THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
John C. Hayes, III, Circuit Court Judge

Case No. 2013-002391

The State of South Carolina, ... Respondent,

v.

Justin McBride, ... Appellant.

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STATEMENT OF THE CASE

Appellant Justin McBride ("McBride") was indicted on charges of first degree criminal sexual conduct with a minor and assault with intent to commit first degree criminal sexual conduct with a minor by return of a true bill on December 2, 2010.[1] McBride pled not guilty to both charges. A jury trial was held before the Honorable John C. Hayes, III on October 28-30, 2013. The jury returned a verdict of guilty as to Count 1, first degree criminal sexual conduct with a minor. (Transcript, hereinafter "Tr.," 375-76.) The jury returned a verdict of not guilty on Count 2, assault with intent to commit criminal sexual conduct. (Tr. 375-76.)

Following the verdict, McBride's counsel renewed previously made requests for directed verdict, renewed various objections to the Court's evidentiary rulings during trial, and made an oral motion for a new trial. (Tr. 379-80.) Those motions were denied. (Tr. 380-81.) On October 30, 2013, McBride was sentenced to 25 years imprisonment. (Tr. 395.) Notice of McBride's Intent to Appeal was filed on that same date. The Notice of Appeal was then filed with the

[1] This matter was never pending in Family Court. Rather, the solicitor, in her sole discretion, chose to file these charges against 16 year old McBride in Circuit Court under S.C. Code § 63-19-20(1). McBride contends this statute improperly vests this discretion in the prosecutor by defining who constitutes a "child" or "juvenile" by the crime allegedly committed instead of any analysis of the true maturity or best interests of the minor involved or justice itself.

lower court on November 1, 2013 and this Court on November 7, 2013, challenging both McBride's conviction and sentence.

STATEMENT OF THE BASIC FACTS

McBride is the cousin of the alleged victim in this case. (Tr. 80.) At the time of the alleged incident that gave rise to the charges, McBride was 16 years old; his cousin was 9. (Tr. 91.)

After returning from school on the school bus, the alleged victim found her mother was not at home. (Tr. 91.) She then either went to a neighbor's house, but did not stay because the neighbor had company, or went directly to McBride's house. (Tr. 91-93.) In any event, she ended up at McBride's house. (Tr. 93.) They all lived in very close proximity to one another.

The testimony from this point gets very unclear and confusing as to actual events. What is clear is that at some point the alleged victim left to return home. (Tr. 101.) At some point after returning home – again the timeline is not clear -- she disclosed some incident with McBride, her cousin. (Tr. 103, 107.) After some unspecified period of time, and with the alleged victim's mother wanting to wait until her husband (the alleged victim's father) got home, family members called the police. (Tr. 103, 259-260.)

Several police officers arrived, including a female officer who was called in to speak with the female alleged victim. (Tr. 178-179.) After getting the alleged victim's statement, that officer spoke with McBride. (Tr. 180.) This conversation

occurred in McBride's home. (Tr. 181.) Two additional uniformed officers[2] were also present during the questioning of McBride. (Tr. 181-182.) And, testimony revealed that, though not technically under arrest, officers stood essentially between McBride and the door to his home, as well as outside McBride's home. (Tr. 35-36, 181-182.)

McBride denied the actions described by the alleged victim. (Tr. 42, 183-184.) His version of events was, at all times, different from the alleged victim and consisted of no wrongdoing. (Tr. 183-184.) A portion of his statement – provided without being informed of his Fifth Amendment rights – was used against him at trial. (Tr. 330-333.)

Only a handful of witnesses testified at trial, including the alleged victim. The alleged victim's own testimony was confusing and conflicting. (Tr. 95, 99, 102-104, 130-132, 149.) She appears to assert that McBride attempted to force her to perform oral sex and attempted to penetrate her anally. (Tr. 95, 100-101.) She indicated that semen ended up on the shirt she was wearing, as well as on a tissue she used to wipe it off. (Tr. 97-98.)

Other witnesses included the alleged victim's mother and aunt and two of the police officers who responded to the original complaint. (Tr. 177, 223, 269.) The only physical evidence introduced included a color photograph of the alleged victim on the day of the incident. (Tr. 153-155, 187, 271.) The photograph purported to show a deodorant stain on the shoulder of the alleged victim's shirt. (Tr. 186.)

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[2] The police department no longer employs either the investigator or the two officers present during the questioning of McBride. (Tr. 37, 191.)

Disturbingly, responding officers did not collect the shirt worn by the alleged victim. (Tr. 200, 247.) Instead, after at least several days, the alleged victim's mother brought the shirt to the police department. (Tr. 247-248.) The shirt was never tested to determine the presence either of semen or deodorant. (Tr. 80, 199-200, 270, 351.) In fact, the shirt was never sent to SLED for any testing and was lost. (Tr. 275.) At no time was the shirt available to the defense; nor was it tested and results of such testing provided. (Tr. 161, 276.) The police also never tested any materials from McBride, such as his deodorant. (Tr. 213, 351.) Even the police department's evidence sheet, completed with all evidence submissions, was missing. (Tr. 277.)

Despite this lack of evidence, the jury returned a guilty verdict on the charge of first degree criminal sexual conduct with a minor based on the State's claim that oral sex occurred. (Tr. 375-376.) This verdict was unsupported by the evidence and followed several erroneous evidentiary decisions of the Circuit Court, along with confusing jury charges, violating McBride's Due Process rights. McBride, only sixteen at the time of the incident, was sentenced to 25 years without parole.

The facts in this case, discussed in greater depth as relevant to the issues raised below, and the legal errors committed at trial, require reversal of McBride's conviction.

ARGUMENT

This appeal raises a number of serious issues. First, this case involves significant legal questions regarding the proper treatment of juveniles in our

criminal justice system. Moreover, the issues regarding the handling of evidence in this matter and treatment of those deficiencies at trial, if upheld, would only serve to encourage negligent investigation and handling of evidence. Specifically, when taken together, these errors made it impossible for McBride to defend himself absent taking the witness stand. A criminal defendant simply cannot be forced to undergo a process that would require such testimony. Even where no one error, alone, may mandate reversal, the totality of these circumstances – involving lost evidence, permitting introduction of surprise and incomplete evidence, excluded cross examination, and dangerously confusing jury charges -- hindered the defense to such an extent that the process provided simply cannot meet constitutionally required standards.

I. THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION IN THIS MATTER INVOLVING A DEFENDANT WHO WAS SIXTEEN AT THE TIME OF THE ALLEGED CRIME OR, IF THE RELEVANT STATUTES PERMITTED THE EXERCISE OF SUCH JURISDICTION WITHOUT A CASE-SPECIFIC ANALYSIS, THOSE STATUTES FAIL TO ENSURE APPROPRIATE CONSTITUTIONAL PROTECTIONS FOR DEFENDANT MCBRIDE.

It is undisputed that McBride was only sixteen (16) years old at the time of the alleged crime. Current South Carolina law provides, in relevant part, that the Family Courts of South Carolina "shall have exclusive original jurisdiction and shall be the sole court for initiating action: (1) Concerning any child living or found within the geographical limits of its jurisdiction: . . . . (d) who is alleged to have violated or attempted to violate any state or local law or municipal ordinance . . . ." S.C. Code § 63-3-510 (emphasis added). In accordance with

this grant of exclusive jurisdiction, the law further provides that "a case involving a child must be transferred or retained as follows:"

> (1) If, during the pendency of a criminal or quasi-criminal charge against a child in a circuit court of this State, it is ascertained that the child was under the age of seventeen at the time of committing the alleged offense, it is the duty of the circuit court immediately to transfer the case, together with all papers, documents, and testimony connected with it, to the family court of competent jurisdiction, except in those cases where the Constitution gives to the circuit court exclusive jurisdiction or in those cases where jurisdiction has properly been transferred to the circuit court by the family court under the provisions of this section. . . .

S.C. Code § 63-19-1210 (emphasis added).

After initiation of a case in family court, where the case involves murder or criminal sexual conduct, the prosecuting authority "may request in writing that the case be transferred to the court of general sessions with a view to proceeding against the child as a criminal rather than as a child . . ." S.C. Code § 63-19-1210(6). Various procedures are established for this transfer. Id. "If the circuit judge elects to exercise the jurisdiction of the general sessions court for trial of the case, he shall issue an order to that effect . . ." Id.

No constitutional provision could be located that provides for exclusive jurisdiction in the circuit court for this case. Indeed, exclusive jurisdiction for trials involving the violation of laws by a child of sixteen, like McBride, lies in the Family Court. Once initiated in that court, the case may be transferred but only in accordance with S.C. Code § 63-19-1210. Discussions with trial counsel and review of the Circuit Court docket entries shows no evidence this case was transferred from any Family Court. Rather, the matter appears to have been initiated in Circuit Court.

Moreover, the circuit judge electing to exercise jurisdiction over a trial like this one is required to "issue an order to that effect." S.C. Code § 63-19-1210(6). The Circuit Court Judge entered no such order.

This procedure intentionally and rationally provides great discretion to the Family Court – the court vested with exclusive jurisdiction over juveniles. It is the Family Court that first determines a request to transfer an otherwise juvenile prosecution to the circuit court. S.C. Code § 63-19-1210(6) ("The judge of the family court is authorized to determine [the prosecution's] request [to transfer]."). But in all instances – in the absence of a constitutional grant of exclusive jurisdiction to the circuit court – the original subject matter jurisdiction lies in the Family Court.

Absent a transfer from the Family Court, no jurisdiction exists in the circuit court. "The jurisdiction of a court over the subject matter of a proceeding is fundamental." State v. Guthrie, 352 S.C. 103,107, 572 S.E.2d 309 (Ct. App. 2002) (citation omitted). "The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court." Id. (citations omitted). "The acts of a court with respect to a matter as to which it has no jurisdiction are void." Id. (citations omitted).

Here the Circuit Court lacked subject matter jurisdiction in the absence of a family court's determination that transfer to that court was appropriate and the Circuit Court's order that it elected to accept that transfer of jurisdiction. Statutory provisions defining "child" or "juvenile" to the contrary simply cannot enlarge or restrict a court's jurisdiction contrary to those legal provisions granting such

jurisdiction. See S.C. Code § 63-19-20(1) (in which the Juvenile Justice Code defines "child" or "juvenile" to exclude minors who are charged with certain crimes carrying sentences of fifteen years or more). Indeed, to define whether an individual is a child based on the acts committed, or solicitor preference, rather than the mental capacity and development of that individual runs counter to the entire body of law intended to protect and rehabilitate children. To leave discretion solely to the solicitor fails to protect the children of this State.

The basing of jurisdiction on definitions of "child" and "juvenile" that base those definitions on alleged crimes and then gives unfettered discretion to the solicitor to file charges in the Circuit Court, runs counter to the process due McBride.

To the extent that the overall statutory scheme intends to permit blanket and unchecked prosecutorial discretion to decide to try minors as adults, it runs afoul of Kent v. United States, 383 U.S. 541 (1966) and general constitutional protections afforded children based on their reduced capacity. See generally Miller v. Alabama, 132 S. Ct. 2455 (2012) (determining that due to the different psychology and development between juvenile and adult minds a life sentence without parole imposed for a non-homicide crime ran afoul of the Eight Amendment); see also Graham v. Florida, 560 U.S. 48 (2010). Such a statutory scheme also runs afoul of the general treatment afforded children and the duties of a criminal prosecutor. It encourages charging offenses with more severe penalties to trigger the discretion of the solicitor.

It is simply inconceivable that whether a minor receives some formal consideration of the prudence of his facing charges as an adult simply rests with the solicitor. Vesting of such discretion invariably results in a failure to treat one minor similarly to another; and potentially violates the Equal Protection Clause of the United States Constitution. U.S. Const. amend. XIV. For example, where charges are originally filed in Family Court, a minor is entitled to review of the Kent factors, which factors include the following:

> (1) The seriousness of the alleged offense.
> (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner.
> (3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
> (4) The prosecutive merit of the complaint.
> (5) The desirability of trial and disposition of the entire offense in one court.
> (6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
> (7) The record and previous history of the juvenile, including previous contacts with law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation, or prior commitments to juvenile institutions.
> (8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available.

State v. Jones, 392 S.C. 647, 652-653, 709 S.E.2d 696 (Ct. App. 2011) (citing the Kent factors and addressing whether the family court properly waived jurisdiction over a juvenile with a prior history of violent crime[3]). No consideration

[3] Where someone charged with armed robbery and manslaughter, as in Jones, and with a prior criminal history of armed robbery gets the benefit of family court consideration prior to transfer to the circuit court, a child such as McBride, with no criminal history is entitled to equal protection and process under the laws.

was given to any of these factors. Moreover, it seems counter to the purpose of the special code provisions aimed at children to leave the determination of one's childhood to whether a prosecutor charges the child with an offense serious enough to result in a serious sentence. In other words, where a child faces a minimum sentence of 25 years, the constitutional procedural safeguards should be greater, not lesser, when determining whether he shall face charges as an adult.

