

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
Honorable Thomas A. Russo, Circuit Court Judge
Appellate Case No. 2016-001652

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SC Court of Appeals

THE STATE,

Respondent,

vs.

JACOB MICHAEL HENDRICKS,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

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

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 East North Street, Suite 325
Greenville County Courthouse
Greenville, SC 29601
(864) 467-8282

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Assuming defense counsel made a proper request for a limiting instruction regarding prior conviction evidence during trial, any error that could have resulted from the trial judge's failure to present such a limiting instruction to the jury was entirely harmless under the particular circumstances of Appellant's case because the jury was never asked to consider the evidence of Appellant's prior convictions for any purpose other than for the purpose of impeachment, the jury could not have logically found Appellant's prior convictions for burglary and grand larceny constituted substantive evidence of Appellant's guilt for the strikingly different offense of first-degree criminal sexual conduct with a minor, and the evidence of Appellant's guilt presented during trial was abundant and compelling.

STATEMENT OF THE CASE

In December of 2014, Appellant Jacob Michael Hendricks was arrested following an investigation into allegations he sexually abused a minor child during a camping trip. In April of 2015, the Pickens County Grand Jury indicted Appellant for one count of first-degree criminal sexual conduct with a minor. On July 27, 2016, a jury trial was commenced in the Pickens County Court of General Sessions with the Honorable Thomas A. Russo, circuit court judge, presiding. At the conclusion of the three-day trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to a term of imprisonment of twenty-five years. Appellant then filed a timely notice of appeal.

STATEMENT OF FACTS

At the conclusion of an investigation into reports Kristy Young (“Mother”) was physically abusive towards her children, personnel from the Pickens County Department of Social Services removed her three children, including her nine-year-old daughter (“Victim”), from the home she shared with her boyfriend, Appellant Jacob Michael Hendricks, and placed them into the foster care system in August of 2014. (Tr. p. 106; p. 111; p. 113; p. 116; p. 119; pp. 232-233; pp. 251-253). Shortly after that, Victim went to live with her aunt, Dawn Young (“Aunt”), and her uncle, Travis Young (“Uncle”).¹ (Tr. p. 106; p. 110; pp. 116-117; p. 120). Approximately a month and a half later, Victim disclosed to Aunt she had been sexually abused by Appellant during a camping trip they jointly went on a few years earlier. (Tr. pp. 88-90; p. 108; p. 113; p. 120). In response, Aunt immediately notified the Department of Social Services of the disclosure, and that agency quickly commenced an investigation into the new allegations in conjunction with the Pickens County Sheriff’s Office. (Tr. p. 108; pp. 120-121; p. 126).

During the investigation, Detective J.B. Kelley, a highly-experienced investigator in the Pickens County Sheriff’s Office’s special victims unit, referred Victim to the Julie Valentine Center, a child abuse and sexual assault recovery center, for a forensic interview. (Tr. pp. 138-139; p. 161; p. 205). Thereafter, on November 24, 2014, Robin Smith, a licensed counselor at the center, interviewed Victim about the allegations, and Victim again disclosed Appellant sexually abused her during a camping trip. (Tr. pp. 161-163; pp. 165-166).

As his investigation into the reported sexual abuse continued, Detective Kelley attempted to locate Appellant to speak with him about the allegations but was unable to get into contact with him despite leaving phone messages for Appellant. (Tr. pp. 126-127). Ultimately though,

¹ Victim’s uncle was her mother’s brother, and Victim’s aunt was married to her uncle. (Tr. p. 105; p. 116).

the detective discovered Appellant had a scheduled court appearance on December 17, 2014, located Appellant at the courthouse on that date, and spoke with him about the allegations at that time. (Tr. pp. 127-131; p. 133). During their brief conversation, Appellant readily acknowledged he went on a camping trip with Victim in 2012.² (Tr. pp. 132-133). However, Appellant claimed he never entered Victim's tent during the trip and insisted he stayed up the entire night drinking. (Tr. p. 140).

Shortly after speaking with Appellant, Detective Kelley obtained an arrest warrant for Appellant in connection to the sexual abuse. (Tr. p. 139). Thereafter, on December 31, 2014, Deputy Adam McJunkin of the Pickens County Sheriff's Office tracked Appellant through an anonymous tip and responded to a specific residence identified by the tipster to make the arrest. (Tr. pp. 146-147). Upon arriving, Deputy McJunkin knocked on the residence's front door but received no response. (Tr. pp. 146-147). He then went around to the back door and knocked on it, which resulted in the door opening slightly. (Tr. p. 147). At that point, he observed cigarette smoke inside the home and announced his presence, and a woman responded to the door. (Tr. p. 147). He then entered the residence after speaking with the woman, called out for Appellant by name, and received no response. (Tr. p. 147). Despite receiving no response, Deputy McJunkin continued to look through the home and found Appellant hiding underneath a bed in a bedroom. (Tr. p. 147). He then arrested Appellant after Appellant came out from his hiding spot and surrendered. (Tr. pp. 147-148).

