense's motion for a mistrial. Id. at 597. The Court referenced Anderson, noting that as in Anderson, the jury was already aware of the mother's feelings about the death of her son and likely understood her outburst as an expression of this grief. Id.

In State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996), this Court dealt with a situation where there was audible crying by spectators during the victim's testimony. The defense moved for a mistrial. Id. at 316. The trial judge stated he did not believe any displays of emotion thus far could have tainted the jurors. Id. However, as a precaution he cleared the courtroom of everyone except the press and the victim's father for the remainder of her testimony. Id. In order to explain to the jury why the courtroom was suddenly emptier, the trial judge informed the jury that the courtroom had been cleared due to the display of emotion by observers. The judge cautioned the jurors that they were not to draw any inferences from this fact and that they were to render their verdict based on the testimony and evidence presented at trial. Id. This Court found that the trial judge did not abuse his discretion in denying the defense motion for a mistrial. Id. at 318. While Jones demonstrates the deference given to trial judges by appellate courts, it is distinguishable from the current case in that the trial judge elected to clear the courtroom and provide a curative instruction. However, a curative instruction was necessary in the case because the jury undoubtedly had significant questions about why they were returning to a nearly empty courtroom. In the current case, there were no major

changes, like the emptying of a courtroom that would necessitate an instruction to the jury.

All of the aforementioned cases demonstrate the view of South Carolina appellate courts that a mistrial is an extreme measure that should only be used in the most grievous situations. The show of emotion by Victim in the current case was not of the extreme nature that would warrant the declaration of a mistrial. Victim's occasional bouts of crying and single instance where she called out for her mother are no more severe than the situations dealt with by the courts in Anderson, Wagstaff, Hughes, and Jones. Furthermore, there was no accompanying testimony like in Anderson and Wagstaff, where the parties who had an emotional outburst directly addressed towards the defendant.

The trial judge also limited any potential prejudicial effect of Victim's emotion. As in Anderson, the trial judge had the foresight to call a recess during both the direct examination and cross-examination of Victim when she began to get emotional in response to questioning. These brief recesses gave the witness time to calm down and limited the amount of crying seen by the jury. Therefore, the three occasions where Minor began crying were simply not enough to justify the declaration of a mistrial. Minor's occasional crying and calling for her mother did not prejudice the defense to the point where there was manifest necessity to terminate the proceeding.[1]

[1] Appellant's assertion that the Solicitor instructed the jury to decide the case on emotion is simply not correct. Appellant argued that the jury heard from a "wound up" Solicitor in closing that Victim's raw emotion was proof that she was telling the truth. Appellant also attempts to argue that the Solicitor instructed the jury to use the emotion of a witness to form the basis for its verdict. (App. Br. p. 20). The Solicitor was simply reminding the jury that one of its core functions was to judge the credibility of witnesses. This is consistent with the trial judge's later instruction to the jury, "Necessarily, you must determine the credibility of witnesses who have testified in this case . . . You may also consider the appearance and manner of a witness while on the witness stand." Tr. p. 412. This instruction is fully consistent with the model good character jury instruction contained in the most recent version of the South

Appellant repeatedly notes a curative instruction was not given in the case. The State notes that no curative instruction was ever requested by the defense. Furthermore, as in Anderson, a curative instruction was not necessary and arguably would have prejudiced the defense by calling the jury's attention to the issue.

Courts in other states have also found emotional behavior akin to that shown by Victim in this case to be insufficient grounds for a mistrial. While Anderson, Wagstaff, Hughes, and Jones demonstrate great deference by South Carolina appellate courts to the trial judge's finding that a mistrial was unnecessary and an attitude that mistrials are reserved for only the most extreme and prejudicial situations, they do not deal directly with a situation where the victim had an "emotional outburst" while on the witness stand. However, there is overwhelming out-of-state authority where courts have adjudged behavior similar to or more extreme than that shown by Victim to not warrant a mistrial.