Moreover, as an officer of the court, the solicitor "represents all the people, including [the] accused, and [he] occupies a quasi-judicial position, whose sanctions and traditions he should preserve. It is his duty to see that justice is done. He must see that no conviction takes place except in strict conformity with the law, and that [the] accused is not deprived of any constitutional rights or privileges." State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244, 248-249 (2006) (emphasis added). Contrary to these duties, no explanation is required of a solicitor utilizing her sole discretion to remove the trial of a child from Family Court to Circuit Court. The solicitor, here, failed to consider or represent any interest of the accused minor child.

The statutes addressing the treatment of children should be read together to provide some required analysis that trial as an adult is appropriate. Some procedure is required before the circuit court can exercise jurisdiction over a child who would otherwise be governed by the children's code, juvenile justice and the specialized family courts.

II. ASSUMING THE CIRCUIT COURT HAD JURISDICTION, THE CIRCUIT COURT'S EVIDENTIARY RULINGS AND CONFUSING AND ERRONEOUS JURY INSTRUCTIONS VIOLATED MCBRIDE'S DUE PROCESS RIGHTS.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that the State shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV; see also S.C. Const. Art. I § 3. As part of that guaranteed Due Process, the Confrontation Clause provides that a defendant in criminal cases "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; S.C. Const. Art. I § 14. Inherent in the process due such a defendant, the State cannot be permitted both to rely on selective, surprise photographs of missing evidence, while depriving the defendant access to that evidence. And, inherent in the Confrontation Clause's protections is the right to relevant and thorough cross-examination of witnesses.

In this case, struggling with difficult facts, the Circuit Court unfortunately erred in a number of evidentiary rulings and decisions, resulting in insufficient procedural safeguards and violations of due process.

A. Where Law Enforcement Lost Key and Potentially Exculpatory Evidence Without Explanation and Contrary to Admitted Investigatory Norms, Due Process Was Violated, or At a Minimum, Required That a Spoliation Charge Be Given to the Jury.

This case presents the disturbing situation of law enforcement's failure to investigate to the detriment of McBride's ability to defend himself. First, law enforcement, aware of the alleged victim's claims that semen ended up on the

shirt she was wearing, failed to collect that shirt as evidence. (Tr. 199-200.[4]) Rather, they merely told the alleged victim's mother to bring this critical evidence with her several days later to a forensic interview. (Tr. 247-51, 260-64.) At the forensic interview, the alleged victim's mother was then told to take the evidence to the police station, which she did. (Tr. 247-51, 260-64.)

Somehow, with no explanation whatsoever, this evidence went missing. (Tr. 270-73.) Also without explanation – and, indeed, with the Court's sustaining an objection to defense counsel's questions about this issue – the solitary officer in charge of evidence at the time was no longer employed by the Kingstree Police Department. (Tr. 270-73.) A clear inference existed that this may not have been the first time evidence went missing under this officer's care. (Tr. 270-73.) Where the alleged victim clearly states that physical evidence should be present on a piece of clothing, the disappearance of that clothing, especially when no care was taken to preserve it by law enforcement, eliminates the defendant's ability to mount a defense to the charges against him. This failure amounts to a violation of his Due Process rights under the United States and South Carolina Constitutions.

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[4] No dispute can exist that the shirt and any evidence on it was important. Detective Hamlet agreed that they would (or should) have collected a shirt that may have some biological agents on it. (Tr. 199-200.) She also testified that collection procedures generally would not be to wait a few days to collect such evidence. (Tr. 201.) She further stated that the longer it takes to collect evidence the higher risk of tampering or disappearance of that evidence. (Tr. 209.) Lieutenant McCrea expressly testified that "[i]f proper procedures had been followed, the evidence would have been sent to sled [sic] within a couple of days of being received." (Tr. 273.) But he was not aware of any clothes being sent to SLED, SLED had no record of any such submissions, and no testing results were ever received by law enforcement investigating this matter. (Tr. 273.) And, now the shirt is simply gone.

"To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, **or** (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means." State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001) (emphasis added). It is clear from the testimony that if the claims made by the alleged victim were true, semen would be found on the shirt the alleged victim was wearing at the time.[5]

The value of the shirt to this case was obvious. Indeed, the Solicitor relied on a photograph of the shirt to show that deodorant appeared to be present on one shoulder. No photographs show the presence of any other substance on the shirt.

Without access to the shirt, potentially exculpatory and key evidence, McBride could not properly cross-examine any of the State's witnesses. The exculpatory value the shirt presented would be obvious to anyone aware of the allegations and McBride's denials. Disputing the source, origination of, or existence of the visual markings was made impossible by only permitting photographs showing a single angle or view of the shirt. And, no other means exist to obtain this evidence.

The Circuit Court erred in its attempt to distinguish this case from Cheeseboro by inventing the concept that exculpatory or inculpatory value

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[5] In addition to stating clearly that semen ended up on her shirt, the alleged victim also stated that she attempted to wipe some off with a tissue she then threw in the bathroom trashcan. Law enforcement failed even to look in that trashcan to see if the tissue could be found. (Tr. 199-201, 336.)

cannot be determined without some forensic test. (Tr. 315.) No dispute can exist that testing the shirt for the presence of semen likely would have provided a definitive answer to whether the victim's allegations were true.

To require some forensic test unfairly places the burden on the defendant to establish the exculpatory nature of evidence to which the defendant can never gain access because law enforcement lose or destroyed it. Such a test creates an incentive for the spoliation of evidence. Here, forensic investigation of the shirt could have revealed no semen on it at all, raising serious doubts about the alleged victim's credibility.

Moreover, the Court's refusal to allow defense counsel to question law enforcement as to the reason for the evidence officer's separation from employment to determine if his handling of evidence played a role, (Tr. 274), denied McBride even the ability to attempt to show bad faith in the handling of this evidence. This line of questioning, contrary to the Solicitor's sustained objection, was clearly relevant to the circumstances surrounding the disappearance of key evidence.

In an attempt to address this serious evidentiary issue, defense counsel requested a jury charge on spoliation of evidence intended to allow the jury properly to consider the significance of the missing evidence.[6] The requested charge explained that the state had "the burden of safeguarding evidence it possessed that could establish that the defendant is innocent or that could raise issues of doubt about his guilt." (Defense Request to Charge #1 Spoliation)

[6] Defense counsel renewed his request for the spoliation charge and objected to the failure to so instruct the jury. (Tr. 373.)

The charge further would have explained to the jury that if the jurors found the evidence "could help establish the innocence of the defendant or create doubt about whether or not he is guilty" they could consider those facts in determining whether the State met its burden. (Id.) The Court refused the requested instruction and did not provide any instruction on spoliation. (Tr. 311-316.)

"To warrant reversal, a trial judge's refusal to give a requested charge must be both erroneous and prejudicial." State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302-03 (2002). Under the circumstances of this case, the refusal to instruct the jury on the spoliation issue was erroneous. Moreover, the failure properly to instruct the jury on this issue was prejudicial. The State's case rested entirely on the assertions of the alleged victim. The loss of physical evidence to clearly determine the veracity of those assertions prejudiced McBride.

Unlike Breeze, this case does not involve evidence (narcotics) that the defendant admitted existed. And, contrary to most cases involving the unavailability of evidence to the defendant, the evidence, here, was not disposed of in the ordinary course of the relevant law enforcement department's policies. See, e.g., State v. Breeze, 379 S.C. 538, 546, 665 S.E.2d 247 (Ct. App. 2008). In addition, these cases involve evidence that was not clearly crucial to the case. See, e.g., State v. Adams, 304 S.C. 302, 304, 403 S.E.2d 678, 680 (Ct. App. 1991) (where defendant claimed a due process violation based on lost breathalyzer results that deprived him of the ability to challenge the validity – not the results – of the test).

The Sixth Amendment to the Constitution of the United States guarantees a criminal defendant the right to a trial by jury. U.S. Const. amend. VI. "[T]rial by jury has been understood to require that 'the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . " Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)) (emphasis in Apprendi).

Where the missing evidence reasonably could be expected either to prove or disprove the events reported by the alleged victim, there can be no clearer deprivation of Due Process and the very Sixth Amendment right to a jury trial where such evidence is lost. Due to the loss of the shirt, McBride was deprived of the opportunity to have the truth of every accusation determined by the jury. At a minimum, a jury charge permitting a negative inference against the State would have been required.

Under circumstances such as these, the State simply cannot be permitted to mishandle evidence so egregiously and then claim no Due Process violation because the defendant cannot prove the exculpatory character of that evidence. Prosecutors have a constitutional duty, even absent a request by a defendant, "to give the defendant evidence which would raise a reasonable doubt about his guilt." State v. Jackson, 302 S.C. 313, 314-15, 396 S.E.2d 101, 101 (1990) (citing United States v. Agurs, 427 U.S. 97 (1976)).

This duty is completely ignored and elusive if the State can simply choose not to determine or to ignore the exculpatory nature of evidence that obviously carries a strong likelihood of physical evidence – or lack of evidence that would be exculpatory – lose that evidence and then proceed to trial against the defendant. To permit this verdict to stand, would simply encourage law enforcement to act recklessly or in bad faith to the detriment of the jury trial system and the constitutional protections afforded criminal defendants.

Based on the conduct of the State, McBride is entitled to have his conviction vacated and this charge dismissed. In the alternative, McBride is entitled to a new trial during which he can be permitted a proper opportunity to mount a defense through full cross-examination (as required by the Sixth Amendment to the U.S. Constitution, U.S. Const. amend. VI) of the State's witnesses and with an appropriate jury instruction as to the jury's ability to consider this missing evidence or, at a minimum, complete exclusion of any reference to the shirt or anything that may or may not have been present on it.

B. Due Process and Rule 5 Required Exclusion of the Photograph of the Victim Where The "Photograph" Was Provided to Defense Counsel as a Black Sheet of Copy Paper, Not as the Color Photograph Introduced Into Evidence, and Where the Actual Color Photograph Was Not Even in the Solicitor's File to be Reviewed by Defense Counsel Prior to Trial.

In addition to completely losing the shirt itself, the State also came to trial with a color photograph purportedly of the alleged victim wearing the missing shirt. (Tr. 160-61.) That photo, according to the contentions of the witnesses and the Solicitor, showed deodorant stains (presumably from McBride) on the

shoulder.[7] Defense counsel did not see this photograph until the first day of trial. (Tr. 157-158, 161.) Indeed, the Solicitor stated that she "got the color photographs this morning." (Tr. 161, lines 11-19.) Not only did permitting use of this photo violate McBride's due process rights, the failure to produce it until trial violated South Carolina Rules of Criminal Procedure 5(a) and 5(c). SCRCrimP 5.

During arguments on McBride's motion to exclude the photo, it became clear that when the State copied and provided its file materials to the defense, this photo appeared merely as a black sheet of paper with no photo visible. (Tr. 160-61.) The Solicitor responded to this motion by stating that defense counsel could have come to review the file, but later acknowledged that she did not even have the photograph in her file until that morning. (Tr. 161.) And, the Circuit Court correctly understood the situation:

> The bottom line is, the defense was provided with, they had the opportunity to inspect. But at the time you gave them the right to inspect, all you had were two black sheets of paper. (Tr. 165-66.)

The Circuit Court described a duty to weigh the prosecutor's duty to produce against the defense's duty to inspect. Here, McBride contends that not only should that balancing have come out in his favor, but that at any time prior to the first day of trial, the prosecution had nothing to inspect, just "two black sheets of paper."

The Circuit Court admitted that things like the previously undisclosed photograph "bother judges immensely." (Tr. 173.) The judge elaborated as follows: "I want to make the record to clear that these irritate me to no end where

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[7] The photos did not show, nor did anyone claim they showed, any evidence of semen on the shirt.

law enforcement pops up with stuff at the last minute." (Tr. 174.) Nonetheless, the judge allowed the photo. (Tr. 173.)

The United States Supreme Court recognizes a defendant's "area of constitutionally guaranteed access to evidence." United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). "[D]efendants have the right to request and obtain from the prosecution evidence that is material to the guilt of the defendant or relevant to the punishment to be imposed." State v. Jackson, 315, 396 S.E.2d 101 (1990) (citing Brady v. Maryland, 373 U.S. 83 (1963) (emphasis added)). Here, the Solicitor introduced, over the objection of defense counsel, a photograph that was not provided to McBride prior to trial. Used to corroborate at least part of the alleged vicitm's testimony, this evidence was clearly material to the guilt of the defendant. Having not been provided at any point prior to trial, it should have been excluded.

Moreover, the State was permitted to use this photograph showing only a portion of the shirt the alleged victim was wearing. Without the availability of the shirt, or at least photographs showing the entire shirt, allowing this evidence is akin to permitting one side to play selected parts of a recording or read selected parts of a statement or transcript into the record without the ability of the defendant to demand the entirety of the evidence be included in order to provide the jury completeness and context. See, e.g., S.C. Rule of Evidence 106. The State simply cannot be permitted to select a portion of an item of evidence to introduce in an attempt to bolster one of its witness' credibility while denying to

the defendant access to the rest of that item to determine if it actually supports or contradicts the witness.