Subsequently, Appellant was indicted for first-degree criminal sexual conduct with a minor, and he proceeded forward to trial. (Tr. pp. 6-7; Indictment). During trial, Victim testified about the incident, stated Appellant digitally penetrated her while she was sleeping in a tent

² Appellant was advised of and waived his rights before speaking with the detective. (Tr. pp. 128-130).

during a summer camping trip approximately four years earlier, identified Appellant in the courtroom as her abuser, and indicated Appellant told her not to reveal what had occurred to anyone else, which she did not do until she was living in a safe environment at her aunt and uncle's house. (Tr. pp. 86-94; p. 96; p. 103). Furthermore, Victim recounted Appellant revealed the sexual abuse to Mother on one occasion without Mother taking any action, and she noted Appellant and Mother talked about sex and engaged in sexual intercourse in front of her and her brothers on different occasions. (Tr. pp. 92-93).

In addition to Victim's testimony, Aunt confirmed Victim disclosed the sexual abuse to her after moving into her home, and both Aunt and Uncle indicated Victim was experiencing panic attacks, having nightmares, and urinating and defecating on herself after she moved in with them. (Tr. pp. 107-109; p. 113; pp. 117-118). Furthermore, the law enforcement officers and other personnel involved in the investigation into the sexual abuse testified about the details of the investigation that led to Appellant's arrest, and Deputy McJunkin specifically discussed Appellant's efforts to hide when he came to arrest him. (Tr. pp. 119-121; pp. 125-140; pp. 146-148). Additionally, Smith testified about her interview of Victim, and a recording of the forensic interview was admitted into evidence and played for the jury. (Tr. pp. 163-167). Likewise, Victoria Tate, a child therapist and expert in child sexual abuse counseling and treatment, testified about her treatment of Victim following the disclosure of the abuse and identified the various trauma symptoms exhibited by Victim, which included signs of anxiety, bouts of excessive crying, high levels of sexual distress, difficulty sleeping, nightmares, depression, and post-traumatic issues. (Tr. pp. 172-185). Furthermore, Dr. Kathy Waggett, a licensed physician and expert in child psychiatry who also treated Victim after the incident, testified she diagnosed Victim with post-traumatic stress disorder based on the symptoms Victim was exhibiting, which

she characterized as consistent with a history of sexual abuse. (Tr. pp. 197-202). Finally, Shauna Galloway-Williams, the executive director of the Julie Valentine Center, testified as an expert in child abuse dynamics without objection and explained topics such as grooming and delayed disclosure to the jury. (Tr. pp. 205-220).

Following the presentation of that testimony and evidence, the solicitor rested the State's case, and the trial judge discussed Appellant's rights in regard to testifying before the jury during an in camera discussion. (Tr. p. 220; pp. 222-227). During the discussion, the solicitor noted Appellant had prior convictions for third-degree burglary and grand larceny, and Appellant confirmed he understood he could be impeached with those convictions. (Tr. p. 224). Nonetheless, Appellant decided to testify in his own defense. (Tr. p. 226).

Thereafter, Appellant took the witness stand and acknowledged to the jury he went on a camping trip in Pickens County at some point during the summer of 2012 along with Victim and a number of other adults and children. (Tr. pp. 234-235). He further acknowledged Victim was alone in a tent at some point on the night of the incident. (Tr. pp. 246-248). However, he insisted Victim's tent was not large enough for him to enter it, claimed he never went into the tent, denied inappropriately touching Victim, and asserted he spent the entire night fishing and talking with others.³ (Tr. pp. 248-249; p. 255). In addition to that testimony, Appellant openly acknowledged he had previously pled guilty to two counts of burglary and two counts of grand larceny. (Tr. p. 230; p. 264). Furthermore, in an effort to explain his attempt to hide from Deputy McJunkin prior to his arrest, Appellant claimed he was hiding under the bed simply because he was serving a probationary sentence as a result of his prior convictions at the time and had recently failed a drug test by smoking marijuana. (Tr. pp. 231-232; p. 262).

³ Inconsistent with his earlier claim to Detective Kelley of spending the entire night drinking, Appellant further insisted he did not drink to excess on the night of the incident. (Tr. p. 251).

