

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEITH DENVER TATE,

APPELLANT

APPELLATE CASE NO. 2014-001694

FINAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial judge's failure to declare a mistrial based upon the alleged victim's multiple emotional outbursts that disrupted the trial and improperly influenced the jury to decide the case on emotion instead of the evidence presented violate Appellant's state and federal constitutional rights to a fair and impartial jury trial?

- II. Did the trial judge's failure to require the state to open in full during closing argument and reply only to the defense's closing argument violate Appellant's state and federal constitutional rights to a fair trial and due process of law?

- III. Did the trial judge's refusal to permit Appellant to elicit testimony concerning the content of three illicit photographs found on the alleged victim's phone where the content was necessary for the jury to understand the alleged victim's motive to fabricate the allegations against Appellant violate Appellant's state and federal constitutional rights to present a defense and confront his accuser?

STATEMENT OF THE CASE

On February 4, 2011, an Abbeville County Grand Jury indicted Appellant for nine counts of criminal sexual conduct with a minor in the second degree. R. 2, lines 15-20; R. 376 - 377. The state, represented by C. Yates Brown and Lance Sheek, called the case for trial before the Honorable Donald B. Hocker and a jury on May 27, 2014. Janna Nelson and Shane Goranson represented Appellant. R. 1. After a three-day trial, the jury acquitted Appellant of eight of the charges. However, the jury found Appellant guilty as to one (2011-GS-01-0046). R. 349, line 1 – R. 350, line 7. Thereafter, Judge Hocker sentenced Appellant to sixteen years' imprisonment. R. 351, lines 20-22; R. 392.

After the trial, Appellant filed a timely motion for new trial. R. 368 – R. 372. A hearing on the motion commenced on July 15, 2014 before Judge Hocker. R. 352. Judge Hocker denied the motion by a written order. R. 373. Appellant then filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

Appellant and Minor's mother were involved in a romantic relationship and had a child in common. In 2009 and 2010, Appellant and Minor's mother lived in a three bedroom apartment in Calhoun Falls. Minor and her two brothers, one of whom was Appellant's son, lived in the apartment as well. R. 12, line 1 – R. 14, line 16; R. 69, line 17 – R. 70, line 2. The apartment had three bedrooms, one bathroom, a living room, and a kitchen. R. 22, lines 7-17; R. 253, lines 5-9. There were two doors going in and out of the apartment – one in the front and one in the kitchen. The front door led to the living room. Both doors were visible from the kitchen and living room. R. 22, line 18 – R. 23, line 8. The apartment was not carpeted, but had a tile floor. The walls were cinderblock. R. 34, lines 7-15; R. 253, line 9; R. 253, line 19.

On March 23, 2010, twelve-year old Minor began dating fifteen-year old Terrance C. Minor's mother did not approve of the relationship and would not let her talk to him and would not let Minor visit Terrance in his home. R. 34, lines 16-24; R. 48, line 15 – R. 49, line 17; R. 69, lines 8-11; R. 105, lines 7-17; R. 161, lines 18-24. On August 14 and 15, Minor received three photographs of Terrance on her phone. The photographs showed Terrance completely nude and with an erect penis. Shortly thereafter, Appellant and Minor's mother discovered the photographs on her phone. Unsurprisingly, they were very concerned and punished Minor. Additionally, they informed Terrance's parents of the photographs. R. 36, lines 9-13; R. 37, line 11 – R. 41, line 13; R. 42, line 11 – R. 45, line 24; R. 162, line 10 – R. 163, line 7; R. 248, line 11 – R. 249, line 18; R. 368 – R. 372.

Less than ten days later, on August 23, 2010, Minor told her band director, Rebecca Holland, that Appellant had sexually assaulted her ten times. R. 107, lines 15-23; R. 163,

lines 13-17; R. 168, lines 13-24; R. 169, lines 5-11; R. 169, lines 19-23. “[B]ecause it was so late in the afternoon, there were no people at the school” for Holland to make a report; therefore, she decided she would address the matter the following day at school. R. 169, line 25 – R. 170, line 5; R. 172, lines 17-20. Holland took Minor to her home, where Appellant lived.¹ R. 172, lines 10-13. Holland took Minor home from school every day because she lived nearby. Holland claimed that Minor would cry on the way to her house, but Holland never inquired as to why. Minor would ask not to go home. Holland also claimed that she would see Appellant waiting for Minor and he would grab Minor by the arm when she arrived home. R. 170, line 23 – R. 171, line 20; R. 172, lines 14-16. Subsequently on August 25, 2010, Holland informed Lori Lindler, the school’s guidance counselor and the assistant principal, about the allegations. R. 107, line 24 – R. 108, line 7; R. 171, lines 21-23; R. 183, lines 6-16. Lindler contacted the police. R. 108, lines 8-10; R. 185, lines 23-24.

Lindler sat down at school with Minor to review the details of her allegations. During their meeting, the two used a school calendar to arrive at ten dates when Appellant allegedly assaulted Minor, including August 26, 2009, October 31, 2009, December 14, 2009, December 26, 2010, February 6, 2010, February 13, 2010, March 3, 2010, March 14, 2010, March 15, 2010, and March 18, 2010.² R. 78, line 18 – R. 79, line 10; R. 79, line 18 – R. 80, line 16; R. 101, lines 21-25; R. 164, line 16 – R. 165, line 3; R. 184, lines 7 – R. 185,

¹ The testimony on this point was conflicting. Minor said she talked to Holland at school and talked to Lindler the same day. R. 108, lines 11-17. However, Holland and Lindler indicated otherwise.

² Minor told the nurse that she could remember the dates because she wrote about it in her diary. However, her diary did not contain entries for each of the encounters and did not contain details about the abuse. Instead, the diary contained poetry about her feelings. R. 124, lines 2-10.

line 1.³ Although Minor told Lindler about sexual abuse, she never claimed any type of physical abuse was occurring. R. 187, lines 8-17. The day after Minor talked to the school officials and police officers, her mother took her to the hospital. R. 110, lines 21-24. Minor also met with a lady at Child's Place on September 28, 2010. R. 111, lines 6-13; R. 259, lines 21-25. Months later, in November 2010, Minor was examined by Dr. Lyle Pritchard. R. 112, lines 7-18; R. 227, lines 3-11.

Initially, Minor claimed that on each of those occasions, Appellant penetrated her vagina. R. 79, lines 14-17. However, later, Minor claimed penetration of her vagina with his penis during every encounter except the last one. On that date, he put his penis in her mouth. R. 88, lines 10-18. She also changed her story to say that she recalled him putting his penis in her "butt hole." R. 88, lines 19-21. Minor testified that she bled the first time Appellant penetrated her vagina and when he penetrated her butt hole. R. 88, line 24 – R. 89, line 2.

Concerning the first alleged assault, Minor claimed this occurred at home while her mother and brothers were there. Minor claimed Appellant assaulted her in the living room on the couch. During her testimony, Minor claimed Appellant asked to see the sizes of her bra and panties. Then, he started kissing her and rubbing her. Appellant then removed her clothes and penetrated her vagina with his penis. R. 82, lines 17-24; R. 83, lines 4-6; R. 83, line 10 – R. 84, line 11; R. 87, lines 1-8. Minor previously said that during the first alleged

³ Despite the dates testified to at trial, the warrants and incident report differed to some degree. For example, the first incident was alleged to have occurred on August 29, 2009, not August 26, 2009 and another incident allegedly occurred on February 14, 2010, not February 13, 2010. R. 206, lines 9-14; R. 209, lines 15-21. Initially, Minor said that all ten incidents occurred in Calhoun Falls. However, immediately before trial, she changed her story to say the incident on December 26, 2009 occurred in Greenville County. R. 106, lines 1-14; R. 207, lines 2-12.

encounter, Appellant threw her on the couch and hit her in the face with his fist. R. 139, lines 20-25; R. 275, line 4 – R. 276, line 7. She also claimed that she screamed during this attack. Tr. 203, lines 8-10. She claimed there was blood everywhere. R. 140, lines 11-12.

Regarding the second alleged assault, Minor testified there was a football game on October 30, 2009. R. 126, lines 22-24; R. 128, lines 4-8.⁴ Minor did not recall saying that Appellant “stuck it up [her] butt” that time, but she remembered that she screamed and Appellant hit her busting her lip. R. 128, lines 9-14. Previously, Minor had stated Appellant “stuck it up her butt.” R. 276, lines 19-21. The next morning, Minor woke up on the couch in the living room to an empty house. Her shorts were up, but her underwear were down. Her shirt was on a lamp. R. 131, lines 1-21; R. 277, lines 16-24; R. 279, lines 14 – R. 280, line 3. She admitted that anyone who left the apartment would have had to walk right by her in her disheveled state. R. 132, lines 23-25. Although the following morning would have been a Saturday based on the date, Minor told the interviewer that she had missed her ride to school that day and her mother had to give her ride. She also told the interviewer that her brothers were gone because their bus arrived at 7:00 a.m. R. 278, lines 1-8.