The State used this surprise evidence selectively to bolster the alleged victim's testimony.[8] This use was improper and violated McBride's fundamental Due Process rights. Not only was he unable to examine the actual shirt – lost by law enforcement – but he was now forced to respond to a photograph not seen until the day of trial and, indeed, not even in the Solicitor's file for review by defense counsel.

The Circuit Court determined that the proper evaluation of this issue was a balancing of state compliance with Rule 5 and McBride's rights. (Tr. 168.) Rule 5(g), however, expressly addresses this evaluation and permits waiver of the rule's production requirements only upon a showing of good cause. SCRCrimP 5(g); see also Hyman v. State, 397 S.C. 35, 723 S.E.2d 375 (2012). No good cause was argued or shown. The Circuit Court erred in permitting the introduction of this photograph, prejudicing McBride, and requiring a new trial.

C. The Circuit Court Erred in Prohibiting Defense Counsel from Cross-Examining Law Enforcement Witnesses on Their Investigation of This Matter, Specifically as Relates to the Investigatory Tools Provided to Law Enforcement by S.C. Code § 16-3-750.

Crimes like criminal sexual conduct often come down to the veracity of the parties. Physical evidence is not always available and direct evidence, such as third party witnesses, rarely exists. For that reason, the South Carolina General Assembly recognized existing common law that defendants could be convicted

[8] Had law enforcement kept and tested the shirt for all substances, as was normal procedure, no photo would have been necessary.

on these charges even in the absence of corroborating testimony to support the accuser's allegations. See S.C. Code § 16-3-657. That said, in further recognition of the issues created in such uncorroborated cases, the legislature clearly set out to provide appropriate tools for law enforcement to evaluate the truthfulness of these serious allegations.

> A law enforcement officer, prosecuting officer, or other governmental official may request that the victim of an alleged criminal sexual conduct offense as defined under federal or South Carolina law submit to a polygraph examination or other truth telling device as part of the investigation, charging, or prosecution of the offense if the credibility of the victim is at issue; however, the officer or official must not require the victim to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation, charging, or prosecution of the offense.

S.C. Code § 16-3-750. Admittedly, this statute does not require law enforcement to administer a polygraph; nor does it appear to require an alleged victim to submit to such a test. But it does specifically provide a useful investigative tool to determine the truthfulness of an accuser in situations like this one.

Particularly given the other issues surrounding the police department's handling of this investigation, McBride was entitled to have his counsel question the State's investigative witnesses about their knowledge of this statute, the availability of a polygraph for use during their investigation, and to determine whether use of this tool was ever considered and the reasons why or why not. Defense counsel was prohibited from even asking generically whether any means existed to determine the validity of the allegations. (Tr. 122.) There appears to be no evidentiary basis on which the Court excluded this questioning. (Tr. 214, 222, 306-10.)

The Circuit Court, ruling on the defense motions for directed verdict and/or mistrial, itself realized the significance of this issue. "Quite candidly, I hope that of course if Mr. McBride is found not guilty then the matter is over. But if he is found guilty, I feel confident this will go up on appeal." (Tr. 309.) This realization stems from the obvious discomfort with a statutory scheme that permits a no corroboration instruction, but prevents the defendant from inquiring of law enforcement if they used the tools available to them to verify the alleged victim's statements.

D. McBride's Due Process Rights Were Violated When The Court Instructed the Jury That No Corroboration Was Required to Support the Alleged Victim's Testimony, Where Such Instruction Had The Effect of Impermissibly Shifting The Burden of Proof, Confusing the Jury, and Elevating the Importance of One Witness' Testimony Over Others In Contravention of McBride's Right Against Self-Incrimination.

It is correct that the current law of South Carolina provides that "[t]he testimony of the victim need not be corroborated in prosecutions" for criminal sexual conduct. S.C. Code § 16-3-657. The common law previously recognized this principle. Including this concept in instructions to the jury in this case, however, unconstitutionally shifts the burden of proof away from the State and to the defendant.[9] Given the totality of the circumstances, prior case law considering similar instructions but lacking the other issues present in this case, is not dispositive. See generally, State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993).

[9] As defense counsel argued, the statute is "basically saying, anyone can accuse anyone and the actual accusation is enough. When someone is facing a depravation of a liberty to the extent of 25 years to life, we may have a due process problem here." (Tr. 50-60.)

As the Court in Rayfield noted, at least one purpose of the no corroboration statute was to recognize

> that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical or forensic evidence identifying a particular perpetrator . . . .

Rayfield, 631 S.E.2d at 249 (emphasis added). Here, however, physical evidence should have existed; and absent the deficient investigation and loss of evidence, that physical evidence likely would have provided an answer to whether the crime was committed as described by the victim. In the light of the admission of some evidence (e.g., photographs of the missing shirt), and the exclusion of other evidence (e.g., lack by investigators of their full set of investigatory tools), adding on the no corroboration instruction virtually ensured confusion of the jury. Given the lack of other evidence, repetition of the no corroboration charge, and the lack of other safeguards, the Circuit Court violated McBride's Due Process rights by including this jury charge.[10]

Even if facially constitutional to the extent that juries in determining credibility are rarely required to find corroborating evidence in order to believe a

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[10] To the extent one reads the existing precedent as supporting the jury charge given, which McBride contends is incorrect given the totality of the circumstances, the best approach is the one proffered by Justice Pleicones in his separate opinion in Rayfield, including the following propositions: "Some principles of law, however, are not to be charged to a jury. [citation omitted] . . . . we did not hold in Schumpert that this no-corroboration charge was proper. Rather, '[t]aking the charges as a whole, we [found] no reversible error.' [citation omitted] . . . I would hold that it is error for a trial court to charge the jury that an alleged victim's testimony needs no corroboration." Rayfield, 631 S.E.2d at 249. Like the court in Indiana, Justice Pleicones further recognized that the no-corroboration was more a standard for courts to apply in considering directed verdicts or on appeal. Id.

witness' testimony, that the law provides this no-corroboration rule does not mean that instructing the jury of this legal standard is proper under these circumstances. See S.C. Const. Art. V § 21; see also State v. Simmons, 209 S.C. 531, 41 S.E.2d 217 (1947).

The jury charges, as given, were confusing to a reasonable juror in terms of the jury's assessment of the alleged victim's testimony. The Supreme Court of Indiana perhaps described the problem with such instructions best:

> The challenged instruction is problematic for at least three reasons. First, it unfairly focuses the jury's attention on and highlights a single witness's testimony. Second, it presents a concept used in appellate review that is irrelevant to a jury's function as fact-finder.[11] Third, using the technical term "uncorroborated," the instruction may mislead or confuse the jury.

Ludy v. State, 784 N.E.2d 459, 461 (Ind. 2003). In Ludy, the jury was instructed that "[a] conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt." Id. at 460. Similarly, the jury in McBride's case was charged that "[t]he testimony of victims in criminal sexual conduct cases need not be corroborated under the law of this State." (Tr. pp. 367-68.)

"A jury instruction must be viewed in the context of the overall charge." State v. Hughey, 339 S.C. 439, 458, 529 S.E.2d 721, 730 (2000) (overruled on other grounds) (citations omitted). "The test for the sufficiency of a jury charge is

---

11 That corroboration is not necessary is a legal principle to be used by courts in determining sufficiency of verdicts. Its inclusion in jury charges confuses the already appropriate charges that the jury is the decider of witness veracity generally. Unless instructed that corroboration is required, as is the case is some limited cases, it is unreasonable to assume a jury would require corroboration.

what a reasonable juror would have understood the charge to mean." Id. Where one witness' testimony is highlighted as not requiring corroboration, a reasonable juror would be confused and have difficulty determining what that means for evaluation of the other witnesses and the evidence as a whole. Moreover, it seems to infer a greater credibility for the victim witness, a presumed credibility, that is counter to the general law regarding the jury's role in assessing witness credibility and to confuse the State's burden of proof.

"[C]harging this rule carries a strong possibility of biasing the jury against the defendant. No witness's testimony need be corroborated. By specifically charging that the alleged victim's testimony need not be corroborated, the trial court singles out the alleged victim and 'appears to express an opinion on her credibility.'" Rayfield, 631 S.E.2d at 251-252 (Pleicones, concurring in part, dissenting in part) (citing State v. Schumpert, 312 S.C. 502, 510, 435 S.E.2d 859, 864 (1993) (Finney, J., dissenting)).

When the giving of this instruction is viewed in the light of the related ruling that did not permit defense counsel to cross-examine law enforcement on the statutorily permitted use of a polygraph, it becomes even more constitutionally troubling. The case now presents a situation where a number of methods of corroboration existed – the shirt, the polygraph – but McBride could point to none of them, or their absence. Clearly, this type of information is relevant, having the potential of creating reasonable doubt in the minds of the jurors and should have been available to be considered by them. Exclusion,

particularly when paired with this instruction to the jury, was highly prejudicial to McBride.

Providing an instruction that no corroboration was necessary also casts a shadow on McBride's right not to testify. See U.S. Const. amend. V. The instruction suggests that nothing more than an allegation by a victim is necessary. This inference easily creates a perception on the part of reasonable jurors that unless that testimony is contradicted it is enough. To contradict what allegedly happened in the home when only the alleged victim and McBride were present would require McBride himself to testify. A jury provided this instruction may, indeed, require a defendant's testimonial denial to reach a verdict of not guilty.

The no-corroboration instruction improperly emphasizes one witness. Such an instruction is not required accurately to charge the jury on the law, given the more general instructions concerning the jury's ability to consider the credibility of all witnesses and to rely on their testimony to establish the facts in a case. As recognized by various judges, the continued use of no-corroboration instructions in cases involving sexual crimes provides no legitimate benefit and serves only to confuse jurors. See People v. Gammage, 828 P.2d 682, 702-704 (Cal. 1992) (Mosk, J., concurring).

III. THE EVIDENCE PRESENTED BY THE STATE WAS LEGALLY INSUFFICIENT TO PROVE THE REQUIRED ELEMENTS OF THE CRIME CHARGED UNDER S.C. CODE § 16-3-655(A)(1).

The jury convicted McBride of first degree criminal sexual conduct with a minor in violation of S.C. Code § 16-3-655(A)(1). That statute, in relevant part, provides the following:

> (A) A person is guilty of criminal sexual conduct with a minor in the first degree if:
> (1) the actor engages in sexual battery with a victim who is less than eleven years of age ....

Based on the facts in this case, "sexual battery" requires evidence of "fellatio . . . or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ." S.C. Code § 16-3-651(h). No definition of fellatio exists in the statute. Thus, its ordinary, dictionary definition must be used. Smith v. United States, 508 U.S. 223, 228 (1993). Fellatio is defined as "oral stimulation of the penis." Merriam-Webster online dictionary (http://www.merriam-webster.com/medical/fellatio). Thus, to have committed this crime, there must be evidence of oral stimulation – contact – between the defendant's penis and the alleged victim's mouth. The alleged victim's testimony does not reveal any fellatio actually occurred. In describing the events for which McBride was charged, she testified as follows:

> Q And then did what?
>
> A He then he grabbed my head. Then he told put my manhood – my mouth on his manhood. And I put – I had my hand on his stomach and then pushed him away from me. And that's when the white stuff and clear stuff came out of his manhood. . . .

(Tr. pp. 96-97; see also Tr. 121.) Though she testifies that the "white and clear stuff" then went in both her mouth and on her shirt, she never says there was actually any contact between her mouth and the defendant's penis. Nor is any such evidence elicited on cross-examination as to that fact.[12]

Defense counsel moved for directed verdict on this issue at the close of the State's case. (Tr. 300-305.) That motion was renewed at the close of the case and prior to submission to the jury. (Tr. 317.) A ruling on a directed verdict motion based on insufficient evidence is concerned with the existence or nonexistence of evidence, not its weight. See State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. McLauren, 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002). Nonetheless, there must be either "direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused" to the crime charged and to be submitted to the jury. State v. Morgan, 352 S.C. 359, 364, 574 S.E.2d 203, 205 (Ct. App. 2002) (emphasis added); see also State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002). Here, no direct evidence exists as to contact or stimulation; rather, the evidence is only that the "white and clear stuff" made contact with the alleged victim's mouth and shirt. Contact with the

[12] On cross-examination, the alleged victim did state that "it" went in her mouth, but there is no reference to McBride's penis and, thus, no way to infer the "it" referenced on cross-examination is anything other than the semen she testified to on direct. (Tr. 121.) Indeed, her testimony reflects that whatever went in her mouth was not McBride's penis or his "manhood" but the stuff that came out of it: "It went in my mouth. That's when the stuff came out of his manhood and went in my mouth." It refers to the stuff – what went in her mouth.

penis must have occurred for McBride to commit the sexual battery required for the offense for which he was charged.[13]

The State chooses the charges to bring against a defendant. And, the jury is charged and returned a verdict on that charge. Regardless whether the evidence could support some other charge – some crime that did not require evidence of actual contact[14] – in this case a showing of contact is required. "Penal statutes are strictly construed against the State and in favor of the defendant." Morgan, 352 S.C. at 367 (citation omitted). "Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." Id.