In Young v. State, 422 S.E.2d 227, 228 (Ga. Ct. App. 1992), Young contended that the trial court erred in denying his motion for a mistrial after the victim began crying uncontrollably on three separate occasions during her testimony, necessitating breaks in the proceedings. The trial judge denied the mistrial motion, noting that although the victim had become emotional at times, these episodes in their entirety were not of such a consequence that it would deprive appellant of his right to a fair trial. Id. Young also complained that the trial judge did not give a curative instruction. Id at 228-29. The

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Carolina Judicial Department's general sessions bench book. See 2015 Suggested General Sessions Jury Instructions, http://www.sccourts.org/juryCharges/GSInstructions.2015.pdf. Also, the Solicitor's mention during closing of Victim's "raw emotion" at trial was in response to the defense's closing, where Defense Counsel directly commented on Victim's emotion at trial and told the jury that her emotion could have been a reaction "to somebody is pointing out the problems with the things she's saying and the reasons that you shouldn't believe it." Tr. p. 386. "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) (citing United States v. Nobles, 422 U.S. 225 (1975)). "To this end it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." United States v. Robinson, 485 U.S. 25, 33 (1988).

Georgia Court of Appeals noted the appellant had not requested a curative instruction at trial. Id. at 29. "It is only where the accused would be denied a fair trial in the absence of corrective instructions that such must be given even in the absence of a request or a mistrial declared." Id.

In Paige v. State, 627 S.E.2d 370, 373-374 (Ga. Ct. App. 2006). Paige asserted he received ineffective assistance of counsel where his counsel failed to move for a mistrial or request a curative instruction after the victim cried on the witness stand, requiring a recess to be taken. The victim started crying very hard when asked to identify the clothing she was wearing at the time of her attack. Id. The Georgia Court of Appeals determined the trial judge would not have abused his discretion in refusing to declare a mistrial, noting there was no evidence that she became hysterical or made any prejudicial comments. Id. Furthermore, trial counsel acknowledged that she was more composed after the recess. Id.

In Miller v. Com., 925 S.W. 2d 449, 453 (Ky. 1996) (overruled on other grounds by Garrett v. Com., 48 S.W. 3d 6 (Ky. 2001)), the victim broke into tears while on the witness stand and was unable to continue testifying. A recess was granted during which time the victim left the courtroom in order to compose herself. Id. However, the victim's cries of "I don't want to. I don't want to," could still be heard in the courtroom. Id. The victim eventually returned to the stand where she testified without further difficulty. Id. The Kentucky Supreme Court found that the trial judge did not abuse his discretion in denying the motion for a mistrial, noting the trial judge was in the best position to ensure a fair trial and determine whether remedial measures were necessary. Id.

In State v. Newman, 283 So.2d 756, 758 (La. 1973), Newman contended the trial judge erred in refusing to grant a mistrial when a thirteen-year-old witness who identified him in a burglary case began hysterically crying while testifying at trial. The trial judge noted that the crying was not unexpected by the jurors in light of the age of the witness and the circumstances, and that in all probability it would happen again should the case be retried. Id. The Louisiana Supreme Court found the trial judge's denial of the mistrial motion to be proper. Id.

All of the above cases reinforce the fact that Victim's shows of emotion at trial were not grounds to warrant a mistrial. The Miller case is nearly identical to the case at hand, as the victim's cries of "I don't want to" are very similar to Victim calling for her mother as the jury exited the courtroom. As the Miller Court noted, the trial judge is in the best position to ensure a fair trial and determine whether any remedial measure are necessary. The trial judge had the best view of the situation and limited any potential prejudice from Victim's crying by calling a recess during her spells of crying while on the witness stand. The conduct of a criminal trial is left largely to the sound discretion of the trial judge. State v. Barton, 325 S.C. 522, 529, 481 S.E.2d 439, 443 (Ct. App. 1997) (citing State v. Sinclair, 275 S.C. 608, 614, 274 S.E.2d 411, 414 (1981)). The trial judge, thus, did not abuse his discretion in refusing to declare a mistrial, as the periods of emotion demonstrated by Victim were not of the extreme nature necessary to constitute manifest necessity for a mistrial.

II.