Regarding the last incident, Minor claimed that Appellant put her on the couch, took out his penis and placed it in her mouth. She bit his penis and he started screaming. She

⁴ Minor claimed the football game on October 30, 2009 was a home game. However, a school calendar showed the game was away in Twiggs County, Georgia. R. 134, line 9 – R. 135, line 1. Then, Minor changed her story to say it may have been after a Junior Varsity football game. R. 135, lines 11-16.

then ran to her room and placed her dresser in front of the door. R. 145, line 22 – R. 146, line 16.⁵

Minor's mother never saw or heard anything that made her suspect any kind of sexual abuse. R. 20, lines 18-21. Minor's mother never heard any screaming in the house. R. 21, lines 22-24

Supposedly, Minor told Terrance that Appellant had sexually assaulted her months before he told his mother about the alleged abuse on August 26, 2010. Terrance's mother told the school counselor, Lindler. R. 53, lines 9-25; R. 58, line 18 – R. 59, line 4; R. 73, line 23 – R. 74, line 1; R. 78, lines 5-19; R. 106, lines 17-23; R. 183, lines 17-21. According to Terrance, Minor claimed that during the first assault "he went through her anal and she screamed," then he stopped and "went through the front." Minor told Terrance that her brother walked in during the assault. When Minor told her brother to get her mother, Appellant told him no, whipped the brother, and slapped Minor. Thereafter, Minor "passed out and woke up in a tub full of bloody water." R. 54, line 4 – R. 55, line 16.⁶ Minor told Terrance that during the most recent assault, Appellant "walked in her room one night and snatched his pants down and hers." R. 56, line 13 – R. 57, line 2. One night while Appellant was assaulting Minor, Terrance sent a text message to Minor's phone. The phone was in the bedroom with Minor's mother and the text message indication woke Minor's

⁵ According to the Executive Director of the South Carolina Housing Authority, the apartment where Minor lived had bedroom doors with locks. R. 253, lines 13-17. This was according to HUD regulations. R. 254, line 25 – R. 255, line 3. The apartments were inspected annually to ensure all remained in line with the regulations. R. 255, lines 20-24.

⁶ Minor denied that her brother ever walked in on one of the alleged sexual assaults. R. 152, lines 15-19. However, Minor agreed that she passed out and woke up in a tub full of bloody water. R. 152, lines 20-22; R. 153, lines 12-20. Minor told Holland that she woke up in bloody water ten times – after each incident. R. 175, lines 10-18.

mother. When this happened, Appellant stopped the alleged assault. R. 57, lines 3-13.⁷ Minor told Terrance that “one night when she was asleep [Appellant] put his private part in her mouth and she bit it.” Appellant “got mad and grounded her.” Minor claimed that Appellant would not stop the abuse even if she were bleeding. She further claimed “that blood was on the sheets, and it was coming out quick, but he wouldn’t stop.” R. 57, line 17 – R. 58, line 3.

⁷ Minor denied this occurred. R. 160, lines 17-24; R. 161, lines 8-11.

ARGUMENT

I. Violating Appellant's state and federal constitutional rights to a fair and impartial trial, the judge erred in failing to declare a mistrial based upon the alleged victim's multiple emotional outbursts that disrupted the trial and improperly influenced the jury to decide the case on emotion instead of the evidence presented.

Relevant facts

During defense counsel's opening statement to the jury, Minor became visibly and audibly upset. The outburst was so extreme that defense counsel stopped her remarks to the jury: "Your Honor, it looks like - - it looks like [Minor] is upset and I don't want that to distract the jury." R. 9, lines 21-24. Thereafter, the judge called the lawyers to the bench, but provided no instruction to the jury. The opening statement continued, followed immediately by the calling of the state's first witness. R. 9, lines 23-25. When the jury was out of the courtroom during a recess, the judge placed on the record that Minor was emotional during defense counsel's argument. Surprisingly, the judge indicated "the court has no problem with that." However, the judge noted that "if that's still a recurring problem then I think we ought to agree that she needs not to be in the courtroom because of the potential nature it has to be disruptive." R. 28, lines 9-21. Again, no instruction was provided to the jury concerning Minor's emotional outburst.

During the state's direct examination of Minor, the state asked if Minor needed to take a short break, and she responded that she did. The judge agreed to take a break. R. 84, lines 12-22. Thereafter, the state inquired of the judge regarding how to "handle this." According to the state, it was very difficult for everybody and he did not "want to sit her up there while she's crying in front of the jury." R. 84, line 23 – R. 85, line 3. The judge

responded that it was evident that Minor was having difficulty testifying, but stated she “was going to have to do the best job that she can.” He further stated that she was “going to have to, you know, try to - - you know, try not to be emotional.” R. 85, lines 4-10.

The judge then addressed Minor directly: “I know this is difficult for you to testify. I understand that. But it’s really important that you do the very best that you can and there is a lot to cover in questions that will be asked of you. So you just need to do the very best that you can so we can get through your testimony.” R. 86, lines 18-24. When the jury returned, Minor’s direct examination continued with no instruction for the jury concerning how to consider, if at all, Minor’s emotional outbursts.

Well into the cross-examination, Minor stated she did not “want to keep talking about it.” R. 155, line 3. When asked if she could continue, Minor requested a break. R. 155, lines 4-7. The judge excused the jury and permitted Minor to have a break. R. 155, lines 8-21. With the jury excused, the judge remarked that he realized Minor was emotional, but he noted “it’s being disruptive.” He instructed the prosecutors to “go out there and talk to her.” R. 155, lines 22-25. Preempting defense counsel’s motion for a mistrial based upon Minor’s outbursts, the judge noted that while he was “not being unsympathetic,” he had “to maintain decorum in this courtroom.” He could not “tolerate the witness storming out of the courtroom in the manner in which she did.” Concerning the jurors, the judge’s explanation was confusing and contradictory: “I think probably the vast majority, if not all of the jurors, were back in the courtroom, or most of them at least were back in there when that took place.” He continued that he hoped the solicitors had explained to Minor that he could not “allow that sort of conduct.” R. 156, lines 7-21.

Defense counsel then moved for a mistrial “because of the pretty extreme display of emotion that was going on while [Minor] was sobbing as the jury left the jury box and while the door back there behind the jury box was still open she started yelling out for her mother.” Defense counsel could not “imagine that even if the jury was right down the hall in their room that they would not have heard that demonstration.” Minor’s repeated and extreme emotional outbursts could be construed only as prejudicial and attempting to influence the outcome of the case based on emotion, not evidence. R. 156, line 25 – R. 157, line 12. Defense counsel further noted that Minor’s emotional conduct began during the opening statements. R. 158, lines 13-25.

In denying the mistrial motion, the trial judge noted “we’ve had a lot of emotion displayed by this witness throughout her testimony, a lot of crying, I think she’s gone through a good many Kleenexes. We have had to take a break or two.” Nevertheless, the judge determined Minor’s repeated and extreme emotional outbursts were “not the amount and type of prejudice that would justify a pretty severe remedy of declaring a mistrial.” R. 158, lines 3-12.⁸

During closing argument, defense counsel tried to anticipate the state’s closing argument specifically regarding Minor’s emotional state during her testimony. Defense

⁸ Appellant renewed the motion for a mistrial in the written motion for new trial. R. 368 – R. 372. Appellant argued he was entitled to a new trial based on the trial judge’s failure to grant a mistrial based on Minor’s “several extreme emotional reactions throughout the course of the trial.” Appellant explained Minor “cried several times while testifying, and broke down sobbing during cross-examination.” Further, Appellant noted that when the jury was exiting the courtroom, Minor “ran from the courtroom yelling for her mother.” Appellant argued Minor’s emotional reactions prejudiced the jury. Further, Appellant argued the judge failed to give the jury a curative instruction to disregard the emotional display and decide the case only on the facts presented. R. 368 – R. 372.

counsel “thought that maybe one of the things that might be said is that [Minor] has been revictimized or retraumatized by having to come in here and tell you what happened.” Defense counsel informed the jury it was not her intent to do that. She further explained that a defendant has the right to confront his accusers pursuant to the Constitution, which is what defense counsel was doing. R. 307, line 16 – R. 308, line 6. Concerning the emotional outbursts, defense counsel reminded the jury “[t]he first time you see [Minor]’s emotional reaction is when I was giving you my opening statement and telling you how I was going to be talking about these different versions of her story. And when she knew that was going to happen she got upset. And when it happened on the stand she got upset.” The jury could interpret the outbursts, and their timing, “one of two ways.” Either Minor “was crying because what happened to her was so horrible and she doesn’t like having to go through it again or she’s crying because somebody is pointing out the problems with the things she’s saying and the reason you shouldn’t believe it, and that – and that is difficult for her.” R. 308, lines 16-23.

The prosecutor’s closing argument immediately responded to the argument regarding why the case was being tried: “I’ll never make an apology for that because I’m not ashamed to be doing what I’m doing here today. ... I will prosecute these cases.” R. 315, lines 14-19. He then said the defense had a different ethical obligation than he because he represented the people, while defense counsel represented the defendant. R. 316, lines 3-12. After apologizing for getting “a little bit wound up,” the prosecutor explained, “This is what I do. I prosecute crimes where children are victims and I believe it whole heartedly.” R. 316, lines 12-15. He further preached, “As long as I have breath in my body I will stand

up for the victims of these types of crimes and I will never be ashamed of it.” R. 316, lines 23-25.

When describing how the jury could judge Minor’s credibility, the solicitor asked the jury to remember Minor’s “raw emotion.” Specifically, he focused on when she told defense counsel she did not “want to think about it.” He continued:

You’re making me go back and back through and I don’t want to think about it. I don’t want to relieve it. Don’t you understand that. That’s what that child said to this lady. Now, I understand as a grown attorney, having done this over and over again, maybe it’s not a big deal. To that child, it was a very, very big deal.

R. 321, lines 6-17. Circling back to Minor’s emotional testimony, the prosecutor asked the jury not to get “sidetracked by what a lawyer tells you. You look at what those witnesses said and you decide if you’re convinced that this man did penetrate that child. Was that a emotion you watched real. Because if she’s made all this up and she’s put on that kind of act, she deserves an Academy Award, because that was compelling.” R. 324, lines 18-25.