Here, strictly construing the statute against the State requires an interpretation that fellatio, as used in S.C. Code § 16-3-651(h)'s definition of sexual battery, requires actual contact between the alleged victim's mouth and the defendant. See Morgan, 352 S.C. at 372-73 (making it clear that for the sexual battery of cunnilingus to occur – the female equivalent of fellatio – contact between the mouth and the genitals is, by definition, required). For sufficient evidence to exist it must be direct, which it is not, and if circumstantial, it must be substantial, which it is not. McBride was entitled to, and the district court erred in not granting, directed verdict in this matter and on this charge.

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[13] Defense counsel moved for a new trial under Rule 29 based on this insufficiency of evidence and on other grounds. (Tr. 380.)

[14] No request was made by the State to include lesser offenses that may not have required contact. Indeed, charging a lesser offense may have eliminated the solicitor's statutory discretion to charge McBride in Circuit Court and require a filing in Family Court. Having charged McBride under this statute, the State was required to prove every element of that charged offense.

"[A] trial judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty." State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254 (2001).

IV. DEFENDANT'S MIRANDA RIGHTS WERE VIOLATED REQUIRING EXCLUSION OF ALL EVIDENCE OF STATEMENTS MADE BY MCBRIDE TO LAW ENFORCEMENT.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself . . ." U.S. Const. amend. V. A very brief Jackson v. Denno, 378 U.S. 368 (1964) hearing was held before the Circuit Court. (Tr. 24-50.) The Circuit Court did exclude a portion of McBride's statement, but no legal reason exists to exclude only a portion of such a statement while permitting introduction of other portions. The statement was either given freely and voluntarily or it was not.

As the Circuit Court explained, "I just don't believe that someone should be put in a situation where their option is freedom to leave when they are in a place they have an absolute right to be; that being their own habitation." (Tr. 50, lines 14-17.) This case does not present the situation of a student in the principal's office, In re Dolshagen, 280 S.C. 84, 310 S.E.2d 927 (1984). Nor is the situation of police questioning at the scene of an accident or at the police station. This case involved a minor, in his home being questioned by uniformed officers with multiple other units outside. (Tr. 24-50.)

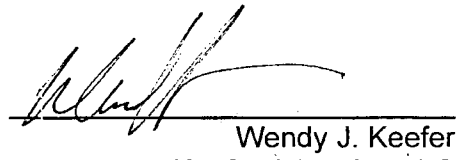
Even if technically free to leave, McBride's only option was to leave his home and go to some other location. Especially a child of sixteen, with no prior criminal history, cannot reasonably have been expected to know he had a choice

not to speak to the officers. Just as the Circuit Court excluded a portion of the statement, the entire statement should have been excluded, as well as any reference to it.

CONCLUSION

For the foregoing reasons, Appellant Justin McBride respectfully requests this Honorable Court reverse his conviction and order either dismissal of the charge on which he was convicted or a new trial.

Respectfully Submitted,



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August 5, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County
John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2013-002391

THE STATE,

Respondent,

vs.

JUSTIN MCBRIDE,

Appellant.

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STATEMENT OF ISSUES ON APPEAL

I.

Appellant's argument that the Circuit Court lacked jurisdiction was never raised below, and by statute, jurisdiction was in General Sessions, and the argument that prosecution of Appellant in General Sessions violated his constitutional rights is both incorrect and not preserved for review.

II.

The trial court did not err in declining a spoliation charge and Appellant was not entitled to dismissal based on lost evidence where no evidence indicates law enforcement acted in bad faith and the lost evidence had exculpatory value. (Appellant's Issue II. A.).

III.

Since no discovery violation occurred, the subject photographs were available for inspection, and there was no prejudice from the imagined violation, the trial court did not err in allowing the photographs to be admitted into evidence and in declining to grant a mistrial (Appellant's Issue II. B.).

IV.

The trial court did not err in not allowing Appellant to cross-examine law enforcement about whether law enforcement made Victim submit to a polygraph examination (Appellant's Issue II.C.).

V.

The trial court did not err in instructing the jury on the legal principle that the testimony of a victim need not be corroborated and the trial court did not unduly emphasize

this correct statement of law to the jury. Appellant was not prejudiced due to the extensive instructions on credibility, the jurors' role as finders of fact, and the State's burden of proving guilt beyond a reasonable doubt. (Appellant's Issue II.D.).

VI.

The trial court did not err in denying the motion for directed verdict as sufficient evidence of a sexual battery was presented for a reasonable juror to find Appellant guilty. (Appellant's Issue III).

VII.

McBride was not subject to custodial interrogation and therefore did not need to be advised of his rights, and further, McBride received the only relief he requested, so no issue remains for this Court to review. Additionally, McBride did not renew any objection to his statement before the jury and any error is harmless beyond a reasonable doubt. (Appellant's Issue IV).

STATEMENT OF THE CASE

Appellant McBride was indicted for first-degree criminal sexual conduct with a minor and assault with intent to commit first-degree criminal sexual conduct with a minor in December 2010. McBride was tried by jury before the Honorable John C. Hayes, III, on October 28-30, 2013. McBride was found guilty of criminal sexual conduct with a minor in the first degree and acquitted of assault with intent to commit criminal sexual conduct with a minor in the first degree. Judge Hayes sentenced McBride to twenty-five years' imprisonment.

STATEMENT OF FACTS

Victim was just shy of her tenth birthday when she was sexually assaulted by Appellant McBride. She was thirteen years old at the time of the trial. Tr. p. 89. McBride was sixteen years old at the time he sexually assaulted Victim, who was his cousin. Tr. p. 108.

Victim was attending summer school. For the first time, she was riding the bus, which she was excited about. It was her second day of summer school and her second day riding the bus. The other children on her bus told Victim that her mom was not home, which made Victim upset. She went to a neighbor's house, but when she saw the neighbor had company, she went to her Aunt Tina's house instead. Aunt Tina is McBride's mother. She knocked on the door and McBride answered and let her in.[1] She was alone in the house with McBride. McBride was watching television. Victim commented that it was a show with bad words, so they should turn the television off. That prompted McBride to begin a violent sexual assault. Tr. pp. 90-94.

McBride took out his penis and told Victim to "jerk it." Tr. p. 95, lines 5-6. He grabbed Victim's hand and put it on his penis. McBride grabbed Victim's head and pulled her toward his penis. Tr. pp. 95-96. Victim testified as follows on this point:

> Q: He grabbed your head hard?
>
> A: Yes, ma'am.
>
> Q: And pulled it down to his manhood; is that right?
>
> A: Yes, Ma'am.

[1] Detective Trena Hamlet noted that McBride's and Victim's houses were side by side with nothing but a small patch of grass between them. Tr. p. 181, lines 4-6.

Q: And then did what?

A: He then he grabbed my head. Then he told put . . . my mouth on his manhood. And I put – I had my hand on his stomach and then pushed him away from me. And that's when the white stuff and clear stuff came out his manhood. It was in my mouth and on my shirt. And I ran in the bathroom.

Q: You said you saw and white and clear stuff come out of his manhood?

A: Yes, ma'am.

Q: And it went in your mouth?

A: Yes, ma'am, on my shirt.

Q: What did that taste like?

A: Nasty.

Q: And it went on your shirt. Is that a yes?

A: Yes, ma'am.

Q: Okay. And then you did what?

A: Then I ran into the bathroom and wipe it off, and spit it out of my mouth.

Tr. p. 97, lines 5-16. Victim testified she spit out in the bathroom sink and wiped the semen off her shirt with a tissue. She put the tissue in a trash can. Tr. pp. 97-98.

When Victim came out of the bathroom, McBride was spraying perfume all around the living room. Tr. p. 100. McBride tried to pull down her pants; he would pull them down, and Victim would pull them back up. Tr. p. 100. Victim testified that McBride tried to put his penis in her butt. Victim testified it hurt. Tr. p. 100, line 25 – p. 101, line 8.

Victim pushed McBride off her, and she ran to the front door. McBride blocked her and "sucked" his teeth. She instead ran for the back door and ran out of the house. She went home and kicked on the door. Her mother (Mother) was there. When Mother asked what was wrong, Victim did not reply. She was scared McBride would come over to the house. But Mother smelled "man perfume" and went next door. Victim testified she had deodorant on her shirt. She testified it was from when McBride had his arm around her neck. She hurt the next day when she was making a bowel movement. Tr. pp. 101-108. Specifically, Victim testified she yelled to her mother she could not use the bathroom because "[h]e put his manhood in the back of my butt." Tr. p. 107, lines 3-8.

On cross-examination, Victim explained the following:

> Q: So he grabbed your head like this?
>
> A: No, with his hand.
>
> Q: With his hand? Where was the rest of his arm?
>
> A: Still back here.
>
> Q: Okay. So he comes over like this and then pulled – grabbed your head with his hand like this?
>
> A: Yes, sir.
>
> Q: And pushes down?
>
> A: Yes, sir.
>
> Q: Now does it go in your mouth?
>
> A: Yes, sir.

Tr. p. 121, lines 1-13. Victim verified her answer upon further cross-examination:

> Q: Now while the solicitor was asking you earlier, isn't it correct that you stated that it never went in your mouth?
>
> A: It went in my mouth. That's when the stuff came out of his manhood and went in my mouth.

Tr. p. 121, lines 19-24.

Detective Trena Hamlet responded to a call regarding a female victim at Victim's residence. Several other officers and family members were already present. While speaking with Victim and her family, Detective Hamlet noticed a white smear on the shoulder of Victim's shirt. After she spoke with Victim, Detective Hamlet spoke with McBride to hear his side of the story. Tr. pp. 178-181.

Detective Hamlet testified that McBride gave the following statement:

> He opened the door and asked why was she over there. Stated that her mom was not at home. She sat on the couch and they were watching TV. He stated that at one point he got up to go to the restroom. And while he was in there, she came in on him. He concealed, tried to conceal himself from her, because he was in the midst of using the restroom. Yelled at her to get out. And she went back in the living room and sat down. And shortly thereafter, she wanted to leave. He said that she didn't want to go to front door because a bug was on the door, so she went to go out the back. The back door was locked. So he had to unlock it. She couldn't unlock it, he had to unlock it for her to leave.

Tr. p. 183, line 13 – p. 184, line 2. Detective Hamlet testified to the statement without objection from McBride.

On cross-examination, McBride elicited the following testimony from Detective Hamlet:

> **Q: Did the second interview [with Victim], did it involve possible penetration?**

A: Yes.

Q: Did the first one indicate that at all?

A: Orally.

Q: Okay. What about on her bottom?

A: Not on the first one.

Q: So it changed.

A: It was added.

Tr. p. 212, lines 11-19 (emphasis added).

Mother testified she arrived at home on time for the bus, or at least she thought so. However, Mother did not hear the bus. She became agitated when her daughter did not come home – more so when the middle school and then high school buses came (Victim's bus should have arrived first). But after a while, she was startled by Victim kicking and beating on the door. Mother became concerned because Victim was not talking, even after she asked Victim where she had been. Victim was excited to ride the bus the day before. But now Victim walked by Mother without discussion. Mother grabbed Victim and smelled the cologne. Victim pointed to her Aunt's house when Mother inquired about where she had been. Mother testified Victim also had a stain on her shirt that smelled like deodorant. Tr. pp. 227-234.

Mother went next door and asked McBride what happened. McBride claimed Victim walked in the bathroom on him. Mother told McBride that she did not believe him. Mother decided it was best to leave at that point, since McBride's mother was not home. Another of

Mother's sisters (not McBride's mother) called police. Tr. pp. 236-239.

Later that night, Mother was trying to finish her school work – she was having trouble due to the stress of the day – when she heard Victim scream from the bathroom. Victim told Mother it hurt when she was trying to go to the bathroom. Tr. pp. 239-240; p. 245.

Law enforcement failed to take Victim's clothing during the interview. Mother and her sister put Victim's clothing in a bag and were told to bring the bag with them to the Durant Center in Florence when they brought Victim for her appointment. The Durant Center told them to take the bag of clothes to the police. She left the clothes with an officer at the Kingstree police station. Tr. pp. 247-250; p. 260.

Lieutenant Thomas Dean McCrea testified that the officer described by Mother as the officer receiving the clothes must have been Sergeant Grant Huckabee, who was an investigator, K-9 handler, and evidence custodian at the time. The only other person with access to the evidence room was Chief Ford. Both Huckabee and Ford are no longer employed with the Kingstree Police Department. Lieutenant McCrea was under the impression the clothing was sent to SLED for testing, but no record of this exists, and it appears the clothing was lost. This was not the first instance of Huckabee losing evidence before. No evidence intake sheet was located. Tr. pp. 271-277.