The trial court did not err in following the established procedure of allowing the prosecution to open its closing argument on the law and argue last on the facts, and following the established procedure did not violate Appellant's constitutional rights to a fair trial and due process of law.

Relevant Facts

Prior to closing arguments, Defense Counsel informed the trial court she had a motion about the order of closing. Tr. p. 258. Defense Counsel noted she also had a written motion in support of her argument. Tr. p. 358. In arguing her motion, Defense Counsel argued:

> But the only thing I would add is that if this is - - if this is the way it's done in civil cases where you're not dealing with somebody's constitutional rights, and that's the way it's done, then that's the process that needs to be used in criminal cases where the State has the burden of proof beyond a reasonable doubt. The standard of proof is higher. There are constitutional rights implicated, and for all those reasons we think that this practice of allowing it the way it's been done needs to change.

Tr. p. 363. The court denied the defense's motion. Tr. p. 363. Following closing arguments by both the State and the defense and the judge's instructions to the jury, Defense Counsel noted several things in the State's closing argument that she would have responded to had she been able to have the last argument. Tr. p. 418.

Discussion

Appellant asserts the trial judge erred in declining to deviate from following the established procedure of allowing the prosecution to open its closing argument on the law and argue last on the facts. Appellant asserts the trial judge's ruling violated his state and federal constitutional rights to a fair trial and due process of law. The State submits this

argument is without merit, as the trial judge did not err in allowing the State to have the last argument as permitted by the established procedure.

The longstanding procedure used in criminal proceedings is reasonable and does not require alteration. Historically, the right to the final closing argument has followed the party with the burden of proof. Stein Closing Arguments § 1:6: Right to open and close; order of argument (2011-2012 ed.) ("Generally, the right to make opening and closing follows the person having the burden of proof."); Nicole Velasco, Taking the "Sandwich" Off of the Menu: Should Florida Depart from Over 150 years of Its Criminal Procedure and Let Prosecutors Have the Last Word?, 29 Nova L.Rev. 99, 112 (2004) ("At common law, the widely accepted rule in the United States is that the party with the burden of proof has the right to open and conclude final argument before the jury.").

In criminal trials in South Carolina, a solicitor is entitled to open and close the closing arguments to the jury unless the defendant has not offered any evidence. State v. Rodgers, 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977). The initial closing argument must include a discussion of the law if demanded by the defendant; however, the solicitor is not required to open his initial closing with any argument on the facts although he may do so as a matter of discretion. State v. Lee, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971) *overruled on other grounds by* State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009); Rodgers, 269 S.C. at 25, 235 S.E.2d at 809.

However, unlike the vast majority of jurisdictions, current South Carolina practice sets the order of closing arguments in criminal cases according to the evidence received at trial. See State v. Brisbane, 2 Bay 451 (S.C. 1802) (As a matter of practice, when a criminal defendant calls no witnesses, he has "the **privilege** of concluding to the jury.")

(emphasis added); see also State v. Gellis, 158 S.C. 471, 155 S.E. 849, 855 (1930) ("It is evident from the more recent decisions of this court that the rule is that if a defendant offers any evidence on trial of the case, the state is not deprived of its general right to the opening and concluding arguments."); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379, 384 (1972); State v. Mouzon, 321 S.C. 27, 467 S.E.2d 122, 125 (Ct. App. 1995).

In this case, Appellant chose to present three defense witnesses. Therefore, under longstanding state procedure, Appellant was not entitled to have last closing argument to the jury nor was he entitled to require the solicitor to open on both the facts and the law. Appellant cites Rule 43(j), SCRCP, and Proposed Rule 21 as support for his proposition that the State should be required to open fully on the law and the facts and reply in rebuttal. However, the Rules of Civil Procedure are wholly inapplicable to criminal cases, and Proposed Rule 21 has yet to be adopted by the South Carolina Supreme Court. Furthermore, a proposed change in a procedural rule does not indicate that the current version violates anyone's constitutional rights.