Discussion

“The right to a fair trial by an impartial jury in a criminal prosecution is guaranteed by the Sixth Amendment to the U.S. Constitution and by Article I, § 14, of the S.C. Constitution.” State v. Stewart, 278 S.C. 296, 303, 295 S.E.2d 627, 630-631 (1982). “[T]he very heart of a ‘fair trial’ embodies a disciplined courtroom wherein an accused’s fate is determined solely through the exercise of calm and informed judgment.” Id. at 303, 295 S.E.2d at 631.

Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495,

500 (Ct. App. 2013)(citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010). While a mistrial should be granted only when “absolutely necessary” and when a defendant can show error and resulting prejudice, a mistrial must be ordered when the incident “is so grievous that the prejudicial effect can be removed in no other way.” Id. Another way of describing when a mistrial must be granted is when there is “manifest necessity.” State v. Bilton, 156 S.C. 324, 153 S.E. 269 (1930). “The less than lucid test is ... whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public’s interest in a fair trial designated to end in just judgment.” State v. Prince, 279 S.C. 30, 32-33, 301 S.E.2d 471, 472 (1983).

The South Carolina Supreme Court held a mistrial was in order where “spectators filled the courtroom seats to capacity and even stood against the walls,” there were several outbursts of laughter from the spectators requiring an admonition from the judge, a juror reported that one spectator glared at her with “obvious disgust,” and the jurors overheard a spectator making opinionated remarks. Stewart, 278 S.C. at 301-302, 295 S.E.2d at 629-630. The Court held it was error for the trial judge to deny the motion for a mistrial “without having first explored the improper conduct of the spectator and without having first determined whether or not there was prejudice.” Id. at 302, 295 S.E.2d at 630. Further, the Court held the judge’s reliance on his instructions to the jury to disregard improper spectator conduct was insufficient to assure Stewart received a fair trial. Id. at 304, 295 S.E.2d at 631.

In another case involving disorder in the court, the Court held a defendant was entitled to a new trial where there was “no doubt that the action on part of the audience and crowd in the courtroom during part of the trial was so irregular and improper and was allowed to go unchecked by the officials that the defendant did not get what he was entitled

to, a fair, impartial, and legal, trial.” State v. Gens, 107 S.C. 448, 93 S.E. 139, 140 (1917).

In this transporting liquor case, several ladies held large posters condemning liquor traffic before the jury during part of the trial. The ladies sat directly in front of the jury and to the left of the judge. Id. at 448, 93 S.E. 139. The Court held:

The action of the women was highly improper, in that it was an attempt to impede justice, however innocent on their part, and deny to the defendant a fair and impartial trial, guaranteed to him by the law of the land, an attempt to influence a sworn jury to arrive at a verdict improperly, and to be influenced by outside influence, trying the case by manufactured outside public opinion, and not by the facts of the case as developed in evidence and the law of the trial judge.

Id. Despite the jurors indicating they were not influenced in any manner by the posters, the Court held the trial judge should have set aside the verdict. Id.

On the other hand, in State v. Hughes, 336 S.C. 585, 596-597, 521 S.E.2d 500, 506 (1999), the Court found a trial judge did not abuse his discretion in denying a motion for a mistrial where the deceased’s mother “loudly exited the courtroom” followed by her sister during the cross-examination of a medical expert. The trial judge noted that the mother’s conduct “could be interpreted as a ‘negative comment’ on the defense evidence,” the disruption was short and “the jury already knew how she felt since she had testified as a victim impact witness” in the capital sentencing proceedings. Id. The Court found the jury “likely understood her outburst as an expression of [her] grief,” about which she had already testified. Id.

Similarly, in State v. Jones, 325 S.C. 310, 316, 479 S.E.2d 517, 520 (Ct. App. 1996), this Court held that the displays of emotion – audible crying by spectators – in the courtroom during the alleged victim’s testimony did not require a mistrial. When defense counsel moved for a mistrial, the trial judge stated “he did not believe that any displays of

emotion so far would have tainted the jury.” To ensure additional emotional outbursts would not prejudice the jury, the judge cleared the courtroom and instructed the jury that the courtroom had been cleared due to the display of emotion by observers. Id. Further, the judge implored the jurors that they were not to draw any inferences from this fact as neither side had done anything improper and reminded the jurors that they were to base their verdict on the testimony and evidence presented, not on emotion. Id.

In another case involving an emotional outburst, the Court held no mistrial was required where the deceased’s sister had a minor outburst while testifying when asked to identify the defendant. State v. Anderson, 322 S.C. 89, 470 S.E.2d 103 (1996). The Court held the emotional outburst was ameliorated by the trial judge dismissing the jury and calling a recess as soon as the outburst occurred to give the witness an opportunity to calm down. Id. at 93, 470 S.E.2d at 105. Further, the Court was persuaded that the outburst had little effect on the jury because it occurred at the beginning of the trial and was “very limited in time and in scope.” Id. As in Hughes, the Court surmised that the sister’s outburst was an expression of grief and the jury likely understood that. Id. While finding the curative measures here sufficient, the Court warned that some cases involving a witness’s or spectator’s outburst “may carry such great potential for prejudice that the trial judge should give, or offer to give, a curative instruction.” Id. at 93, 470 S.E.2d at 106.

The trial judge erred in failing to order a mistrial based on Minor’s repeated and extreme emotional outbursts. Although the trial judge was aware of Minor’s disruptive behavior, took repeated breaks for Minor to compose herself, and admonished Minor regarding her behavior, the trial judge never instructed the jury concerning how to consider, if at all, Minor’s behavior. Minor’s sobbing began during defense counsel’s opening

statement. Her sobbing continued during her direct examination, which was after several witnesses had testified. Thus, her emotional outbursts were not limited to single event or to the beginning of the trial. Minor's improper actions culminated in her storming from the witness stand and screaming for her mother within earshot of the jurors. Despite Minor's conduct, the judge never told the jury not to consider her conduct in their deliberations. Minor's constant sobbing, storming from the witness stand, and screaming for her mother were a far cry from the deceased's mother "loudly" exiting the courtroom in Hughes, supra. The conduct on display at Appellant's trial was not limited to crying by spectators as in Jones, supra, where the judge cleared the courtroom and instructed the jury not to draw an adverse inference from clearing the courtroom and to decide the case based only on the evidence presented. Despite the Court warning in Anderson, supra, that in some cases, a witness's or spectator's outburst "may carry such great potential for prejudice that the trial judge should give, or offer to give, a curative instruction," no instructs were given here. See Anderson, 322 S.C. at 93, 470 S.E.2d at 106.

Instead, the jury heard from a "wound up" solicitor in closing that Minor's "raw emotion" was proof that she was telling the truth. According to the solicitor, Minor's performance was so real and "compelling" that if she were not telling the truth, then she deserved an Academy Award. The solicitor instructed the jury to do exactly what it is not supposed to do – use the emotion of a witness to form the basis for its verdict. Further, in describing his opinion that Minor's testimony was compelling as evidenced by her repeated emotional outbursts, the solicitor improperly conveyed to the jury his belief that Minor was telling the truth. See State v. Jennings, 394 S.C. 473, 479, 716 S.E.2d 91, 94 (2011)(holding that a forensic interviewer's report that each child had provided a "compelling" disclosure of

abuse could only be interpreted to mean the forensic interview believed the children were being truthful).

The trial court failed to grant a mistrial where the ends of justice required one. Minor's continuous sobbing and repeated emotional outbursts tainted the proceedings. While some emotion is to be expected in these types of cases, Minor's conduct was extreme, even theatrical, as acknowledged by the prosecutor's remark regarding the Academy Awards. Minor's conduct deprived Appellant of the fair trial he deserved and that the Constitution demands. The taint of her performance could be removed in no other way except a mistrial.

II. Violating Appellant's state and federal constitutional rights to a fair trial and due process of law, the trial judge erred in failing to require the state to open in full during closing argument and reply only to the defense's closing argument.

Relevant facts

Prior to closing arguments, defense counsel moved to require the state to open in full and use their final argument for rebuttal only. R. 284, line 21 – R. 285, line 3. Defense counsel submitted a written motion in support of this position as well. R. 363 – R. 367.⁹ Appellant compared the order of closing to that in civil cases. Appellant argued that in civil cases, the jury is not being asked to determine guilt and the burden of proof is much lower. R. 286, lines 6-17. Despite Appellant's well-reasoned arguments, the judge denied the motion. R. 286, lines 6-17.

Thereafter, the parties proceeded to closing arguments with the state opening on the law, then defense counsel arguing in full, and the state arguing again. At the conclusion of the arguments and jury instructions, defense counsel noted multiple statements by the prosecutor to which she could not respond due to the order of the closing arguments. First, the prosecutor argued to the jury that “[d]efense counsel wasn't there and can't tell you what happened.” The obvious response would be that the prosecutor was not there either. R. 340, lines 9-12.

Second, the prosecutor related a personal story of when he had traumatic events in his life and that he could not remember what he wore. Defense counsel argued that “[n]one of this case is about clothing. It's about statements, things that were said, things that

⁹ Defense counsel argued this issue in the motion for new trial as well. R. 368 – R. 372.

happened.” When the subject of clothing was presented, no questions were asked about the details of the clothing. Further, the questions about the clothing concerned what she stated to police and others around the time of the alleged incident, not at the trial, as the prosecutor implied to the jury. R. 340, lines 12-22.