Samantha Cooper, Victim's aunt, testified she confronted McBride with Victim's allegations, and he told her he did not mean to do it. Cooper understood McBride's comments to be a confession. Cooper was enraged. She went running after McBride, and he ran inside his house. Cooper collected herself sufficiently enough to walk away rather than act on violent urges. Thereafter, she called the police. Tr. pp. 277-284.

ARGUMENT

I.

Appellant's argument that the Circuit Court lacked jurisdiction was never raised below, and by statute, jurisdiction was in General Sessions, and the argument that prosecution of Appellant in General Sessions violated his constitutional rights is both incorrect and not preserved for review.

McBride claims the trial court did not have subject matter jurisdiction over him for criminal sexual conduct with a minor in the first degree and assault with intent to commit criminal sexual conduct with a minor in the first degree. Of course, General Sessions has the power to hear criminal trials for those charges. Further, McBride bases his argument on a statutory argument that is contradicted by case law and the plain meaning of the applicable statutes. McBride, for the first time on appeal, argues alternatively that if there is jurisdiction, then it is unconstitutional. This claim also lacks merit.

Appellant relies on S.C. Code Ann. § 63-19-1210 to argue the trial court should have remanded the matter to family court. Section 63-19-1210 requires the following:

> (1) If, during the pendency of a criminal or quasi-criminal charge against **a child** in a circuit court of this State, it is ascertained that **the child** was under the age of seventeen years at the time of committing the alleged offense, it is the duty of the circuit court immediately to transfer the case . . . to the family court of competent jurisdiction, except in those cases where the Constitution gives to the circuit court exclusive jurisdiction or in those cases where jurisdiction has properly been transferred to the circuit court by the family court under the provisions of this section.

(Emphasis added). "Child" is defined as follows under S.C. Code Ann. § 63-19-20(1):

> (1) "Child" or "juvenile" means a person less than seventeen years of age. "Child" or "juvenile": does not mean a person sixteen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen year or more. However, a person sixteen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor.

Criminal sexual conduct with a minor in the first degree is a felony with a penalty of twenty five years' imprisonment or life imprisonment. S.C. Code Ann. §16-3-655(D)(1). Therefore, under the plain language of the statute, McBride was not a child when he sexually assaulted his cousin.

While McBride suggests uncertainty on the issue of jurisdiction in his brief, the question was already soundly answered. The Supreme Court found that a sixteen year old charged with A, B, C, or D felonies is not a "child" as defined by statute and, therefore, may be charged in circuit court without first bringing the charges in family court. State v. Graham, 340 S.C. 352, 532 S.E.2d 262 (2000).

Additionally, McBride conflates an issue of personal jurisdiction with an issue of subject matter jurisdiction. Subject matter jurisdiction is merely the power for a court to hear a certain class of cases. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). General Sessions has the power over criminal charges such as criminal sexual conduct with a minor in the first-degree and assault with intent to commit criminal sexual conduct with a minor in the first-degree. On the other hand, the applicability of the Children's Code to a particular person is a matter of personal jurisdiction. Shedden v. State, 265 S.C. 334, 338, 218 S.E.2d

421, 422 (1975) ("It has been held that a juvenile may waive his right to be treated as such either by his failure to plead his age or by entering a guilty plea."); Ex parte Cannon, 385 S.C. 643, 654, 685 S.E.2d 814, 820 (Ct. App. 2009) ("Personal jurisdiction may be waived, but subject matter jurisdiction may not be waived.").

In the instant case, no objection to having the matter heard in General Sessions, including any accompanying constitutional infirmities, was raised to the trial court. Accordingly, this whole argument is not preserved for this Court's review. An argument not raised to and ruled on by the trial court is not preserved for appeal. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) (objection must be entered on a specific ground at trial to preserve an appeal); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Even constitutional issues must be raised below to be preserved. State v. Byram, 326 S.C. 107, 112-13, 485 S.E.2d 360, 362-63 (1997) (a constitutional issue must be presented to the trial court to be preserved for review); State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998) (holding failure to raise constitutional issue at trial precluded its consideration on appeal). Accordingly, this Court should not review this issue.

Further, the statute is undoubtedly constitutional. The protection of family court to juveniles is provided by our legislature as a privilege, and not as a matter of right. State v. Shaw, 274 S.C. 534, 265 S.E.2d 522 (1980); see also C.J.S.2d Constitutional Law § 1432 ("Courts have upheld statutes divesting a juvenile court of jurisdiction of proceedings against

children of a specified age for particular violations or crimes . . . ."). No constitutional infirmity exists where a state has determined a class of offenses requires the juvenile to be treated as an adult. See Woodward v. Wainwright, 556 F.2d 781 (5th Cir. 1977) (noting "several of our sister circuits have upheld the constitutionality of statutes similar to Florida's which permit juveniles to be treated as adults without a hearing in certain instances"). In the instant case, McBride committed an offense the legislature ranks high in terms of severity. It is one of the few non-homicide crimes to be punishable by up to life imprisonment. McBride violently assaulted a cousin living right next door to him in such a manner that evidences his danger to society and requires long-term incarceration. No constitutional issue exists in the legislative determination that sixteen-year-olds who rape children under the age of eleven should be prosecuted as adults. General Sessions had jurisdiction under due process of the law over McBride's charges.

II.

The trial court did not err in declining a spoliation charge and Appellant was not entitled to dismissal based on lost evidence where no evidence indicates law enforcement acted in bad faith or the lost evidence had exculpatory value. (Appellant's Issue II. A.)

McBride argues that his due process rights were violated because the Victim's shirt was lost by law enforcement and that he was entitled to a spoliation instruction. McBride does not allege bad faith on the part of law enforcement and no evidence of bad faith exists. Further, the lost evidence did not have apparent exculpatory value. Finally, the requested charge is an unconstitutional charge on the facts and was improper.

McBride was not entitled to dismissal of the charge or exclusion of the photograph of the shirt. The State does not have an absolute duty to preserve potentially useful evidence, and a defendant must demonstrate either: 1) the State destroyed evidence in bad faith; or 2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. State v. Moses, 390 S.C. 502, 702 S.E.2d 395, 404 (Ct. App. 2010) (citing State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991)). The bad faith requirement limits the extent of the State's obligation to preserve evidence to reasonable bounds, and confines it to cases in which the police conduct indicates the evidence could form a basis for exonerating the defendant. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); Moses, 702 S.E.2d at 403.

Youngblood is factually on point with this matter. In Youngblood, clothes from the child-victim in a sexual assault case were not properly refrigerated. Id. at 53. Experts for Arizona and the defendant confirmed that semen on the clothes could have been tested if

refrigerated properly. Id. at 54. In that case, unlike the present case, identity was an issue. The Arizona Court of Appeals reversed, finding, "when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process." Id. (citation and internal quotation marks omitted). Note the Arizona Court of Appeals holding closely tracks McBride's argument. Further note, as explained below, the Arizona Court of Appeals decision was reversed.

Youngblood held as follows:

> We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interest of justice most clearly requires it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of the law.

Id. at 58.

In the instant case, no evidence suggests law enforcement acted in bad faith. Additionally, it is speculative at best that the shirt contained exculpatory evidence. See United States v. Agurs, 427 U.S. 97, 109-10 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."). Accordingly, the issue lacks merit.

Additionally, McBride sought a spoliation instruction. Such an instruction is

tantamount to a prohibited charge on the facts. S.C. Const. Art. V, §21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). In that vein, the trial court properly refused to charge the jury on "adverse inference." South Carolina case law indicates that in criminal cases, jury charges of this nature, on behalf of the State or the defense, are "not warranted except in the most unusual of circumstances." State v. Batson, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (1973) ("[W]e entertain grave doubt as to the propriety, in a criminal case, of the rule of an adverse inference from the failure to produce a material witness."); see also State v. Simmons, 267 S.C. 479, 482, 229 S.E.2d 597, 598 (1976) ("Even greater caution should be exercised by the courts in permitting an adverse inference comment in criminal proceedings than in civil proceedings.") (citations omitted); see also State v. Breeze, 379 S.C. 538, 547, 665 S.E.2d 247, 252 (Ct. App. 2008) (citing Simmons favorably but declining to decide whether a spoliation charge was warranted; instead this Court found no prejudice from any error in declining spoliation charge). Accordingly, the trial court did not err in declining to instruct the jury as McBride requested.

III.

Since no discovery violation occurred, the subject photographs were available for inspection, and there was no prejudice from the imagined violation, the trial court did not err in allowing the photographs to be admitted into evidence and in declining to grant a mistrial (Appellant's Issue II. B.).

McBride complains the prosecution violated Rule 5, SCRCrimP, by not making a better copy of the photographs depicting Victim wearing the shirt bearing the deodorant stain. McBride also makes a vague due process claim. The prosecution complied with Rule 5, McBride was not denied due process, and further, McBride was not prejudiced by the perceived violation.

Prior to the photographs' admission and out of the presence of the jury, McBride objected to the photographs. McBride remonstrated: "we were provided with a document that was black – blank. Well it wasn't blank, excuse me. It was black. It was a no color photo. The one that they're looking to place into evidence is a colored photo." Tr. p. 151, lines 9-13. McBride's counsel confirmed his law firm received discovery: "The law firm was able to acquire documents in regards to the case itself, which included these dark photographic images which you cannot make out." Tr. p. 151, lines 22-25.

McBride's counsel provided further explanation making clear he was aware of the existence of photographs he needed to inspect: "We have never been provided the colored photos in this particular case that we can actually view. We knew there was an image there. We didn't know what it was." Tr. p. 152, lines 16-19. Despite the fact counsel knew there were photographic images that were apparently difficult to make out, counsel never

attempted to contact the prosecution or law enforcement to seek information about the photographs or arrange an opportunity to view the photographs.

McBride's counsel was candid that he did not believe the perceived violation was intentional on the prosecution's part. McBride's counsel refreshingly noted the prosecutor's "high professional standards." Tr. p. 153, lines 1-13. McBride's counsel did not complain he needed further preparation due to his belated viewing of the photographs. Instead he complained the photographs might have helped him work out a plea deal with the prosecution. Tr. p. 153, lines 13-23.

The prosecutor noted in both a discovery response to McBride's first attorney, and then to the present counsel, there was reference both to a disk and pictures available for inspection and duplication. Tr. p. 155. Further, the incident report provided to counsel also indicated a white stain on Victim's shirt. Tr. p. 156, lines 8-13. As the prosecutor noted: "It's not as if they had no idea that there were photographs in the case, then all of a sudden in the morning of trial, I spring photographs on them. Judge, we gave them notice two years ago that there were photographs in this case." Tr. p. 162, lines 19-24.

Rule 5 was complied with. Under Rule 5(a)(1)(C):

> (C) Documents and Tangible Objects. Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

In the instant case, it is apparent that McBride's counsel was made aware there were

photographs available for inspection. It is further clear McBride was aware he was in possession of less than perfect copies of photographs and yet made no attempt to attain better copies or see the originals. Accordingly, the trial court correctly found the State complied with Rule 5. State v. Newell, 303 S.C. 471, 401 S.E.2d 420 (Ct. App. 1991) (where solicitor had open file policy, the defense attorney was allowed to inspect the file, and the defense attorney admitted that he probably inspected the file, the solicitor substantially complied with Rule 5).

Further, the trial court has discretion to determine what remedy, if any, is necessary to protect the defendant's rights. Rule 5(d)(2), SCRCrimP, states that if a party fails to comply with Rule 5, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing the undisclosed evidence, or it may enter such other order as it deems just under the circumstances. Rule 5(d)(2), SCRCrimP; State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996).

The remedy, or determination that no remedy is required, will not be reversed absent an abuse of discretion. See Newell, 303 S.C. at 476, 401 S.E.2d at 423 (citing 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 261 at 16 (2d ed. 1982) (adverse orders regarding discovery may be reviewed on appeal but they must be affirmed unless the trial court abused its discretion)).

In the instant case, McBride was unable to demonstrate actual prejudice from the purported violation. "A violation of Rule 5 is not reversible unless prejudice is shown." State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006). McBride did not seek a continuance, did not state the need for further investigation or preparation, and failed to note

the need for any additional witnesses. Indeed, McBride failed to indicate how the time he already had prior to the photograph being admitted was not sufficient to view the photographs. It was just two photographs, all counsel had to do was look at them. See State v. Lunford, 318 S.C. 241, 456 S.E.2d 918 (Ct. App. 1995) (finding no reversible error where defense counsel did not seek additional time to study materials and prepare for further cross-examination); State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct. App. 1992) (finding no abuse of discretion in trial court's denial of motion to suppress following late disclosure where defendant was permitted to view and copy the State's file and defendant never requested a recess in order to review the file); State v. Patterson, 290 S.C. 523, 351 S.E.2d 853 (1986) (subsequent history omitted) (finding the state's failure to produce discovery material consisting of a taped interview with the prosecution witness until the morning jury selection began did not warrant a dismissal or a mistrial where the trial court allowed defense counsel to listen to the tape before the witness took the witness stand and the trial court delayed cross-examination until the next day); Gorham v. Wainwright, 588 F.2d 178 (5th Cir.1979) (denying the defendant's mistrial motion and holding the defendant was not prejudiced by the prosecution's failure to turn over certain reports prior to trial because, although defense counsel requested and received a ten minute recess to review the new evidence, he did not request a continuance); 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 19.5, at 545-46 (1984) (a defendant's failure to request a continuance when a disclosure of exculpatory evidence is first made at trial "is often viewed as automatically negating any claim of actual prejudice.").