In rejecting an equal protection challenge, the Florida Supreme Court explained the rationale of its rule that is similar to the practice in South Carolina:

> In all criminal proceedings, the prosecution takes the offensive at the outset, building through its witnesses a "case" for defendant's guilt. In most instances, defense counsel is limited to the defensive tactic of cross-examination to show the weakness of the State's evidence, and to create a reasonable doubt in the minds of the jury. Occasionally the defense will be in a position to take the offensive itself by calling witnesses to build its own case for innocence. In those instances where such an offensive tactic is possible, the defense receives a more balanced exposure before the jury, and is more adequately able to offset the impression created in the minds of the jurors by the prosecution's presentation. But what of those situations where the circumstances do not give the defendant the option of presenting his own case? In our judgment it was precisely to counterbalance the weight of the State's offensive in such cases that the Legislature, and later this Court, created an exception to the common law

> rule that the party with the burden of proof is entitled to the concluding argument before the jury. As we view the Rule, it is intended as an aid to those defendants entitled to avail themselves of it, rather than as a limitation upon those desiring to call defense witnesses.

Preston v. State, 260 So.2d 501, 504 (Fla. 1972).[2]

Totally denying a criminal defendant the opportunity for closing argument constitutes a denial of the defendant's basic right to make his defense. Herring v. New York, 422 U.S. 853, 858-859 (1975). While the right to make a closing argument cannot be circumvented, the order of argument is vastly different, particularly since argument is not evidence. See, e.g., Ex parte Morris, 367 S.C. 56, 624 S.E.2d 649, 653 (2006), quoting S.C. Dep't. of Transp. v. Thompson, 357 S.C. 101, 590 S.E.2d 511, 513 (Ct. App. 2003) ("'[A]rguments made by counsel are not evidence'"); Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22, 24 (1987) ("[T]he solicitor's closing argument is not evidence"). There is no constitutional right to a certain order or scope of argument.

The order of closing arguments is a matter of state procedural rule or practice rather than substantive law. State v. Huckie, 22 S.C. 298, 299 (1885) (alleged error in denying defendant final closing argument was "not a matter of error as to express law, but of practice"). The United States Supreme Court has consistently held the states are free to shape their own rules of procedure. See, e.g., United States v. Scheffer, 523 U.S. 303, 316 (1998), *quoting* Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("we thus stressed that the ruling did not 'signal any diminution in the respect traditionally accorded to the states in the establishment and implementation of their own criminal trial rules and

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[2] In 2007, Florida changed its rules to eliminate a defendant's right to make a final closing argument. See In re Amendments to the Florida Rules of Criminal Procedure–Final Arguments, 957 So.2d 1164 (Fla. 2007). Florida's new rule provides, in pertinent part, as follows: "In all criminal trials, excluding the sentencing phase of a capital case, at the close of all the evidence, the prosecuting attorney shall be entitled to an initial closing argument and a rebuttal closing argument before the jury or the court sitting without a jury." Id. at 1167.

procedures.'").

Significantly, Appellant did not lose his right to make a closing argument; rather, he merely chose to forfeit the opportunity to present his argument last. See Herring, 422 U.S. at 857-64 (finding a *total denial* of the opportunity to present a closing argument to the trier of fact is a denial of the basic right of the accused to make his defense).

The order of closing arguments is a matter of state procedural preference which does not offend equal protection or any other constitutional right. Sheffer. The trial judge and the parties below had the right to rely on well-established precedent and longstanding practice -- a practice that never deprives any defendant of the opportunity to present a closing argument. That practice was followed in Appellant's case. There was no error.

III.

The trial judge did not err in refusing to allow Defense Counsel to elicit testimony that the photographs on Victim's phone showed T.C.'s genitals, where the defense was still able to effectively argue that the photographs provided a motive for Victim to fabricate the allegations, the evidence was inadmissible under the Rape Shield Law, and the evidence was inadmissible under Rule 401, SCRE and Rule 403, SCRE, as the evidence was irrelevant and any potential probative value of the evidence was substantially outweighed by the evidence's potential for undue prejudice.