Third, defense counsel argued the prosecutor made “just an absolute misrepresentation to the jury about the DNA evidence.” Specifically, the prosecutor asked the jury why would the state send Appellant’s cover for DNA testing when it would just show his DNA. This was a misrepresentation because the state did send the cover for DNA testing. The report was that there was no blood on the covers; therefore, the prosecutor’s argument was “a total misleading and inaccurate statement.” R. 340, line 22 – R. 341, line 7.

Fourth, the prosecutor argued there was no dispute about Minor telling her boyfriend about the alleged assaults a month and a half before. However, this was not true because Minor responded that she could not remember when she told her boyfriend about the alleged assaults. R. 341, lines 7-14.

Fifth, the prosecutor made disparaging remarks comparing prosecutors and defense attorneys. Specifically, the prosecutor told the jury “how glad he was to be on this side and that his ethical obligations were different.” Due to the order of arguments, defense counsel could not tell the jury that the prosecutor, who was a former public defender, “defended one of these cases just earlier this year ... and got his guy off, and in a child sex case in another circuit.” R. 341, lines 15-24.

Discussion

Closing argument is “an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment by which the states are bound.” Donnelly v. DeChristoforo, 416 U.S. 637, 649 (1974)(J. Douglas dissenting). The South Carolina Rules of Criminal Procedure are silent on the order of closing arguments. However, the Rules of Civil Procedure provide that

[t]he moving party upon a motion shall have the right to open and close argument, and the plaintiff shall have the right to open and close upon the trial; except that a party admitting the adverse party’s claim in his pleading, and taking upon himself the burden of proof, shall have the like privilege. The party having the right to open shall be required to open in full, and in reply my respond in full but may not introduce any new matter.

Rule 43(j), SCRCP. On April 29, 2015, the Supreme Court requested written comments and provided notice of a public hearing concerning a proposed rule to the Rules of Criminal procedure to govern closing arguments in non-capital criminal cases. Proposed Rule 21 would require the prosecution to open in the argument in full, followed by the defense to reply, and finally, allow the prosecution to reply in rebuttal. The comment to the rule notes that it would replace the common law rule, which allows a defendant to retain the final closing argument if the defendant presented no evidence during the trial.

In a 1911 case, the Court explained that a defendant in a criminal case who has the right to reply in argument by reason of not introducing evidence may decline to open in argument and still retain the right to make the closing argument to the jury either upon the case in general or by way of reply to the state’s argument. State v. Garlington, 90 S.C. 138, 72 S.E. 564, 566 (1911). South Carolina required the prosecution to close in full prior to the defense’s closing argument pursuant to court rule – Rule 59 of the Circuit Court. See State v. Atterberry, 129 S.C. 464, 124 S.E. 648, 651 (1924). Subsequently, the rule changed to

require the partying having the opening in the argument to disclose fully the law.¹⁰ Thus, the Court held in State v. Lee, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971), that the solicitor was no longer required to make an opening argument to the jury on issues of fact. Id.

The trial judge's refusal to require the state to open fully denied Appellant's right to a fair trial and due process of law because it prevented him from responding to specific points made the prosecutor. Several of the points – especially, those mischaracterizing the record and demeaning the defense – could not have been anticipated. There is simply no good reason – other than custom – to adhere to the current status quo. The prosecution should have been made to open fully as to the law and the facts with the Appellant having an opportunity to respond to the argument and close fully on the law and the facts. The prosecution could have refuted any unanticipated arguments by Appellant in a rebuttal. Permitting the order of arguments in this fashion would have ensured the Appellant's rights to a fair trial and due process of law were not at odds with his right to present a full and complete defense. The current system forces defendants to choose between presenting a defense, which would forfeit last argument, or not to present a defense and keep last argument. No further explanation is needed to demonstrate how this scenario places a defendant on the horns of a dilemma.

¹⁰ Rule 58 of the Circuit Court Rules provided for the order of closing at the time.

III. Violating Appellant's state and federal constitutional rights to present a defense and confront his accuser, the trial judge erred in refusing to permit Appellant to elicit testimony concerning the content of three illicit photographs found on the alleged victim's phone where the content was necessary for the jury to understand the alleged victim's motive to fabricate the allegations against Appellant.

Relevant facts

During the cross-examination of Minor's mother, Appellant asked her about finding some photographs of Terrance C., Minor's ex-boyfriend, on Minor's phone. R. 34, line 25 – R. 35, line 1. The state agreed there were three photographs of Terrance's genitalia on Minor's phone. R. 37, lines 11-20. The state objected that the photographs were not relevant and questions regarding the photographs were prohibited by the Rape Shield Law. R. 35, lines 11-21. The state also argued the photographs were more prejudicial than probative as well. R. 36, lines 14-19. Appellant argued that the photographs were important to establish a motive for why Minor would make up the allegations against Appellant. TR. 36, lines 3-13. To this, the state proposed to limit the questioning to whether the phone was being used in an improper manner and whether Minor got into trouble for using the phone in such a manner. R. 36, lines 14-19.

Appellant explained that the photographs appeared on Minor's phone on August 14 and August 15 of 2010. Appellant made her allegations of sexual assaults on August 25, 2010. Appellant and Minor's mother discovered the photographs on Minor's phone and Minor was punished. Appellant argued that the jury learning that Minor had pictures of Terrance on her phone was not enough information to support the motive to fabricate the allegations. R. 38, lines 3-14. The jury would not appreciate why someone would tell this

story without knowing the contents of the photographs. R. 41, lines 8-12. To the judge's questioning regarding relevancy, Appellant explained the content of the photographs were relevant to explain fully Minor's motive to fabricate and went to her credibility. Appellant explained explaining the motive was part of the defense to which Appellant had a constitutional right to present. Appellant made clear there would be no questioning of any witness regarding whether Minor and Terrance were having sex, which would keep the evidence in compliance with the Rape Shield Statute. Further, Appellant made clear the line of questioning regarding the content of the photographs would not include a request that the jury see the photographs. R. 39, line 9 – R. 40, line 6; R. 41, lines 12-13.

The judge found the content of the photographs was not relevant. He ruled that Appellant could "ask if there were pictures on the phone concerning Terrance that the mom disapproved of, if she did, that [Appellant] disapproved of if he did," but he refused to allow Appellant to "tell the jury that they are actually Terrance's private areas." His ruling would permit Appellant to argue motive because Minor got into trouble over the photographs on the cell phone, but he was adamant that the jury not learn the nature of the photographs. R. 40, lines 7-25. In short, the judge found that Minor's improper motive to make the false allegations could be established without the jury knowing that the pictures were of male genitalia. R. 41, line 23 – R. 42, line 4.

To support Appellant's argument that the content of the photographs were necessary for the jury to understand Minor's motive, which was part and parcel of Appellant's right to present a defense, and not in violation of the Rape Shield Statute as argued by the state, Appellant cited State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989) and State v. Lang, 304 S.C. 300, 403 S.E.2d 677 (Ct. App. 1991). Appellant noted that Minor told the interviewer

that she had never had sex with someone else and the content of the photographs would attack her credibility in this regard.¹¹ Appellant assured the judge the photographs were not an attempt to make Minor look bad, but were to attack her credibility and establish a motive for making up the allegations. R. 61, line 19 – R. 63, line 25.¹²

Thereafter, Appellant proffered the testimony of Minor's mother on this point. Minor's mother admitted Appellant found photographs of a naked Terrance on Minor's phone. Appellant showed the photographs to her. She thought the photographs were inappropriate so she had a discussion with Minor and Terrance's parents. She clarified that the photographs showed a young man's penis, but she could not remember if the penis were erect. R. 42, line 11 – R. 44, line 4.

After the proffer, the judge remained steadfast that the jury would not learn what the photographs actually showed. He also refused to allow the jury to learn that the photographs showed Terrance was naked. R. 44, lines 5-14.

Before the jury, Minor's mother testified that twelve-year old Minor had a fifteen-year old boyfriend named Terrance C. at the time the allegations of sexual misconduct were made. R. 44, line 23 – R. 45, line 24. Minor's mother saw at least one inappropriate photograph of Terrance on Minor's phone. R. 45, lines 2-5.

¹¹ Minor testified that she had never had any sexual contact with anybody other than Appellant. R. 116, lines 14-18.

¹² Appellant renewed her motion to present the content of the photographs to the jury in her motion for new trial. As explained in the motion, there was no attempt to show the photographs to the jury due to the age of the young man in the photographs, but there was an attempt to inform the jury that the photographs showed the young man naked and with a fully-erect penis. Appellant argued that his right to present a defense and his rights to a fair trial and due process were denied as a result of the trial judge's erroneous ruling. R. 368 – R. 372.

According to Minor, when Terrance became her boyfriend on March 23, 2010, her mother found out she had a boyfriend and refused to allow her to speak to him or allow Terrance to visit. R. 161, lines 15-24. Minor admitted her phone had three inappropriate pictures of Terrance on it. R. 162, lines 17-19. Her mother and Appellant found the pictures and disciplined her, including taking her phone away. R. 162, line 24 – R. 163, line 7; R. 163, lines 10-11. Not long after that, Minor made allegations of sexual assault against Appellant and he was arrested. R. 163, lines 8-9; R. 163, lines 13-17.

Bart Cave, an expert in the field of forensic phone analysis, analyzed Minor's cell phone as part of state's investigation. Cave found three inappropriate photographs on the phone. R. 248, lines 1-25. Cave determined the dates and times of the photographs appearing on the phone: two arrived at 12:36 a.m. on August 15, 2010, and one arrived at 11:59 a.m. on August 14, 2010. R. 249, lines 1-18.