As to McBride's ambiguous Brady or due process argument, it simply lacks

substance. The evidence is not exculpatory. See State v. Anderson, 407 S.C. 278, 287, 754 S.E.2d 905, 909 (2014) ("Favorable evidence is either favorable exculpatory evidence or favorable impeachment evidence."); State v. Carlson, 363 S.C. 586, 609, 611 S.E.2d 283, 295 (Ct. App. 2005) ("Exculpatory evidence is that which creates a reasonable doubt about the defendant's guilt.") (citation omitted). The "violation" did not leave McBride with inadequate time to prepare. State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998) ("In a Brady analysis, information is not deemed 'material' if the defense discovers the information in time to adequately use it at trial.").

In the instant case, there was no Rule 5 violation, the trial court did not err in denying the motion for mistrial, and there is no prejudice accruing from the perceived Rule 5 violation. Further, no due process violation occurred. Rule 5 was available as a matter of procedural due process and a remedy short of dismissal or suppression of the photographs might have been available if McBride sought anything other than a windfall.

IV.

The trial court did not err in not allowing Appellant to cross-examine law enforcement regarding whether law enforcement requested Victim to submit to a polygraph examination (Appellant's Issue II.C.).

McBride claims the trial court erred in not allowing him to cross-examine law enforcement about whether law enforcement requested Victim to submit to a polygraph examination. McBride makes this claim based on S.C. Code Ann. § 16-3-750, which allows law enforcement in some cases to request a victim of a sexual assault submit to a polygraph examination. However, the statute does not provide for the admissibility of the request or results of a polygraph examination at a criminal trial, and it would be poor policy for law enforcement to subject child victims of sexual assault to a polygraph examination in all but the most extreme cases. Such a proposed line of questioning was properly excluded by the trial court.

Under S.C. Code Ann. § 16-3-750:

> A law enforcement officer, prosecuting officer, or other governmental official may request that the victim of an alleged criminal sexual conduct offense as defined under federal or South Carolina law submit to a polygraph examination or other truth telling device as part of the investigation, charging, or prosecution of the offense if the credibility of the victim is at issue; however, the officer or official must not require the victim to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation, charging, or prosecution of the offense.

Notably, this provision allows law enforcement to request a polygraph examination of the victim only if the credibility of the victim is at issue, which would necessarily be due to

the subjective view of the law enforcement agency. Further, no part of the statute provides for the request, failure to request, or failure to submit to a polygraph be admitted into evidence. Of course, the statute does not provide that the results of the polygraph are admissible.

The right to present a defense is not unlimited, but must "bow to accommodate other legitimate interests in the criminal trial process." Rock v. Arkansas, 483 U.S. 44, 55 (1987). While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence regardless of its admissibility under the rules of evidence. State v. Hamilton, 344 S.C. 344, 534 S.E.2d 586, 594 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240, 244 (2001).

Our Supreme Court has held that evidence of the results of a polygraph "or the defendant's willingness or refusal to submit to one is inadmissible." State v. Johnson, 334 S.C. 78, 89, 512 S.E.2d 795, 801 (1999). In Johnson, the Supreme Court found no error in denying a mistrial motion made when a detective testified that he asked the defendant if he would be willing to submit to a polygraph examination, but before the detective testified about the defendant's reply to the detective's request. Id. The Supreme Court, however, found no error because the reference to the polygraph was inadvertent and a curative instruction was provided. Id. at 90, 512 S.E.2d at 801. The Supreme Court has also opined that "the results of polygraph examinations are generally inadmissible because the reliability

of the test is questionable." State v. McHoney, 344 S.C. 85, 96, 544 S.E.2d 30, 35 (2001).

In State v. Wright, 322 S.C. 253, 471 S.E.2d 700 (1996), Wright argued the results of his polygraph examination, which showed deception, should be allowed to prove his subsequent confession was involuntary. The Supreme Court found the trial court did not abuse its discretion in finding the test was inadmissible "considering the authority against admitting evidence of polygraph examinations and the potential prejudice to appellant." Id. at 256, 471 S.E.2d at 702.

In State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (1985), which was a joint appeal by co-defendants Merriman and Mazzell, Mazzell argued that the trial court erred when it redacted a sentence from the immunity agreement of a cooperating co-defendant, Hogg, that required him to submit to a polygraph examination. Mazzell also sought to introduce the results of the examination that showed deception on the question of whether Hogg killed the victim. Id. at 85-87, 337 S.E.2d at 225-26. The Supreme Court found no error in the trial court's decision to redact the agreement. Id. at 87, 337 S.E.2d at 226.

For evidence to be admissible, it must be relevant. Rule 402, SCRE. Relevant evidence is "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." Rule 401, SCRE. "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, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-27, 606 S.E.2d 508, 513 (Ct. App. 2004).

Relevant evidence may be excluded where its probative value is substantially

outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Pagan, 369 S.C. 201, 210, 631 S.E.2d 262, 266 (2006). A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App.2004).

"The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). Thus, a trial court's decision regarding the comparative probative value and prejudicial effect of relevant evidence will be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

"A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Stephens, 398 S.C. 314, 320, 839 S.E.2d 68, 71 (Ct. App. 2012).

Whether law enforcement could have requested Victim take a polygraph test has no bearing on Victim's credibility. Of course, the results of a polygraph would not be admissible, which may have some bearing on why law enforcement would not want to conduct such a test. Further, subjecting a child-victim to a polygraph test in all but the most

exceptional circumstances would be poor policy. The environment of a polygraph test would likely inhibit disclosure, plus the leading questions inherent in a polygraph examination run counter to a format that should include non-leading questions in an interview conducted by skilled forensic interviewers. See State v. Michaels, 642 A.2d 1372, 1379 (N.J. 1994) (noting "a sufficient consensus exists within the academic, professional, and law enforcement communities, confirmed in varying degrees by courts, to warrant the conclusion that the use of coercive or highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events.").

Instead, the child was brought to a trained professional for a proper forensic interview. The Legislature's preference for this approach is evidenced by S.C. Code Ann. § 63-11-310, which provides for the establishment of Child Advocacy Centers that in addition to various therapeutic services, are required to provide "(1) a neutral, child-friendly facility for forensic interviews" as a response to child maltreatment. A polygraph examination, which sends a clear message to a victim that they are not believed, is antithetical to this objective.

In the instant case, the trial court did not abuse its discretion in not allowing McBride to cross-examine law enforcement about whether a polygraph examination was attempted because it was not relevant and was far more prejudicial than probative. Pagan, supra.

Further, McBride is unable to show prejudice, since he failed to proffer what testimony would have been provided. State v. Simmons, 360 S.C. 33, 46, 599 S.E.2d 448, 454 (2004) (finding the failure to raise argument against exclusion of testimony and to

proffer witness's testimony, had it been allowed, resulted in the issue not being preserved for review). A likely answer is that law enforcement did not polygraph the Victim because they believed her.

V.

The trial court did not err in instructing the jury on the legal principle that the testimony of a victim need not be corroborated and the trial court did not unduly emphasize this correct statement of law to the jury. Appellant was not prejudiced due to the extensive instructions on credibility, the jurors' role as finders of fact, and the State's burden of proving guilt beyond a reasonable doubt. (Appellant's Issue II.D.).

McBride argues the trial court should not have instructed the jury on the correct principle of law that the testimony of a victim need not be corroborated. This principle of law is useful for the jury to understand in sexual assault cases, does not diminish the State's burden of proof, and does not mislead the jury. The trial court properly instructed the jury and did not unduly emphasize the lack of a requirement for corroboration. Appellant was not prejudiced by the trial court's instructions.

S.C. Code Ann. § 16-3-657 provides: "The testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658." McBride was charged under S.C. Code Ann. §§ 16-3-655 and 656. In State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), the South Carolina Supreme Court found it was not error to charge § 16-3-657 as long as the charge as a whole comports with the law. Relying on Schumpert, the Supreme Court subsequently ruled:

> A trial judge is not required to charge § 16-3-657, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law.

State v. Rayfield, 369 S.C. 106, 117-18, 631 S.E.2d 244, 250 (2006).

Noting Rayfield, this Court, in State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011), reviewed a jury instruction on §16-3-657 like the one provided in this case. In Hill, the court's charge consisted simply of the one-sentence statute followed by a charge on credibility. The instruction in the instant case was also one sentence, repeated once more at a later point in the instruction, following the instructions on the elements of the offense. Likewise, in State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct. App. 2011), this Court found the single-sentence charge was proper and not unduly emphasized.

In the instant case, the trial court advised the jury: "The testimony of victims in criminal sexual conduct cases need not be corroborated under the laws of the state." Tr. p. 367, line 24 – p. 368, line 1. After charging the elements of the offenses, the trial court stated: "Again the testimony of the victim need not be corroborated under the laws of this state." Tr. p. 369, lines 14-16. As in Rayfield, Hill, and Orozco, the no-corroboration instruction was not unduly emphasized.

As noted in Rayfield, the instruction serves an important purpose during the jury trial:

> It is not always necessary, of course, to charge the contents of a current statute. Section 16-3-657 prevents trial or appellate courts from finding a lack of sufficient evidence to support a conviction simply because the alleged victim's testimony is not corroborated. However, § 16-3-657 does much more. In enacting this statute, the Legislature recognized that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical and forensic evidence identifying a particular perpetrator. The Legislature has decided it is reasonable and appropriate in criminal sexual conduct cases to make abundantly clear – **not only to the judge but also to**

> **the jury** – that a defendant may be convicted solely on the basis of a victim's testimony.

Rayfield, 369 S.C. at 117, 631 S.E.2d at 250 (emphasis added). Note the legislature has not corrected Rayfield's interpretation of its statute, despite meeting eight times since the decision was rendered.

As in Rayfield, Hill, and Orozco, the jury in the instant case was charged extensively on reasonable doubt and the State's burden of proof. Tr. pp. 362-364. Like those cases, the jury was also instructed extensively on their role in determining credibility of witnesses and their role as finders of fact. Tr. pp. 364-365. The trial court did not err in the instant case in instructing the correct law.

VI.

The trial court did not err in denying the motion for directed verdict as sufficient evidence of a sexual battery was presented for a reasonable juror to find Appellant guilty. (Appellant's Issue III).

McBride argues there was insufficient evidence of a sexual battery to find him guilty. However, in the light most favorable to the State, evidence was sufficient for a reasonable juror to find McBride guilty of a sexual battery based on evidence of fellatio.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. Id. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury. State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001).

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)).

"A person is guilty of criminal sexual conduct with a minor in the first degree if . . . the actor engages in sexual battery with a victim who is less than eleven years of age . . . ."

S. C. Code Ann. § 16-3-655. Sexual battery is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ." S.C. Code Ann. § 16-3-651(h).

The battery element has been interpreted broadly to cover even the slightest sexual contact. For instance, in State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986), the South Carolina Supreme Court found the six year-old victim's testimony that the defendant touched her with his penis, but could not remember whether he put it inside her body, sufficient to survive directed verdict where she also testified it hurt. The Supreme Court found this was sufficient evidence of an intrusion to survive directed verdict. See also Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir. 1989) (opining "neither Mathis nor the statute [section 16-3-651(h)] requires that there be evidence of penetration or intrusion of the victim's body. There must merely be evidence of intrusion by one person into another person's body.").

In State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999), the Supreme Court similarly found evidence of an intrusion sufficient to survive directed verdict on the element of sexual battery as to the victim named Betty where Betty testified that Johnson touched Betty and it hurt, and the physical examination revealed an injury inside Betty's vagina. Id. at 85-86, 512 S.E.2d at 799.

In State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002), this Court considered the proper definition of "cunnilingus" as defined by section 16-3-651(h) and ultimately rejected a restrictive definition that would require penetration. This Court observed that the act of cunnilingus is a statutorily enumerated type of sexual battery. In

reaching that conclusion, this Court quoted a substantial portion of State v. Ludlum, 281 S.E.2d 159 (N.C. 1981). However, a particularly relevant passage quoted is the following:

> We are satisfied the Legislature did not intend that the vulva in its entirety or the clitoris specifically must be stimulated in order for cunnilingus to occur. To adopt this view would saddle the criminal law with hypertechnical distinctions and the prosecution with overly complex and in some cases impossible burdens of proof. We think, rather, that given the possible interpretations of the word as ordinarily used, the Legislature intended to adopt that usage which would avoid these difficulties.

Morgan, 352 S.C. at 371, 574 S.E.2d at 370-71 (quoting Ludlum at 162-63).