Relevant Facts

Prior to trial, the Solicitor noted that in his Rule 5 disclosures, he accidentally released three photographs that were taken off a cell phone showing the genitals of a minor boy. Tr. p. 49. The Solicitor noted he should not have released them, as they would be improper to disclose, display, or disseminate in any form. Tr. p. 49. Defense Counsel agreed the photographs should not have been disclosed to her. Tr. p. 149. Defense

Counsel then stated, "It would not be my intention to try to introduce that photograph unless - - unless for some reason it - - the fact that they existed on this young lady's phone is disputed." Tr. p. 49. Defense counsel continued, "And then, you know, if there was some way to describe them to the jury short of them seeing the actual images. But I- - you know it wouldn't be my desire to introduce them." Tr. p. 49. The trial judge then stated:

> Well, if I understand what you're saying, you don't want to concede 100 percent at this stage that that you would not consider some sort of relevant evidence. And we'll just see how it goes. Quite frankly, I don't see where it would be relevant. But I'm not making any rulings on that . . . And if some reason the Defense feels like they want to have those introduced then we'll deal with that as an evidentiary matter.

Tr. p. 50.

During Mother's testimony, Defense Counsel began to ask whether Mother had discovered photographs of T.C. on Victim's phone. Tr. pp. 97-98. The Solicitor immediately objected and the judge sent the jury out of the courtroom so that the trial court could take up the matter of law. Tr. p. 98.The Solicitor argued:

> I'm assuming, and I may have pulled the trigger too quick, the pictures the Defense is getting ready to ask about are the pictures that I advised the court about earlier which would have no relevance to the accusations of this crime, unless they're trying to put it in through some type of third party guilt, which clearly they haven't met the statutory requirements of that, or they're trying to go into some other alleged sexual activity by the child, which would be certainly objected under the Rape Shield law. And I can't imagine what other sense of relevance it may have.

Tr. p. 98.

Defense Counsel argued, "I think those photographs coming in on that phone at the time that they did go to a motive for why [Victim] would be saying these things about Mr. Tate, because she got in trouble for the pictures being on her phone." Tr. p. 99. The

Solicitor countered that the pictures were completely irrelevant and would certainly be more prejudicial than probative under Rule 403, SCRE. The trial judge asked counsel whether the photographs were received in conjunction with a text message or were the pictures simply in the phone's photo album. Tr. p. 99. The Solicitor clarified for the judge that the pictures were not received in conjunction with a text and were simply found on the phone. Tr. p. 100. There were no phone records tying the picture to one particular person. Tr. p. 100. The Solicitor disclosed that, from his own investigation, he discerned the pictures came from T.C. Tr. p. 100. The trial judge asked Defense Counsel:

> Why do they have to know it's his private parts? I realize this is - - this is a case involving sexual allegations. I understand that. And that she has made allegations against the Defendant of sexual in nature. I understand that. But why does the jury has to know that there are sexual pictures on her phone giving her the motive to fabricate these allegations?

Tr. p. 101. The Solicitor offered, "To give you a good example, Your Honor, let's say she was actually caught engaging in intercourse with [T.C.] and that was the basis for some discipline, the Rape Shield still applies. You can't get into you had sex with [T.C.] and that's why you got in trouble, isn't it." The Solicitor continued, "They couldn't do that. So why can they go into the fact that there was this picture on the phone?" Tr. p. 102. Defense Counsel maintained that the content of the pictures was relevant because it goes to motive and why the Victim could fabricate the allegations. Tr. p. 102.

The trial judge ruled:

> I don't really see much of a difference in them seeing pictures or being told that there are pictures of his male private parts. I mean, they can - - if it's male private parts they can envision in their mind what the pictures show. I just don't - - I think you can certainly ask if there were pictures on the phone concerning [T.C.] that the mom disapproved of, but if he did, but I don't think we need to tell the jury that they are actually [T.C.'s] private areas. I don't think the jury needs to know that. I don't see where there's any relevance. You can still argue motive, because she got into

> trouble allegedly over these pictures on the cell phone. . . .But the jury is not going to know that there were pictures of his private area.

Tr. p. 103. The trial judge later continued, "I think motive can be established without the jury knowing that the pictures were of male genitalia. So the question is - - I guess the objection by the State is sustained." Tr. p. 105.