Discussion

The Sixth Amendment to the United States Constitution guarantees an accused the right to be confronted with the witnesses against him. "The Confrontation Clause requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness's demeanor and assess his credibility." State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), aff'd as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007). "[C]ross-examination is essential to a fair trial as guaranteed by the Sixth Amendment and due process as required by the Fourteenth Amendment." State v. McCoy, 274 S.C. 70, 72, 261 S.E.2d 159, 160 (1979). This guarantee ensures a defendant has the opportunity to cross-examine a witness concerning bias. Davis v. Alaska, 415 U.S. 308, 316 (1974); State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315,

317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). Additionally, Rule 608(c) of the South Carolina Rules of Evidence states that “[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.” To establish a violation of the Confrontation Clause, Appellant must show that he was prohibited from asking questions designed to show bias on the part of Minor. See Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). In addition, the error must not have been harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 574, 336 S.E.2d 150, 151 (1985), State v. Sims, 348 S.C. 16, 26, 558 S.E.2d 518, 523 (2002).

The Rape Shield Statute prohibits “[e]vidence of specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct, and reputation evidence of the victim’s sexual conduct ... in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656.” S.C. Code Ann. § 16-3-659.1(1). This statute is completely inapplicable to the instant matter because Appellant was not offering evidence of specific instances of Minor’s sexual conduct, opinion evidence of Minor’s sexual conduct, or reputation evidence of Minor’s sexual conduct. In fact, the photographs could not demonstrate specific instances of Minor’s sexual conduct as the photographs did not depict Minor engaged in any sex acts. Rather, Appellant was offering three sexually explicit photographs on the twelve-year old’s phone from her fifteen-year old boyfriend to show the motivation Minor had to lie about the allegations of sexual abuse.

Having determined the Rape Shield Statute does not bar the evidence, the only remaining question is whether the evidence was relevant. Relevant evidence is any “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. Was the fact that Minor had three photographs of her naked boyfriend showing his fully erect penis on her phone relevant to Minor’s credibility?

Deciding an issue similar to the one presented in the instant matter, the Court in State v. Finley, 300 S.C. 196, 199, 387 S.E.2d 88, 89 (1989) noted that relevant evidence “need not be sufficient in itself to establish the whole or any definite portion of a party’s contention.” Finley sought to introduce a tape recording of a conversation with the alleged criminal sexual conduct victim in which the victim agreed to drop the charges in exchange for money. The trial judge refused. On appeal, the Supreme Court found the tape recording was relevant on the issues of whether Finley tried to obstruct justice or whether the alleged victim was trying to extort money. Id.

Additionally, the Court held that Finley should be allowed to present evidence that the alleged victim engaged in sexual intercourse with her neighbor in full view of Finley on the night she claimed Finley assaulted her. Id. at 200, 387 S.E.2d at 90. Finley’s defense was that the alleged victim fabricated the charges to keep him from telling anyone about her sexual conduct with the neighbor. “The unique facts of this controversy, coupled with [Finley]’s right to confront and cross examine witnesses against him and to present a full defense to the charges makes relevant evidence which tends to establish motive, bias, and prejudice on the part of the prosecuting witness.” Id. The Court found the evidence was “essential to a full and fair determination of [Finley]’s guilt and was offered for purposes other than to attack the complainant’s character by revelation of her sexual activity with a third party.” Id. (citing State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986)); see also

State v. Lang, 304 S.C. 300, 403 S.E.2d 677 (Ct. App. 1991) (holding that evidence of victim's sexuality was admissible when offered for a purpose other than to attack the victim's morality).

Although State v. Grovenstein, 340 S.C. 210, 530 S.E.2d 406 (Ct. App. 2000) principally concerns the Rape Shield Statute, it is instructive for what type of evidence is relevant in criminal sexual conduct cases. In Grovenstein, the victims accused the defendant of anally penetrating them with rolled-up paper. Id. at 213, 530 S.E.2d at 408. Before the victims knew the defendant, they had been "accused of inserting objects in the vagina and rectum of a young girl." Id. This Court held that evidence of these accusations prior to meeting the defendant "should have been admitted because it provided an alternate explanation of how the young victims would be familiar with the sexual conduct they alleged [the defendant] committed." Id. at 220, 530 S.E.2d at 412. This Court ruled that the Rape Shield Statute "is not a blanket exclusion of evidence concerning alternative sources of a child victims of sexual knowledge." Id. at 219, 530 S.E.2d at 411. Thus, relevant evidence in a criminal sexual conduct case is evidence that provides an alternate explanation of how young victims would be familiar with sex.

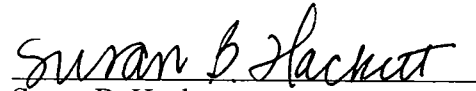
While the photographs showing a naked Terrance with an erect penis did not show that Minor was familiar with all aspects of sex, the photographs certainly demonstrated that Minor had some knowledge of sex outside of the alleged abuse. Thus, under Grovenstein, the photographs were relevant to demonstrate Minor's knowledge of sex from an alternate source. Of course, the photographs served more than this purpose. The photographs were the impetus for Minor to fabricate her fantastical tale of sexual abuse. At twelve-years old, Minor had an older boyfriend and her parents did not approve. In fact, her mother and

Appellant had forbidden her to talk to him and would not allow her to visit him. When the two learned that Minor had sexually explicit photographs of Terrance on her phone, the two were outraged and punished her, as all parents would. The content showed just how serious Minor's misbehavior was and just how desperately she was to deflect the punishment. Photographs of Terrance's naked body with a fully erect penis on twelve-year old Minor's phone were a far cry from simply "inappropriate" photographs. The actual content of the photographs demonstrated Minor's knowledge of sex and the outrage her parents felt over her misconduct. The punishment she would suffer would be severe – just as the revenge she would dole out. The jury deserved and needed to know the content of those photographs in order to evaluate Minor's credibility and to learn that Minor had a very big incentive to fabricate the allegations against Appellant.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and remand for a new trial.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

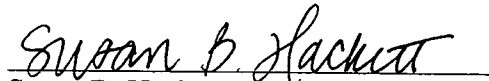
ATTORNEY FOR APPELLANT

This 22nd day of February, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 22, 2016


Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

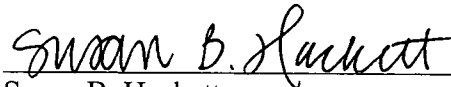
V.

KEITH DENVER TATE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Henry Gunter, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of February, 2016.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of February, 2016.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.

ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY

Court of General Sessions

Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2014-001694

THE STATE,

Respondent,

v.

KEITH DENVER TATE,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

Post Office Box 516
Greenwood, SC 29648
(864) 942-8800

ATTORNEYS FOR RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

I.

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

II.

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

III.

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

STATEMENT OF THE CASE

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

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

STATEMENT OF FACTS

In July of 2009, Mother moved to Calhoun Falls in Abbeville County with her children and Keith Tate, the appellant in this matter. ROA. p. 13. Appellant was Mother's boyfriend and the father of one of her sons. ROA. p. 14. Mother had three children: Victim, T.R., and T.R. ROA. p. 12. Appellant and Mother dated for three or four years and cohabitated for the entirety of the relationship. ROA. p. 14. Mother suffers from significant health problems including seizures, schizophrenia, bipolar disorder, fibromyalgia, rheumatoid arthritis, and neuropathy. ROA. p. 15. To treat her various illnesses, Mother took around thirty-six pills per day and had prescriptions for Xanax, Geodon, Depakote, Ativan, Seroquel, Lortab, Phenergan, Flexeril, and Zanaflex. ROA. pp. 14-15. As a result of being heavily medicated, Mother slept most of the day. ROA. p. 16. Mother would take the first dose of medication and sleep until 5:00 p.m. or 6:00 p.m., take the second dose and sleep until 9:00 p.m. or 10:00 p.m., then take a third and final dose and sleep through the night. ROA. p. 15. Due to Mother's poor health, Appellant primarily cared for the children. ROA. p. 72.

Rebecca Holland worked at Calhoun Falls Charter School, where Victim was a student, as a substitute teacher, bus supervisor, track coach, band director, and bus driver. ROA. pp. 168-169. Victim was in the color guard in the band during the 2009 season and part of the 2010 season. ROA. p. 169. Holland took Victim home from band practice every day. ROA. p. 170. Holland testified that Victim would cry on the way home and ask her not to take her back to her house. ROA. p. 171. Holland sometimes witnessed Appellant grab Victim by the arm when she would drop Victim off at home. ROA. p. 171. On August 23, 2010, Victim disclosed to Holland that she had been sexually

assaulted. ROA. p. 169. Following Victim's disclosure, pursuant to school policy, Holland reported the incident to Lori Lindler, the school's assistant principal and guidance counselor. ROA. p. 170.

Sometime earlier in 2010, Victim also disclosed the abuse to T.C., her boyfriend at the time. ROA. p. 49. Victim detailed Appellant's abuse to T.C. around five or six months after the abuse had been happening. ROA. p. 52. Victim did not want T.C. to tell anyone about the abuse because it would "mess the family up." After Victim told T.C. the abuse was continuing, he told his mother. T.C. subsequently gave a statement to police on August 26, 2010. ROA. p. 58.