The Nebraska Supreme Court, in interpreting a provision similar to our own, found "where defendant has engaged the victim's mouth with the defendant's penis, the defendant has committed fellatio and thus been guilty of 'sexual penetration.'" State v. Gonzales, 366 N.W.2d 775, 777 (Neb. 1985).

The Minnesota Court of Appeals adopted a dictionary definition which defined fellatio as "oral stimulation of the penis" and determined oral stimulation would mean any stimulation by the mouth, tongue or lips. State v. Ptacek, 766 N.W.2d 355 (Minn. Ct. App. 2009).

In State v. Johnson, 413 S.E.2d 562 (N.C. Ct. App. 1992), two female children testified that the defendant inserted his penis into their mouth, but their lips never touched his penis. The court cited its state supreme court precedent defining fellatio as "contact between the mouth of one party and the sex organs of another." Id. at 563 (internal quotation marks and citation omitted). The court further explained: "The case law clearly holds that fellatio is any touching of the male sexual organ by the lips, tongue, or mouth of another person." Id. at

564. The North Carolina Court of Appeals found evidence to support conviction, opining "it is logical to infer that when the penis of an adult male is placed in the mouth of a five year old child, a touching of some part of that child's mouth, however slight, will occur." Id. The court concluded as follows:

> Finally, we note that it would be an absurdity under the facts of this case to overturn defendant's convictions for first degree sexual offense. All the evidence points to an unwarranted and unwelcomed invasion by the defendant's penis into the mouths of these little children. The jury found that such activity occurred.

Id.; see Beltz v. State, 980 P.2d 474, 476 (Alaska Ct. App. 1999) (rejecting dictionary definitions advanced by appellant suggesting requirement of sexual stimulation and approving a dictionary definition defining fellatio as "a sexual activity involving oral contact with the penis"); State v. McParlin, 422 A.2d 742, 743 n.2 (R.I. 1980) (noting definition of fellatio as "the offense committed with the male sexual organ and the mouth" cited in Black's Law Dictionary 743 (4th ed. Rev. 1968)); Travis v. State, 98 A.3d 281, 287 (Md. Ct. Spec. App. 2014) (finding "[f]or the appellant to place his penis inside the lips and in contact with the teeth of the victim qualifies as oral-genital contact within the contemplation of the term 'fellatio'").[2]

In the instant case, McBride contends there is no evidence of oral contact or stimulation with his penis. On cross-examination, Victim explained the following:

Q: So he grabbed your head like this?

[2] Nor should actual penetration of the mouth be required to constitute fellatio. See In re S.M., 666 A.2d 177, 181 (N.J. Super. 1995) ("We conclude that placing one's mouth on the penis of a male victim without inserting the victim's penis into the mouth falls within the legislature's proscription of prohibited acts. We conclude that the public is reasonably apprised of the legislative intent based upon concepts of common intelligence and ordinary human experience." (citation omitted)).

A: No, with his hand.

Q: With his hand? Where was the rest of his arm?

A: Still back here.

Q: Okay. So he comes over like this and then pulled – grabbed your head with his hand like this?

A: Yes, sir.

Q: And pushes down?

A: Yes, sir.

Q: Now does it go in your mouth?

A: Yes, sir.

Tr. p. 121, lines 1-13. Obviously, from context, McBride was referring to his penis when asking if "it" went into his mouth. His intention was verified when he tried to argue to Victim that this was inconsistent with her direct examination. However, Victim verified her answer as follows:

Q: Now while the solicitor was asking you earlier, isn't it correct that you stated that it never went in your mouth?

A: It went in my mouth. That's when the stuff came out of his manhood and went in my mouth.

Tr. p. 121, lines 19-24.

Additionally, cross-examination of Detective Hamlet confirmed that Victim reported oral penetration. Tr. p. 212, lines 11-15. Finally, the jury could logically infer that oral stimulation caused McBride to ejaculate absent evidence of another form of contact at that moment. Put in the light most favorable to the State, direct evidence supports the conviction,

and the trial court did not err in denying the motion for directed verdict.

VII.

McBride was not subject to custodial interrogation and therefore did not need to be advised of his rights, and further, McBride received the only relief he requested, so no issue remains for this Court to review. Additionally, McBride did not renew any objection to his statement before the jury and any error is harmless beyond a reasonable doubt. (Appellant's Issue IV).

McBride dedicates little more than a page of his brief to argue that his Miranda[3] rights were violated. The reason for his truncated analysis may lie in the fact that the issue is clearly unpreserved. McBride successfully convinced the trial court to strike a portion of the statement and did not object when the remainder was published to the jury. This Court should not review the issues. Further, the statement was not the result of custodial interrogation, so Miranda does not apply.

During the pre-trial hearing, Detective Hamlet testified she went to McBride's house after speaking with Victim. Tr. p. 28. She spoke with McBride after getting permission from McBride's mother. Tr. pp. 38-39. Detective Hamlet explained she did not read McBride Miranda rights because he was not under arrest and because "[w]e were just trying to sort out who, you know, what happened." Tr. pp. 38-39 (direct quote, tr. p. 39, lines 21-22). She testified that McBride's mother was present the whole time. Detective Hamlet testified McBride was not under arrest, not placed in handcuffs, and free to leave at any time. Tr. pp. 28-30. Detective Hamlet testified the conversation took place for roughly five to ten minutes. Tr. pp. 29-30.

Detective Hamlet testified she asked McBride if he knew why law enforcement was

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

there and McBride responded "that they were trying to say that he touched his cousin." Tr. p. 31, lines 3-9. Detective Hamlet next asked what happened and McBride gave his version of events. McBride admitted he let Victim inside the house and no one else was home. McBride told her they watched television. At some point, McBride went to the restroom. Victim came into the restroom while he was still using the restroom and he tried to conceal himself. He yelled at her to leave the bathroom. A short time thereafter she left to go home. Tr. pp. 31-32.

Following Detective Hamlet's in camera testimony, McBride specifically asked for only the initial statement – about the reason Detective Hamlet was interviewing McBride – to be suppressed. Tr. p. 43, lines 12-23. When given the opportunity to respond to McBride's argument, the solicitor asked for clarification that only the initial statement about why law enforcement was there was being challenged. McBride confirmed that was correct. Tr. p. 45, lines 11-17. **The trial court ruled in McBride's favor**, suppressing the answer to the initial question of whether McBride knew why law enforcement was there. Tr. p. 50, lines 8-21. When the remainder of McBride's statement to Detective Hamlet was published to the jury, **there was no objection.** Tr. pp. 182-83.

The issue raised now on appeal is not preserved for review. "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373 628 S.E.2d 902, 919 (Ct. App. 2006). "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).

In the instant case, the trial court struck only a portion of the statement, **per McBride's request**. Therefore, McBride received the relief he asked for, leaving no issue for this Court to review. State v. Parris, 387 S.C. 460, 465, 692 S.E.2d 207, 209 (Ct. App. 2010) (finding there is no issue for the appellate court to decide if a defendant receives the relief requested from the trial court).

Further, McBride waived further objection since he did not renew any remaining objection he might have when the statement was published to the jury. A ruling *in limine* is not a final ruling on the admissibility of evidence. State v. Griffin, 339 S.C. 74, 528 S.E.2d 668 (2000); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999). Generally, a motion *in limine* seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. See State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988). A pre-trial ruling on the admissibility of evidence is preliminary and subject to change based on developments at trial. Id. Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993).

McBride's argument fails on the merits as well. The warnings were not required as the statement was not the product of a custodial interrogation. Under Miranda v. Arizona, 384 U.S. 436, 444 (1966), prior to custodial interrogation, a suspect must be warned he has a right to remain silent, any of his statements may be used against him, and he has a right to an attorney. However, these requirements only apply to situations involving custodial interrogation. Id. at 477.

Custodial interrogations are made up of two key components: custody and interrogation. State v. Whitner, 380 S.C. 513, 518, 670 S.E.2d 655, 658 (Ct. App. 2008). "Miranda warnings are required for official interrogations only when a suspect 'has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" State v. Easler, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997) (quoting Miranda, 384 U.S. at 444). In the present case, McBride was not in custody and indicated willingness to engage in what was clearly non-confrontational questioning lasting a mere five to ten minutes. Accordingly, Miranda would not apply in the present case.

In support of admission of the statement, the solicitor cited United States v. Parker, 262 F.3d 41 (4th Cir. 2001). In Parker, in support of the finding that the statement was admissible, the Fourth Circuit noted that Parker was in her own home during questioning. The Fourth Circuit also noted that a relative was allowed to enter the interview room twice during questioning. Further, Parker was never told that she was not free to leave. Id. at 419. In the instant case, the fact that McBride was in his own home and his mother was present weighs heavily in favor of admissibility. Detective Hamlet testified she even asked McBride's mother for permission to question McBride, which she provided. Tr. p. 30, lines 4-11.

Under the totality of circumstances, McBride was not in custody, and therefore, Miranda would not apply. State v. Kerr, 330 S.C. 132, 146, 498 S.E.2d 212, 219 (Ct. App. 1998) (finding DUI suspect not in custody under totality of circumstances) (citation omitted); see also In re Drolshagen, 280 S.C. 84, 310 S.E.2d 927 (1984) (finding juvenile questioned by school officials in the principal's office while police officers were present was not in

custody for purposes of Miranda).

The reason, of course, McBride's counsel sought admission of the remainder of the statement, as opposed to suppression, was that the statement constituted about the best defense possible. Therefore, it is not surprising that trial counsel did not object to the portion of the statement published to the jury. Therefore, any conceivable error is harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). Exclusion of evidence is reversible only where error and prejudice are shown. State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990). The "materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Thompson, 352 S.C. 552, 575 S.E.2d 77, 83 (2003). In the instant case, the statement did not provide much of a defense, but it was the only defense or alternate explanation, so therefore it was not prejudicial – it was just not terribly helpful for McBride. Accordingly, the conviction and sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,

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February 2, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
John C. Hayes, III, Circuit Court Judge

Case No. 2013-002391

The State of South Carolina, ... Respondent,

v.

Justin McBride, ... Appellant.

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ARGUMENT

Appellant, Justin McBride, provides this reply brief to address issues raised by the Respondent and to clarify the arguments provided in Appellant's Initial Brief. To the extent Appellant believes the issues were thoroughly addressed in his Initial Brief, he does not repeat or rehash those issues here, but relies on the Initial Brief for his position on the same.

This appeal raises a number of serious issues that are at the core of the process due to those who face criminal charges in our judicial system. Appellant's Initial Brief addressed legal questions regarding the proper treatment of juveniles in our criminal justice system. This case also raises significant issues regarding the handling of evidence and the fact that the State was permitted to introduce a photograph of evidence that was lost by the State, that was not available to Appellant, and which evidence could have exculpated him. This case does not present a mere loss of evidence, or a mere inability of a defendant to access evidence that may have excluded him as the perpetrator. On the contrary, this case presents a situation where evidence was photographed, eventually received by but then badly handled by law enforcement, and then lost while in the care of an officer who previously lost evidence. Then at trial – despite the inability of Appellant ever to see or analyze the evidence – a photograph of that very same piece of evidence was admitted into evidence, with testimony making speculative

statements as to what appeared in the photograph. This testimony and the photograph were admitted despite the State's actions depriving Appellant access to the shirt depicted in the photograph. This situation is even more egregious when it is clear that the entirety of the State's case rested on the credibility of the accuser and that the missing evidence – based on that accuser's own statements – would either show that the accuser was or was not accurately relaying what happened.

I. THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION IN THIS MATTER INVOLVING A DEFENDANT WHO WAS SIXTEEN AT THE TIME OF THE ALLEGED CRIME OR, IF THE RELEVANT STATUTES PERMITTED THE EXERCISE OF SUCH JURISDICTION WITHOUT A CASE-SPECIFIC ANALYSIS, THOSE STATUTES FAIL TO ENSURE APPROPRIATE CONSTITUTIONAL PROTECTIONS FOR DEFENDANT MCBRIDE.

It is undisputed that McBride was only sixteen (16) years old at the time of the alleged crime. As explained in Appellant's Initial Brief, this matter should have been initiated in the Family Courts of this State. In any event, if the Circuit Court was going to retain jurisdiction, the circuit judge electing to exercise jurisdiction over a trial like this one is required to "issue an order to that effect." S.C. Code § 63-19-1210(6). The Circuit Court Judge entered no such order.

The failure of the Court to consider whether a trial in the Circuit Court was appropriate for this minor defendant, deprived McBride of the protections our statutory scheme provides to him as a minor facing these serious charges. The statutes addressing the treatment of children should be read together to provide some required analysis that trial as an adult is

appropriate. Some procedure is required before the circuit court can exercise jurisdiction over a child who would otherwise be governed by the children's code, juvenile justice and the specialized family courts.