Following a proffer of Mother's testimony by the defense, the judge clarified the scope of what Defense Counsel could ask regarding the pictures, stating, "So the ruling is that nothing can be mentioned to the jury out of what the actual pictures show. Certainly the use of the word inappropriate, if that's the word of choice to describe the pictures. I'll allow that. But they will not be told actually what the pictures show." Tr. p. 107. Defense Counsel subsequently asked Mother "And did there come a time when you saw at least one inappropriate photograph of [T.C.] on [Victim's] phone?" Tr. p. 108. Mother responded that she had seen the photograph and talked to T.C.'s parents about it, who also agreed the picture was inappropriate. Tr. p. 108. Mother later testified that Appellant was the one who made her aware of the inappropriate photographs. Tr. pp. 109-110.

During Defense Counsel's cross-examination of Victim, Victim was asked whether her phone had three inappropriate pictures of T.C. on it. Tr. p. 225. Victim responded that it did. Tr. p. 225. The pictures were subsequently discovered by Appellant and Mother. Tr. pp. 225-226. Defense Counsel asked Appellant whether she got in trouble for the photographs, and Victim replied that she did. Tr. p. 226. Defense Counsel then asked Victim whether her phone had been taken away when Appellant and Mother found the pictures, and Victim replied that it had been. Tr. p. 226. Defense Counsel also asked Victim whether it was ten days after Appellant's discovery of the pictures when she disclosed Appellant's abuse to Holland and Lindler. Tr. p. 226. Victim did not recall

the specific number of days but agreed that the disclosure occurred a short time after the phone incident. Tr. p. 226.

One of the witnesses called by the defense was Bart Cave. Tr. p. 310. Cave works in the computer crime center at SLED. Tr. p. 311. Cave was involved in Appellant's case because SLED received phones that needed to be examined. Tr. p. 312. Defense Counsel asked Cave whether any of the phones contained inappropriate photographs. Cave discovered three inappropriate pictures on one of the phones. Tr. p. 312. Defense Counsel also asked Cave what the dates were of the photographs on the phone. Tr. p. 313. Cave explained that there is a date and time associated with the pictures of when they were on the device. Tr. p. 313. Cave testified photographic files showed dates of August 14, 2010, and August 15, 2010. Tr. p. 313.

During closing argument, in trying to convince the jury Victim fabricated the allegations against Appellant, Defense Counsel cited Victim's relationship with T.C. as the motivation for Victim to lie. Tr. p. 390. Defense Counsel attempted to paint a picture where Victim somehow perceived Appellant as an obstacle to her relationship with T.C. Tr. pp. 390-391. Defense Counsel argued:

> And then the culmination of all that is when those inappropriate pictures turn up on the phone on August 14th and 15th. Mr. Cave told you about. [Victim] - - one of the things she was able to admit to was those pictures on her phone. Her mother admitted to seeing those. Her phone gets taken away. It gets talked about with [T.C.'s] parents. And then, just, what, a week and a half later. The pictures are there the 14th and 15th, so they've got to be found some time after that while they're at Blue Hole. And then on August 23rd all of this starts coming out. And then Keith is gone. The person who was awake most of the time, who stayed with the kids when [Mother] went to the hospital. . . . But he - - he's out of the picture and the boyfriend problem won't be a problem anymore. And then [Victim] at some point starts using contraceptives, and then in November there's an exam that shows some sort of penetration. So that's the only thing I know of to point to explain to you why this would have started coming up.

Tr. p. 391. When discussing the State's medical evidence during her closing, Defense Counsel also emphasized the fact that Victim was using contraceptives. Tr. p. 387.

Discussion

Appellant contends the trial judge erred in refusing to allow Appellant to elicit testimony that the photographs on Victim's phone showed T.C.'s genitals. Appellant argues the trial judge's ruling is violative of his constitutional rights to present a defense and to confront his accuser. Appellant asserts the content was necessary for the jury to understand Victim's purported motive to fabricate the allegations against Appellant. The State submits that this argument is without merit. The trial judge's limitation of questioning regarding the photographs to whether there were inappropriate pictures of T.C. on Victim's phone allowed the defense ample opportunity to argue Victim's punishment for the photographs motivated her to fabricate the allegations against Appellant. Furthermore, allowing Defense Counsel the opportunity to elicit testimony about the specific content would have violated the Rape Shield Law. Finally, the evidence was inadmissible under Rule 401, SCRE, and Rule 403, SCRE, as the evidence was irrelevant and any probative value of the evidence was substantially outweighed by the evidence's potential for undue prejudice.