Lori Lindler spoke with Victim regarding her allegations of sexual abuse on August 25, 2010. ROA. p. 184. Lindler testified that Victim came to speak with her after confiding in the parent of a student and Rebecca Holland, who subsequently referred the matter to her. ROA. p. 183. In her conversation with Lindler, Victim recounted Appellant's abuse. ROA. p. 184. Victim identified ten separate occasions where she had been sexually abused by Appellant. ROA. p. 184. Nine of the instances of assault occurred in Abbeville County and one instance took place in Greenville County. ROA. p. 184. Lindler went through a calendar with Victim in an effort to identify the dates of the assaults as closely as possible. ROA. p. 184. They used the school calendar to aid them in selecting dates because Victim could remember when certain assaults occurred based on what school events were happening at the time. ROA. p. 184. Following her conversation with Victim, Lindler contacted the Calhoun Falls Police Department. ROA. p. 185. The officers subsequently obtained a search warrant for the residence and an arrest warrant for Appellant. ROA. p. 201.

On September 28, 2010, Jessica Bell interviewed Victim at The Child's Place. ROA. p. 259. The Child's Place was a children's advocacy center whose role is to make the investigation of child abuse easier on children. ROA. p. 260. The case was referred to The Child's Place by Monique Bell of the Calhoun Falls Police Department. ROA. pp. 260. Jessica Bell testified that she did not ask Victim about specific dates, as children generally only remember things like their age at the time and what events were going on around the time of the abuse. ROA. p. 263. Bell prepared a report following her interview with Victim. ROA. p. 260. Several weeks after the forensic interview, Dr. Lyle Pritchard performed a forensic medical examination on Victim on November 23, 2010. ROA. p. 227. The forensic medical examination took place at The Child's Place. ROA. p. 232. Dr. Pritchard is part of the South Carolina Child Abuse Medical Response System. ROA. p. 226. Dr. Pritchard testified that during his examination of Victim, he noticed a transection of Victim's hymen. ROA. p. 229. A transection of the hymen is an injury that is consistent with something being forced into the vaginal opening. ROA. p. 229. Dr. Pritchard testified there is a delay in disclosure in the vast majority of child sexual abuse cases. ROA. p. 230. Dr. Pritchard also noted that any signs of physical abuse (bruising, lacerations, etc.) would have healed by the time he examined Victim. ROA. pp. 230-231. While at the Child's Place for her physical examination, Victim told a nurse that she never had sexual contact with anyone other than Appellant. ROA. p. 116. On cross examination, Defense Counsel asked Dr. Pritchard if Victim was using contraceptives at the time of the examination. ROA. p. 235. Dr. Pritchard indicated that she was using contraceptives. ROA. p. 235.

At trial, Victim fully recounted the extensive abuse she suffered at the hands of Appellant. Victim was sixteen years old at the time of trial. ROA. p. 67. In August of 2009, Victim was twelve years old. ROA. p. 69. Appellant took care of Victim and her siblings while Mother was sleeping. ROA. p. 72. Victim testified that she referred to Appellant as "Dad." Victim testified that Appellant no longer has her trust because he sexually assaulted her. ROA. p. 73.

Some months after the abuse began occurring, Victim disclosed the abuse to her boyfriend, T.C. ROA. p. 73-74. Victim did not immediately disclose the abuse because she did not know who to tell. ROA. p. 74. Victim did not think anyone would believe her, as it would be her word against Appellant's. ROA. p. 175. Appellant also told Victim that if she told, her mother would have a seizure. ROA. p. 281.

Victim testified that Appellant touched her with his penis. ROA. p. 77. Specifically, Appellant penetrated her vagina with his penis. ROA. p. 78. When she sat down with Lori Lindler to try and ascertain the dates of the assaults, Victim identified ten dates when Appellant sexually assaulted her. ROA. p. 79. On all ten of these occasions, Appellant penetrated Victim's vagina with his penis. ROA. p. 79. Victim also testified that on the last occasion, Appellant put his penis in her mouth. ROA. p. 88. Victim also recalled Appellant penetrating her anus. ROA. p. 88. Victim testified that she bled the first time Appellant penetrated her vagina and on the occasion when he penetrated her anus. ROA. p. 89. Victim bled onto a sheet, which Appellant subsequently took away. ROA. p. 89. The dates of the nine assaults that occurred in Abbeville County were August 26, 2009, October 31, 2009, December 14, 2009, February 6, 2010, February 13, 2010, March 3, 2010, March 14, 2010, March 15, 2010, and March 18, 2010. ROA. pp.

79-80. Appellant also sexually assaulted Victim on a tenth occasion in Greenville County on December 26, 2009, at the home of Victim's aunt. ROA. p. 106.

Victim testified the first assault took place at their home in August of 2009. ROA. p. 82. The assault took place on the couch in the living room of the home while Victim's mother and siblings were home. ROA. pp. 82-83. No one else was in the room at the time of the assault. ROA. p. 86. Appellant told Victim he wanted to see what size bra and panties she wore. ROA. p. 83. Appellant then began kissing her neck and rubbing her bottom. ROA. pp. 83-84. Appellant tried to take Victim's shirt off and told her "he was helping her for her bra." ROA. p. 84. Appellant eventually took Victim's clothes off and lay on top of her, telling her "don't act like you don't want it." ROA. p. 87. Appellant then penetrated her with his penis. ROA. p. 87. Victim testified that after the first assault, she was afraid to go home from school. ROA. p. 94. Following the first incident, Victim began writing poetry about her feelings. ROA. p. 94. Following the first incident, Victim's journal read:

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

ROA. p. 99.

Appellant's second sexual assault of Victim occurred on October 31, 2009. ROA. p. 126. Victim recalled the date because there was a school football game on October 30th. ROA. p. 126. Victim reported to Jessica Bell that on this particular incident, she screamed and Appellant hit her in the face, busting her lip open. ROA. p. 128. Minor's

mother also recalled noticing Victim had a busted lip at some point in time. ROA. p. 20. When Mother asked why Victim's lip was busted, she was told that Victim injured herself while playing. ROA. p. 21. After the assault on October 31st, Victim woke up to an empty house and noticed that her shorts were up, her underwear was down, and her shirt was on a lamp. ROA. p. 131.

During Appellant's final assault of Victim, Appellant put her on the couch and put his penis in her mouth. ROA. p. 145. Victim bit Appellant's penis and he began screaming. ROA. p. 146. Victim then ran down the hallway and barricaded her bedroom door with her dresser. ROA. p. 146. Victim also told T.C. about this incident, disclosing to him that one night when she was asleep, Appellant put his penis in her mouth. ROA. p. 57. Victim told T.C. that Appellant got angry with her and grounded her. ROA. p. 57. Eventually, Victim began sleeping with her mother to get away from Appellant. ROA. p. 127.

ARGUMENT

I.

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

Relevant Facts

During the defense's opening argument, Victim became visibly upset. Defense Counsel briefly paused and told the court, "Your honor, it looks like – it looks like [Victim] is upset and I don't want that to distract the jury." ROA. p. 9. The judge briefly spoke with both lawyers at the bench before Defense Counsel continued her opening arguments. ROA. pp. 9-10. Victim's emotional state came about shortly after Defense Counsel referred to her as a story teller akin to Stephen King or James Patterson. ROA. pp. 8-9. During the next recess, the judge noted for the record that Victim became upset during the Defense's opening statement. ROA. p. 28. The trial judge noted the court "has no problem with that, but if that's still a recurring problem then I think we ought to agree that she needs not to be in the courtroom because of the potential nature it has to be disruptive. So just as a cautionary matter." ROA. p. 28.

On direct examination, Victim became emotional while describing the first instance of sexual assault by Appellant. ROA. p. 84. The Solicitor asked if Victim would like to take a break and she indicated that she would. ROA. p. 84. After the jury exited the courtroom, the Solicitor asked the court how it would like to handle Victim's

testimony during the spells where she became emotional. ROA. pp. 84-85. The trial judge replied:

Well, evidently it's very difficult for her to testify. She's just going to have to - - she's going to have to do the best job she can and, you know, we'll just have to, you know, muddle our way through it. Possibly you could, without discussing her testimony, just maybe talk with her, and she's going to have to, you know, try to - - you know, try not to be emotional. Easy for me to say.

ROA. p. 85.

The judge instructed Victim, "I know this is difficult for you to testify. I understand that. But it's really important that you do the very best that you can and there is a lot to cover in questions that will be asked of you. So you just need to do the very best that you can so we can get through your testimony." ROA. p. 85. Victim was able to get through the remainder of her direct testimony without any more periods where she was visibly emotional.

During the lengthy cross-examination by Defense Counsel, Victim indicated that she did not want to keep talking about the incident. ROA. p. 155. When asked by Defense Counsel whether she could keep going, Victim requested a break. ROA. p. 155. After Victim stepped down from the witness stand, the trial judge told the solicitors, "I realize she's emotional. I understand that. But I don't want this - - and this is - - I'm not commenting on - - but it's being disruptive. Okay? So I want both of you all to go out there and talk to her." ROA. p. 155. After a brief recess, prior to the jury returning to the courtroom, the trial judge stated:

I don't want any perception of anyone to think that I'm not being unsympathetic. But I've got to maintain decorum in this courtroom. And regardless of the nature of the allegations and the emotions involved and everything, I've still got to maintain decorum, and I just can't tolerate the witness storming out of the courtroom in the manner in which she did. I

think the vast majority, if not all of the jurors, were back in the courtroom, or most of them at least were back in there when that took place. But I just - - and I hope both Solicitors have talked with her. And I know this has not been an easy experience for this witness to be testifying. But nonetheless, she's got to be aware that we can't allow that sort of conduct.