II. ASSUMING THE CIRCUIT COURT HAD JURISDICTION, THE CIRCUIT COURT'S EVIDENTIARY RULINGS AND CONFUSING AND ERRONEOUS JURY INSTRUCTIONS VIOLATED MCBRIDE'S DUE PROCESS RIGHTS.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that the State shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV; see also S.C. Const. Art. I § 3. As part of that guaranteed Due Process, the Confrontation Clause provides that a defendant in criminal cases "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; S.C. Const. Art. I § 14. Inherent in the process due such a defendant, the State cannot be permitted both to rely on selective, surprise photographs of missing evidence, while depriving the defendant access to that evidence. And, inherent in the Confrontation Clause's protections is the right to relevant and thorough cross-examination of witnesses.

In this case, the Circuit Court erred in a number of evidentiary rulings and decisions, resulting in insufficient procedural safeguards and violations of due process. Those errors are addressed in Appellant's Initial Brief and are further discussed, as necessary, here.

A. Where Law Enforcement Lost Key and Potentially Exculpatory Evidence Without Explanation and Contrary to Admitted Investigatory Norms, Due Process Was Violated, or At a Minimum, Required That a Spoliation Charge Be Given to the Jury.

In a case such as this one – a case that turns on the credibility of the accuser -- the failure of law enforcement even to collect the shirt the victim was wearing when they arrived on the scene created an impossible situation for Appellant. (R. Vol. II pp. 189-191.) The alleged victim's statement made it clear that if the events happened as she claimed, semen would be found on the shirt she was wearing. Critical to the defense of any offense such as this one – which pits one person's statement over another's – is any evidence that could bolster or disprove one of those statements. If the shirt was available for Appellant and no semen was present on the shirt, the likelihood that a jury would have taken the word of the alleged victim is incredibly low. This conclusion is particularly clear when considering the standard of proof by which an accused guilt must be determined.

Admittedly, the standards governing lost evidence create some frustration for Appellant where Appellant may be required to show either that the State acted in bad faith or that the lost evidence had exculpatory value. State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001). This standard, however, was developed as one means of determining whether the State failed to fulfill its constitutional duty to preserve evidence.[1] "[T]hat duty is limited to evidence that might be expected to play a significant role in the suspect's defense." California v. Trombetta, 467 U.S. 479 (1984). This materiality standard is met where the evidence possesses "an

[1] Though addressing post-conviction relief proceedings, the statutory scheme of this State fully recognizes the importance of preserving physical evidence in cases where it may serve to prove one's innocence. See, e.g., S.C. Code §§ 17-28-30, 17-28-70, 17-28-300 *et seq.*

exculpatory value that was apparent before the evidence was destroyed," and where the evidence is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Id. (citations omitted). In South Carolina, if either of these tests is met, the defendant should have had access to the now lost evidence in order to comport with due process and to provide a level of fundamental fairness required in criminal trials. See, e.g., Cheeseboro, 346 S.C. at 538-39, 552 S.E.2d at 307.

The key distinction between earlier cases discussing lost evidence and the situation that unfolded during the trial of Appellant is this: the State did not merely lose the evidence such that neither side had access, the State photographed the evidence, admitted that photograph into evidence, was permitted to introduce testimony as to what substance appeared on the shirt in the photograph (deodorant) all in an attempt to bolster the accuser's credibility while Appellant remained unable to provide any defense to that testimony or to effectively cross-examine the witness as to what did and did not exist on the shirt.

The State, in its Initial Brief, relies in part on Arizona v. Youngblood, 488 U.S. 51 (1988). Though that case does discuss the general standard for addressing lost evidence, key factual distinctions exist. First, the trial court in Youngblood actually gave a spoliation instruction to the jury, providing some guidance to them for their consideration of the government's failure to preserve the evidence. This spoliation charge permitted the jury in that case

to consider the circumstances of the lost evidence under the proper legal standard. Youngblood, 488 U.S. at 60-61 (Stevens, J., concurring) (wherein Justice Stevens makes it clear he is concurring in the Court's decision in large part due to the spoliation instruction and the jury's ability to consider this issue). Here, the jury was not given that option as the request for a spoliation charge was denied.

At its most basic level, due process includes the right to defend one's self and to confront one's accuser. Fundamental fairness requires that a defendant "be afforded a meaningful opportunity to present a complete defense." Trombetta, 467 U.S. at 485. The State simply cannot be permitted to refer to and rely on photographs of physical evidence without ever giving the defense that actual physical evidence. The lack of access to this evidence not only prevented Appellant from having it analyzed for the presence of any substances – deodorant, semen or otherwise – but also limited his ability to cross-examine his accuser on her accusations.

The facts of this case are akin to a murder trial where the knife allegedly used to commit the murder is photographed and then lost. The defendant is denied access to the knife. The prosecutor then introduces a photograph of the knife (a photo not seen by defense counsel until trial) and presents testimony that a dark substance on the knife is blood. Not having had access to the knife, the defendant has little or no opportunity to cross-examine the witness on the purported substance on the knife or to present evidence in his defense that the substance is not blood or is not either his or

the victim's blood. It is difficult to conceive how one can defend himself under such circumstances. But even this troubling hypothetical lacks the added problems of a no corroboration jury instruction in the absence of an instruction on spoliation.

With absolutely no explanation, the shirt evidence in this case went missing. (R. Vol. II pp. 260-263.) Also without explanation – and, indeed, with the Court's sustaining an objection to defense counsel's questions about this issue – the solitary officer in charge of evidence at the time was no longer employed by the Kingstree Police Department. (R. Vol. II pp. 260-263.) And, that same officer, who was the evidence custodian, admittedly lost evidence before. (Respondent's Brief at 9.) The jury, at a minimum, should have been instructed on and been permitted to consider whether this history of evidence handling and the handling of the evidence in this case rose to the level that an inference should've been drawn against the State given the total and unexplained disappearance of the accuser's shirt.

It is true, as the State claims, that spoliation charges should be limited to "the most unusual of circumstances." (Respondent's Brief at 16 (citing State v. Batson, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (1973)). This case presents this most unusual of cases: police did not collect key evidence but instead relied on the accuser's family to maintain it, bring it to a forensic interview, then the same family transported it to the police, who then failed to send it for testing and lost it, all while the prosecutor relied on a photograph of just part of the shirt. This is certainly a most unusual of circumstances. The

Supreme Court also understands, in serious circumstances like this, that spoliation charges may be the only avenue to address lost evidence to ensure a fair trial for the defendant. See Youngblood, 488 U.S. at 60-61 (Stevens, J., concurring).

This is also not the typical lost evidence case. The value of the shirt to this case was obvious. The Solicitor relied on a photograph of the shirt to claim that deodorant appeared to be present on one shoulder. No photographs show the presence of any other substance on the shirt and the photograph did not encompass the entire shirt such that Appellant himself could have relied on it; nor was there any way for Appellant to cross-examine witnesses on what substance actually appeared (or didn't appear) on the shirt.

Moreover, the Court's refusal to allow defense counsel to question law enforcement as to the reason for the evidence officer's separation from employment to determine if his handling of evidence played a role, (R.Vol. II pp. 264-265), denied McBride even the ability to attempt to show bad faith in the handling of this evidence. This line of questioning, contrary to the Solicitor's sustained objection, was clearly relevant to the circumstances surrounding the disappearance of key evidence.

It is the combination of the loss of the evidence, the permitted introduction of speculation that a photograph of that same lost evidence showed Appellant's deodorant, and the failure of the trial court to give a spoliation instruction that together violated the guaranteed fundamental

process the Due Process Clauses of the federal and state constitutions require.

Based on the totality of these circumstances, McBride is entitled to have his conviction vacated and this charge dismissed. In the alternative, McBride is entitled to a new trial during which he can be permitted a proper opportunity to mount a defense through full cross-examination (as required by the Sixth Amendment to the U.S. Constitution, U.S. Const. amend. VI) of the State's witnesses and with an appropriate jury instruction as to the jury's ability to consider this missing evidence[2] or, at a minimum, complete exclusion of any reference to the shirt or anything that may or may not have been present on it.

B. Due Process and Rule 5 Required Exclusion of the Photograph of the Victim Where The "Photograph" Was Provided to Defense Counsel as a Black Sheet of Copy Paper, Not as the Color Photograph Introduced Into Evidence, and Where the Actual Color Photograph Was Not Even in the Solicitor's File to be Reviewed by Defense Counsel Prior to Trial.

In addition to completely losing the shirt itself, the State also came to trial with a color photograph purportedly of the alleged victim wearing the missing shirt. (R. Vol I p. 150-152.) That photo, according to the contentions of the witnesses and the Solicitor, showed deodorant stains (presumably from

[2] Further review of the jury instructions in their totality, in the light of the lost evidence, demonstrates that the combination of the refusal to instruct on spoliation while providing instructions on the fact that an accuser's statement does not require corroboration, an issue discussed further in Appellant's Initial Brief, gave the benefit of the doubt to the State and the accuser. This situation is counter to the fundamental fairness required by the Due Process Clause and afforded to all criminal defendants.

McBride) on the shoulder.[3] Defense counsel did not see this photograph until the first day of trial. (R. Vol. I pp. 150-151.) Indeed, the Solicitor stated that she "got the color photographs this morning." (R. Vol. I p. 151, lines 11-19.) Not only did permitting use of this photo violate McBride's due process rights, the failure to produce it until trial violated South Carolina Rules of Criminal Procedure 5(a) and 5(c). SCRCrimP 5.

The Circuit Court admitted that things like the previously undisclosed photograph "bother judges immensely." (R. Vol. I p. 163, lines 2-5.) The judge elaborated as follows: "I want to make the record to clear that these irritate me to no end where law enforcement pops up with stuff at the last minute." (R. Vol. I p. 163, line 25 to p. 164, line 2.) Nonetheless, the judge allowed the photo. (R. Vol. I p. 163.)

The State used this surprise evidence, a photograph of evidence the State previously lost, selectively to bolster the alleged victim's testimony.[4] This use was improper and violated McBride's fundamental Due Process rights.

III. THE EVIDENCE PRESENTED BY THE STATE WAS LEGALLY INSUFFICIENT TO PROVE THE REQUIRED ELEMENTS OF THE CRIME CHARGED UNDER S.C. CODE § 16-3-655(A)(1).

The jury convicted McBride of first degree criminal sexual conduct with a minor in violation of S.C. Code § 16-3-655(A)(1). "Sexual battery" in this case required evidence of "fellatio," S.C. Code § 16-3-651(h), or "oral

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[3] The photos did not show, nor did anyone claim they showed, any evidence of semen on the shirt.

[4] Had law enforcement kept and tested the shirt for all substances, as was normal procedure, no photo would have been necessary.

stimulation of the penis." Merriam-Webster online dictionary (http://www.merriam-webster.com/medical/fellatio). The alleged victim's own recitation of events involved insufficient evidence of oral stimulation of Appellant's penis. (R. Vol. I pp. 88-89; see also R. Vol. I pp. 113-114.)

Defense counsel moved for, and should have been granted, directed verdict on this issue.

IV. DEFENDANT'S MIRANDA RIGHTS WERE VIOLATED REQUIRING EXCLUSION OF ALL EVIDENCE OF STATEMENTS MADE BY MCBRIDE TO LAW ENFORCEMENT.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself . . ." U.S. Const. amend. V. A very brief Jackson v. Denno, 378 U.S. 368 (1964) hearing was held before the Circuit Court. (R. Vol. I pp. 18-45.) The Circuit Court excluded a portion, but not the entirety of McBride's statement. This ruling is legally perplexing. The statement was either given freely and voluntarily or it was not.

As the Circuit Court explained, "I just don't believe that someone should be put in a situation where their option is freedom to leave when they are in a place they have an absolute right to be; that being their own habitation." (R. Vol. I p. 45, lines 14-17.)

McBride, a minor at the time, had only one option -- to leave his home and go somewhere else. A sixteen year old, with no prior criminal history, cannot reasonably have been expected to know he could refuse to speak to

the officers. Just as the Circuit Court excluded a portion of the statement, the entire statement should have been excluded, as well as any reference to it.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Appellant's Initial Brief, Appellant Justin McBride respectfully requests this Honorable Court reverse his conviction and order either dismissal of the charge on which he was convicted or a new trial.

Respectfully Submitted,

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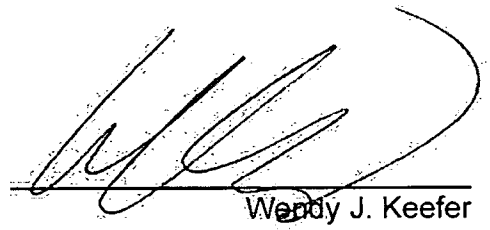

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
John C. Hayes, III, Circuit Court Judge

Case No. 2013-002391

The State of South Carolina, ... Respondent,

v.

Justin McBride, ... Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief and Final Reply Brief on Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on 6-25-15, 2015, addressed to attorneys of record, David Spencer and Alan McCrory Wilson at the S.C. Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211 and Ernest Adolphus Finney, III at 215 N. Harvin Street, Sumter, South Carolina 29150:

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