Firstly, the trial judge did not err in refusing to allow Appellant to elicit testimony that the photographs on Victim's phone showed T.C.'s genitals because the defense was still able to effectively argue Victim's punishment stemming from the photographs was the motive for her to fabricate the allegations against Appellant. The trial judge's limitation on Appellant's questioning did not implicate his constitutional rights to present a defense and to confront his accuser whatsoever. The Confrontation Clause guarantees

that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This right to confront and cross-examine witnesses "is essential to a fair trial in that it promotes reliability in criminal trials, and insures that convictions will not result from testimony of individuals who cannot be challenged at trial." State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). The Confrontation Clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." United States v. Owens, 484 U.S. 554, 559 (1988) (citations and internal quotation marks omitted). Appellant was able to fully and vigorously cross-examine all witnesses presented by the State. Appellant's rights of confrontation and right to present a defense were not implicated whatsoever, and the judge's limitation of questioning regarding the photographs on Victim's phone still enabled the defense to argue motive. Defense Counsel was able to ask both Mother and Victim about "inappropriate photographs of T.C." found on Victim's phone. Defense Counsel also asked whether T.C.'s parents were contacted, whether punishment was doled out, and what the time and date of the pictures were. The inappropriate pictures found on Victim's phone were one of the major pieces of evidence relied upon by Defense Counsel in her closing argument. The trial judge's ruling that Defense Counsel not be allowed to question witnesses as to what specifically these "inappropriate pictures" contained did not impugn Appellant's defense whatsoever. The defense could, and did, argue fully that the inappropriate pictures provided Victim a motive to fabricate the allegations against Appellant. Thus, Appellant's right to confrontation and right to present a defense were not violated. Furthermore, any alleged error in the trial judge's

ruling regarding the content of the photographs was harmless, as Appellant suffered no prejudice. Appellant was still able to fully argue that Victim had a motive to fabricate these allegations by asking Victim, Mother, and Cave about the inappropriate pictures found on Victim's phone. Defense Counsel was able to vigorously argue throughout closing argument that Victim was a "storyteller" who had a very strong motive to fabricate the allegations.

Secondly, allowing Appellant to elicit testimony concerning the content of the inappropriate photographs would have been violative of the Rape Shield Statute. S.C. Code Ann. § 16-3-659.1(1) provides, "Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656." Allowing Defense Counsel to elicit testimony that Victim had photographs of T.C.'s penis on her phone would enable her to reference specific instances of Victim's sexual conduct. Furthermore, Defense Counsel's statements during closing arguments emphasizing the fact Victim was using contraceptives evinces a clear intent to attempt to point to other specific incidents of Victim's sexual conduct that could explain the transection in her hymen that was discovered during her examination by Dr. Pritchard.

Thirdly, the evidence was inadmissible under Rule 401, SCRE, and Rule 403, SCRE, as the evidence was irrelevant and any probative value of the evidence was substantially outweighed by the evidence's potential for undue prejudice. All relevant evidence is admissible, and only relevant evidence should be admitted at trial. State v. Douglas, 369 S.C. 424, 430, 632 S.E.2d 845, 848 (2006); see Rule 402, SCRE ("All

relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible."). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'").

However, even if relevant, evidence must be excluded from trial if its probative value is **substantially outweighed** by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), *rev'd on other grounds*, 409 S.C. 524, 763 S.E.2d 22 (2014). Unfair prejudice means an undue tendency to suggest a

decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000).