ROA. p. 156.

Defense Counsel moved for a mistrial, asserting that it was warranted "because of the pretty extreme display of emotion that was going on while [Victim] was sobbing as the jury left the jury box and while the door back there behind the jury box was still open she started yelling out for her mother . . ." ROA. p. 157. The trial judge denied the defense's motion, ruling:

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

ROA. p. 158. The trial judge later noted "[T]his is just inherent in a case like this that there is going to be a lot of emotion." ROA. p. 159. The trial judge further stated, "We may have some other witnesses get very emotional, too, when it's all said and done in this case. I don't know that. But taking everything into consideration I don't think the justification is there to grant a mistrial." ROA. p. 159. Defense counsel did not request a curative instruction at any point in the proceeding.

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

They're calling him a child molester. So yes, he gets to have an advocate who gets up and says that's a story. That is not true. And if it really isn't true, is it worse to be called a storyteller than it is to be called a child molester? The first time you see [Victim's] emotional reaction is when I

was giving you my opening statement and telling you how I was going to be talking about these different versions of her story. And when she knew that was going to happen she got upset. And you can interpret that, I guess one of two ways. She was crying because what happened to her was so horrible and she doesn't like having to go through it again or she's crying because somebody is pointing out the problems with the things she's saying and the reason that you shouldn't believe it, and that - - and that is difficult for her. And there may be other ways to interpret it. I don't know.

ROA. p. 308.

During the State's closing argument, the Solicitor noted the heinous nature of sexual abuse crimes involving the parent of a child and stated, "And I can't imagine the emotional trauma of coming in here and having to talk about it four years later." ROA. p. 320. The Solicitor then told the jury that one of the greatest tasks before them as jurors in these case was to judge credibility. ROA. pp. 320-321. The Solicitor stated:

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

ROA. p. 321. The Solicitor later noted "You look at what those witnesses said and you decide if you're convinced this man did penetrate that child. Was that a emotion you watched real. Because if she's made all this up and she's put on that kind of act, she deserves an Academy Award, because that was compelling."

ROA. p. 324.

Discussion

Appellant asserts the trial judge erred in refusing to declare a mistrial due to Victim's shows of emotion during trial. Specifically, Appellant contends the show of

emotion by Victim disrupted the trial and improperly influenced the jury to decide the case on emotion. The State submits this argument is without merit, as the trial judge properly denied the motion for a mistrial where there was no showing of manifest necessity to warrant the declaration of a mistrial.

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

South Carolina Courts have repeatedly found displays of emotion to be insufficient grounds for a mistrial. In State v. Anderson, 322 S.C. 89, 470 S.E.2d 103 (1996), the South Carolina Supreme Court was faced with the question of whether a mistrial was warranted where the victim’s sister had an emotional outburst while on the witness stand. Specifically, when asked to identify the defendant in the case, she

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

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

We believe the jury could readily understand that the witness in question might have a hostile attitude toward the accused, because of the natural effect of the circumstances on her emotions, although there was nothing whatever in her testimony tending to show his guilt, and hence her attitude was based solely upon the testimony of others. . . . When all the circumstances of the instant case are considered we believe it is clear that even if a motion for a mistrial had been made the trial Judge would not

have been justified in granting it, in the proper exercise of his discretion. There was certainly no manifest or absolute necessity for such action.

Id. at 453-54.

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

In State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996), this Court dealt with a situation where there was audible crying by spectators during the victim's testimony. The defense moved for a mistrial. Id. at 316. The trial judge stated he did not believe any displays of emotion thus far could have tainted the jurors. Id. However, as a precaution he cleared the courtroom of everyone except the press and the victim's father for the remainder of her testimony. Id. In order to explain to the jury why the courtroom was suddenly emptier, the trial judge informed the jury that the courtroom had been cleared due to the display of emotion by observers. The judge cautioned the jurors that they were not to draw any inferences from this fact and that they were to render their verdict based on the testimony and evidence presented at trial. Id. This Court found that the trial judge did not abuse his discretion in denying the defense motion for a mistrial. Id. at 318. While Jones demonstrates the deference given to trial judges by appellate courts, it is distinguishable from the current case in that the trial judge elected to clear the courtroom and provide a curative instruction. However, a curative instruction was

necessary in the case because the jury undoubtedly had significant questions about why they were returning to a nearly empty courtroom. In the current case, there were no major changes, like the emptying of a courtroom that would necessitate an instruction to the jury.

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

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

¹ Appellant's assertion that the Solicitor instructed the jury to decide the case on emotion is simply not correct. Appellant argued that the jury heard from a "wound up" Solicitor in closing that Victim's raw emotion was proof that she was telling the truth. Appellant also attempts to argue that the Solicitor instructed the jury to use the emotion of a witness to form the basis for its verdict. (App. Br. p. 20). The

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

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

In Young v. State, 422 S.E.2d 227, 228 (Ga. Ct. App. 1992), Young contended that the trial court erred in denying his motion for a mistrial after the victim began crying uncontrollably on three separate occasions during her testimony, necessitating breaks in the proceedings. The trial judge denied the mistrial motion, noting that although the victim had become emotional at times, these episodes in their entirety were not of such a

Solicitor was simply reminding the jury that one of its core functions was to judge the credibility of witnesses. This is consistent with the trial judge's later instruction to the jury, "Necessarily, you must determine the credibility of witnesses who have testified in this case . . . You may also consider the appearance and manner of a witness while on the witness stand." ROA. p. 334. This instruction is fully consistent with the model good character jury instruction contained in the most recent version of the South Carolina Judicial Department's general sessions bench book. See 2015 Suggested General Sessions Jury Instructions, <http://www.sccourts.org/juryCharges/GSInstructions.2015.pdf>. Also, the Solicitor's mention during closing of Victim's "raw emotion" at trial was in response to the defense's closing, where Defense Counsel directly commented on Victim's emotion at trial and told the jury that her emotion could have been a reaction "to somebody is pointing out the problems with the things she's saying and the reasons that you shouldn't believe it." ROA. p. 308. "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) (citing United States v. Nobles, 422 U.S. 225 (1975)). "To this end it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." United States v. Robinson, 485 U.S. 25, 33 (1988).

consequence that it would deprive appellant of his right to a fair trial. Id. Young also complained that the trial judge did not give a curative instruction. Id. at 228-29. The Georgia Court of Appeals noted the appellant had not requested a curative instruction at trial. Id. at 29. "It is only where the accused would be denied a fair trial in the absence of corrective instructions that such must be given even in the absence of a request or a mistrial declared." Id.

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

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

denying the motion for a mistrial, noting the trial judge was in the best position to ensure a fair trial and determine whether remedial measures were necessary. Id.

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

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

II.

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

Relevant Facts

Prior to closing arguments, Defense Counsel informed the trial court she had a motion about the order of closing. ROA. p. 194. Defense Counsel noted she also had a written motion in support of her argument. ROA. p. 284. In arguing her motion, Defense Counsel argued:

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

ROA. p. 286. The court denied the defense's motion. ROA. p. 286. Following closing arguments by both the State and the defense and the judge's instructions to the jury, Defense Counsel noted several things in the State's closing argument that she would have responded to had she been able to have the last argument. ROA. p. 340.

Discussion

Appellant asserts the trial judge erred in declining to deviate from following the established procedure of allowing the prosecution to open its closing argument on the law and argue last on the facts. Appellant asserts the trial judge's ruling violated his state and

federal constitutional rights to a fair trial and due process of law. The State submits this argument is without merit, as the trial judge did not err in allowing the State to have the last argument as permitted by the established procedure.

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

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

However, unlike the vast majority of jurisdictions, current South Carolina practice sets the order of closing arguments in criminal cases according to the evidence received at trial. See State v. Brisbane, 2 Bay 451 (S.C. 1802) (As a matter of practice, when a

criminal defendant calls no witnesses, he has “the **privilege** of concluding to the jury.”) (emphasis added); see also State v. Gellis, 158 S.C. 471, 155 S.E. 849, 855 (1930) (“It is evident from the more recent decisions of this court that the rule is that if a defendant offers any evidence on trial of the case, the state is not deprived of its general right to the opening and concluding arguments.”); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379, 384 (1972); State v. Mouzon, 321 S.C. 27, 467 S.E.2d 122, 125 (Ct. App. 1995).

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

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

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

counterbalance the weight of the State's offensive in such cases that the Legislature, and later this Court, created an exception to the common law rule that the party with the burden of proof is entitled to the concluding argument before the jury. As we view the Rule, it is intended as an aid to those defendants entitled to avail themselves of it, rather than as a limitation upon those desiring to call defense witnesses.

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

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

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

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

to the states in the establishment and implementation of their own criminal trial rules and procedures.””).

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

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

III.

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

Relevant Facts

Prior to trial, the Solicitor noted that in his Rule 5 disclosures, he accidentally released three photographs that were taken off a cell phone showing the genitals of a minor boy. ROA. p. 3. The Solicitor noted he should not have released them, as they would be improper to disclose, display, or disseminate in any form. ROA. p. 3. Defense

Counsel agreed the photographs should not have been disclosed to her. ROA. p. 86. Defense Counsel then stated, "It would not be my intention to try to introduce that photograph unless - - unless for some reason it - - the fact that they existed on this young lady's phone is disputed." ROA. p. 3. Defense counsel continued, "And then, you know, if there was some way to describe them to the jury short of them seeing the actual images. But I- - you know it wouldn't be my desire to introduce them." ROA. p. 3. The trial judge then stated:

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

ROA. p. 4.