The content of the photographs on Victim's phone was not relevant whatsoever. The content of the photographs had no bearing on the proceeding, and did not make the existence of any fact that was of consequence to the determination of the action more probable or less probable than it would be without the evidence. The only stated purpose the defense offered for the pictures was that they were relevant to the alleged motive of Victim to fabricate the allegations. The specific content of the pictures was not relevant whatsoever to Victim's alleged motive. The existence of the photographs themselves and Victim's punishment for possessing them are the only relevant evidence that goes towards motive.

Appellant's comparisons of the current case to State v. Grovenstein, 340 S.C. 210, 530 S.E.2d 406 (Ct. App. 2000) are inapposite. As noted by Appellant, the Grovenstein Court held that evidence of a child victim's prior sexual experience is relevant to demonstrate that the defendant is not necessarily the source of the victim's ability to testify about alleged sexual conduct. Id. at 219. However, whether Victim was familiar with the sexual conduct that was alleged was not an issue in the proceeding. In State v. Williams, 409 S.C. 455, 761 S.E.2d 770 (2014), Williams argued the trial court erred in excluding evidence of prior sexual abuse of a victim by the victim's stepbrother. The Court found the situation distinguishable from that in Grovenstein, ruling the evidence Williams sought to admit did not provide an alternate explanation as to how the victims were familiar with the sexual conduct they alleged Williams to have committed because the allegations against Williams were not similar to the alleged abuse by the victims'

stepbrother. Id. at 466. The Court emphasized that Williams was accused of digitally penetrating the victims, while the victim's stepbrother allegedly forced the victim to perform oral sex. Id. The Court noted that the fact that the victim was previously forced to perform oral sex would not show a source of the victim's ability to testify about the defendant's acts of digital penetration. Id. As in Williams, the contents of the photographs were not similar whatsoever to the abuse committed by Appellant. The fact that Appellant had nude photographs of her boyfriend did not show a source of the victim's ability to testify about instances of sexual abuse by Appellant. Furthermore, the issue of whether the evidence was relevant to demonstrate an alternate explanation as to how Victim was familiar with various aspects of sex is not preserved for appellate review. Defense Counsel's stated reason for why the content of the photographs should be admissible all revolved around Victim's motive and credibility. Tr. pp. 99- 102, 104. Defense Counsel never argued to the trial judge that the content of the photographs was relevant to establish the child had an alternate source of sexual knowledge. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003).

Whatever probative value, if any, the evidence had was substantially outweighed by the risk of unfair prejudice and misleading the jury. The admission of the content of the photographs would have had an undue tendency to suggest a decision on an improper basis. The jury would have placed improper emphasis on the content of the photographs. The jury would not have seen the content of the photographs as proof of motive; instead,

the jury would have viewed the photographs and believed T.C. was the likely source of the transection in Victim's hymen. As such, the highly prejudicial nature of the photographs leads to the conclusion that the probative value was substantially outweighed by the risk of unfair prejudice and misleading the jury.

CONCLUSION

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

Respectfully submitted,

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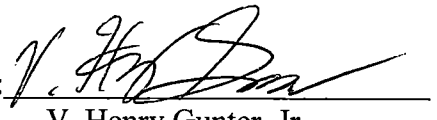
BY: 
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ATTORNEYS FOR RESPONDENT

December 30, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

DEC 30 2015

SC Court of Appeals

Appeal From Abbeville County
Donald B. Hocker, Circuit Court Judge

STATE OF SOUTH CAROLINA, Respondent

v.

KEITH DENVER TATE, Appellant.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within **Initial Brief of Respondent and Designation of Matter** on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Susan B. Hackett, Esquire, Appellate Defender, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 30th day of December, 2015.

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ALAN WILSON
ATTORNEY GENERAL

December 30, 2015

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: **State v. Keith Denver Tate**
Appellate Case No: 2014-001694

Dear Ms. Kitchings:

Enclosed please find the original of the **Initial Brief of Respondent and Designation of Matter** in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this brief today.

Sincerely,

V. Henry Gunter, Jr.
Assistant Attorney General
Bar No: 102259

VHG/nb
Enclosures

cc: Susan B. Hackett, Esquire (2 copies enclosed)
Trisha Allen, Victim Services (1 copy enclosed)