During Mother's testimony, Defense Counsel began to ask whether Mother had discovered photographs of T.C. on Victim's phone. ROA. pp. 34-35. The Solicitor immediately objected and the judge sent the jury out of the courtroom so that the trial court could take up the matter of law. ROA. p. 35. The Solicitor argued:

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

ROA. p. 35.

Defense Counsel argued, "I think those photographs coming in on that phone at the time that they did go to a motive for why [Victim] would be saying these things about

Mr. Tate, because she got in trouble for the pictures being on her phone.” ROA. p. 36. The Solicitor countered that the pictures were completely irrelevant and would certainly be more prejudicial than probative under Rule 403, SCRE. The trial judge asked counsel whether the photographs were received in conjunction with a text message or were the pictures simply in the phone’s photo album. ROA. p. 36. The Solicitor clarified for the judge that the pictures were not received in conjunction with a text and were simply found on the phone. ROA. p. 37. There were no phone records tying the picture to one particular person. ROA. p. 37. The Solicitor disclosed that, from his own investigation, he discerned the pictures came from T.C. ROA. p. 37. The trial judge asked Defense Counsel:

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

ROA. p. 38. The Solicitor offered, “To give you a good example, Your Honor, let’s say she was actually caught engaging in intercourse with [T.C.] and that was the basis for some discipline, the Rape Shield still applies. You can’t get into you had sex with [T.C.] and that’s why you got in trouble, isn’t it.” The Solicitor continued, “They couldn’t do that. So why can they go into the fact that there was this picture on the phone?” ROA. p. 39. Defense Counsel maintained that the content of the pictures was relevant because it goes to motive and why the Victim could fabricate the allegations. ROA. p. 39.

The trial judge ruled:

I don’t really see much of a difference in them seeing pictures or being told that there are pictures of his male private parts. I mean, they can - - if it’s male private parts they can envision in their mind what the pictures show. I just don’t - - I think you can certainly ask if there were pictures on

the phone concerning [T.C.] that the mom disapproved of, but if he did, but I don't think we need to tell the jury that they are actually [T.C.'s] private areas. I don't think the jury needs to know that. I don't see where there's any relevance. You can still argue motive, because she got into trouble allegedly over these pictures on the cell phone. . . .But the jury is not going to know that there were pictures of his private area.

ROA. p. 40. The trial judge later continued, "I think motive can be established without the jury knowing that the pictures were of male genitalia. So the question is - - I guess the objection by the State is sustained." ROA. p. 42.

Following a proffer of Mother's testimony by the defense, the judge clarified the scope of what Defense Counsel could ask regarding the pictures, stating, "So the ruling is that nothing can be mentioned to the jury out of what the actual pictures show. Certainly the use of the word inappropriate, if that's the word of choice to describe the pictures. I'll allow that. But they will not be told actually what the pictures show." ROA. p. 44. Defense Counsel subsequently asked Mother "And did there come a time when you saw at least one inappropriate photograph of [T.C.] on [Victim's] phone?" ROA. p. 45. Mother responded that she had seen the photograph and talked to T.C.'s parents about it, who also agreed the picture was inappropriate. ROA. p. 45. Mother later testified that Appellant was the one who made her aware of the inappropriate photographs. ROA. pp. 46-47.

During Defense Counsel's cross-examination of Victim, Victim was asked whether her phone had three inappropriate pictures of T.C. on it. ROA. p. 162. Victim responded that it did. ROA. p. 162. The pictures were subsequently discovered by Appellant and Mother. ROA. pp. 162-163. Defense Counsel asked Appellant whether she got in trouble for the photographs, and Victim replied that she did. ROA. p. 163. Defense Counsel then asked Victim whether her phone had been taken away when Appellant and

Mother found the pictures, and Victim replied that it had been. ROA. p. 163. Defense Counsel also asked Victim whether it was ten days after Appellant's discovery of the pictures when she disclosed Appellant's abuse to Holland and Lindler. ROA. p. 163. Victim did not recall the specific number of days but agreed that the disclosure occurred a short time after the phone incident. ROA. p. 163.

One of the witnesses called by the defense was Bart Cave. ROA. p. 246. Cave works in the computer crime center at SLED. ROA. p. 247. Cave was involved in Appellant's case because SLED received phones that needed to be examined. ROA. p. 248. Defense Counsel asked Cave whether any of the phones contained inappropriate photographs. Cave discovered three inappropriate pictures on one of the phones. ROA. p. 248. Defense Counsel also asked Cave what the dates were of the photographs on the phone. ROA. p. 249. Cave explained that there is a date and time associated with the pictures of when they were on the device. ROA. p. 249. Cave testified photographic files showed dates of August 14, 2010, and August 15, 2010. ROA. p. 249.

During closing argument, in trying to convince the jury Victim fabricated the allegations against Appellant, Defense Counsel cited Victim's relationship with T.C. as the motivation for Victim to lie. ROA. p. 312. Defense Counsel attempted to paint a picture where Victim somehow perceived Appellant as an obstacle to her relationship with T.C. ROA. pp. 312-313. Defense Counsel argued:

And then the culmination of all that is when those inappropriate pictures turn up on the phone on August 14th and 15th. Mr. Cave told you about. [Victim] - - one of the things she was able to admit to was those pictures on her phone. Her mother admitted to seeing those. Her phone gets taken away. It gets talked about with [T.C.'s] parents. And then, just, what, a week and a half later. The pictures are there the 14th and 15th, so they've got to be found some time after that while they're at Blue Hole. And then on August 23rd all of this starts coming out. And then Keith is gone. The

person who was awake most of the time, who stayed with the kids when [Mother] went to the hospital. . . . But he - - he's out of the picture and the boyfriend problem won't be a problem anymore. And then [Victim] at some point starts using contraceptives, and then in November there's an exam that shows some sort of penetration. So that's the only thing I know of to point to explain to you why this would have started coming up.

ROA. p. 313. When discussing the State's medical evidence during her closing, Defense Counsel also emphasized the fact that Victim was using contraceptives. ROA. p. 309.

Discussion

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

Firstly, the trial judge did not err in refusing to allow Appellant to elicit testimony that the photographs on Victim's phone showed T.C.'s genitals because the defense was still able to effectively argue Victim's punishment stemming from the photographs was

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

argue fully that the inappropriate pictures provided Victim a motive to fabricate the allegations against Appellant. Thus, Appellant's right to confrontation and right to present a defense were not violated. Furthermore, any alleged error in the trial judge's ruling regarding the content of the photographs was harmless, as Appellant suffered no prejudice. Appellant was still able to fully argue that Victim had a motive to fabricate these allegations by asking Victim, Mother, and Cave about the inappropriate pictures found on Victim's phone. Defense Counsel was able to vigorously argue throughout closing argument that Victim was a "storyteller" who had a very strong motive to fabricate the allegations.

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

Thirdly, the evidence was inadmissible under Rule 401, SCRE, and Rule 403, SCRE, as the evidence was irrelevant and any probative value of the evidence was

substantially outweighed by the evidence's potential for undue prejudice. All relevant evidence is admissible, and only relevant evidence should be admitted at trial. State v. Douglas, 369 S.C. 424, 430, 632 S.E.2d 845, 848 (2006); see Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible."). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE ("Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'").

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

398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), *rev'd on other grounds*, 409 S.C. 524, 763 S.E.2d 22 (2014). Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000).

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

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

were familiar with the sexual conduct they alleged Williams to have committed because the allegations against Williams were not similar to the alleged abuse by the victims' stepbrother. Id. at 466. The Court emphasized that Williams was accused of digitally penetrating the victims, while the victim's stepbrother allegedly forced the victim to perform oral sex. Id. The Court noted that the fact that the victim was previously forced to perform oral sex would not show a source of the victim's ability to testify about the defendant's acts of digital penetration. Id. As in Williams, the contents of the photographs were not similar whatsoever to the abuse committed by Appellant. The fact that Appellant had nude photographs of her boyfriend did not show a source of the victim's ability to testify about instances of sexual abuse by Appellant. Furthermore, the issue of whether the evidence was relevant to demonstrate an alternate explanation as to how Victim was familiar with various aspects of sex is not preserved for appellate review. Defense Counsel's stated reason for why the content of the photographs should be admissible all revolved around Victim's motive and credibility. ROA. pp. 36-39, 41. Defense Counsel never argued to the trial judge that the content of the photographs was relevant to establish the child had an alternate source of sexual knowledge. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003).

Whatever probative value, if any, the evidence had was substantially outweighed by the risk of unfair prejudice and misleading the jury. The admission of the content of the photographs would have had an undue tendency to suggest a decision on an improper

basis. The jury would have placed improper emphasis on the content of the photographs. The jury would not have seen the content of the photographs as proof of motive; instead, the jury would have viewed the photographs and believed T.C. was the likely source of the transection in Victim's hymen. As such, the highly prejudicial nature of the photographs leads to the conclusion that the probative value was substantially outweighed by the risk of unfair prejudice and misleading the jury.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY: 

V. Henry Gunter, Jr.
Bar # 102259

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

February 17, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

KEITH DENVER TATE

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

By: 

V. HENRY GUNTER, JR.
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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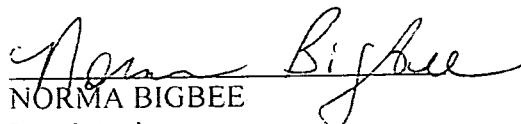
Appellant.

PROOF OF SERVICE

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

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

This 16TH day of February, 2016.


NORMA BIGBEE
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727