At the conclusion of his testimony, Appellant offered the testimony of several witnesses who also allegedly went on the camping trip with him and Victim. (Tr. pp. 268-299; pp. 306-313). Regarding that testimony, Pamela Aiken, who identified Appellant as her daughter's ex-husband's cousin, indicated she was on the trip, asserted she never saw Appellant go completely into Victim's tent on the night of the incident, and claimed she was certain she kept her eyes on Appellant the entire night except for when she went into Victim's tent with one of Victim's brothers. (Tr. pp. 268-276; p. 278). Similarly, Stephen Cain, who identified himself as Appellant's brother-in-law, stated he was also on the camping trip and claimed he never saw Appellant enter Victim's tent. (Tr. pp. 279-285). However, he indicated he did not keep watch over Appellant the entire night and acknowledged he went to sleep at some point in time, which prevented him from being able to confirm Appellant did not go into Victim's tent after that point. (Tr. p. 286; p. 288). Likewise, Robert Galloway, who identified himself as Appellant's cousin, stated he also went on the camping trip and insisted he never saw Appellant go into Victim's tent, which he described as being roughly five feet by six feet in size. (Tr. pp. 289-296). However, he acknowledged he did not watch Appellant the entire evening and confirmed Victim was alone in the tent at some point during the night. (Tr. pp. 298-299). Finally, Cain's son, who was ten years old at the time of trial, testified he was also on the camping trip and claimed he never saw Appellant enter Victim's tent except when Appellant went to put Victim's brother to bed. (Tr. pp. 306-311). However, Cain's son further acknowledged he personally was not inside Victim's tent throughout the entire night. (Tr. p. 313).

Subsequently, the defense rested, and the trial judge noted he had provided both the solicitor and defense counsel with a printed copy of his proposed jury instructions. (Tr. p. 313; p. 315). The trial judge then asked the parties if they had any requests for additional jury

instructions. (Tr. p. 315). In response to the query, defense counsel asserted: “No. Nothing, Your Honor.” (Tr. p. 315). At that point, the parties proceeded to present their closing arguments to the jury. (Tr. pp. 319-352).

During his closing argument, defense counsel indicated to the jury he personally believed Victim was wrong and inaccurate in regard to the sexual abuse, asserted he did not personally believe Appellant committed the indicted offense, and informed the jurors they should not believe Appellant committed the offense either. (Tr. p. 323; p. 334). Conversely, during her closing argument, the solicitor argued to the jury Appellant sexually abused Victim on the camping trip and discussed the evidence establishing Appellant’s guilt while pointing out the inconsistencies in the testimony offered in Appellant’s defense. (Tr. pp. 335-348). Additionally, the solicitor noted Appellant personally brought up a failed drug test during his testimony and indicated it was possible Appellant may have been on drugs at the time of the incident. (Tr. pp. 348-349). Furthermore, the solicitor reminded the jury Appellant had a prior criminal record and indicated Appellant was not credible in light of his willingness to engage in criminal behavior in the past. (Tr. p. 349). Specifically, the solicitor—without objection—argued:

[Y]ou know, I think it’s interesting that [Appellant] brought up the part about him failing a drug test with probation. I mean, who’s to say he wasn’t on drugs at the time this happened. I mean, gosh, who -- who are we looking at here? Let’s talk about the fact that he’s had a prior record. He’s had two grand larcenies, two burglaries. So if he’s willing to break in somewhere, take something that’s over \$2,000 -- that’s the definition of grand larceny. It’s got to be over two grand. Then why in the world would he feel the need to tell the truth today if he’s willing to do those things?

Now, I submit to you that he is not credible. He is not a credible person, and he is not to be believed.

(Tr. pp. 348-349).

Following the closing arguments, the trial judge instructed the jurors on the applicable law.⁴ (Tr. pp. 353-362). During the jury charge, the trial judge instructed the jury the State had the burden of proof, Appellant was presumed to be innocent, and Appellant could only be convicted if his guilt was established beyond a reasonable doubt. (Tr. p. 355). Furthermore, the trial judge thoroughly explained reasonable doubt for the jury, discussed the evaluation of witness testimony, and defined the elements of first-degree criminal sexual conduct with a minor. (Tr. pp. 355-360). However, the trial judge did not present any instructions regarding the evidence of Appellant's prior convictions. (Tr. pp. 353-362).

Thereafter, at the conclusion of the trial judge's jury charge, the trial judge inquired of the parties if there were any objections or exceptions to his instructions. (Tr. p. 362). At that point, defense counsel indicated there was "one issue [he]'d like to present to the Court and ask probably in the form of an objection and then a curative charge." (Tr. p. 363). Regarding that issue, defense counsel indicated the solicitor referenced Appellant's prior record during her closing argument while conceding she was entitled to do so. (Tr. p. 363). However, defense counsel asserted he "understood the solicitor to say that that evidence and prior record could be proof of this crime" and claimed he believed the solicitor "said something to the effect if [Appellant] would commit a burglary and a grand larceny, something to the effect, well, he certainly would do this."⁵ (Tr. p. 363). Based on that alleged comment from the solicitor, defense counsel requested the trial judge present a "curative charge" stating Appellant's record was not to be considered as proof of the charged crime. (Tr. p. 363). Following defense

⁴ At the outset of his jury charge, the trial noted to the jurors he was reading the instruction to them verbatim from a printed copy of the charge. (Tr. p. 353).

⁵ Notably, defense counsel's claims regarding the solicitor's closing argument were plainly and clearly incorrect as the solicitor solely asked the jurors to consider the evidence of Appellant's prior convictions in connection to Appellant's credibility. (Tr. pp. 348-349).

counsel's remarks, the trial judge indicated he agreed with the objection and believed the argument identified by defense counsel was an improper argument. (Tr. p. 363). However, the trial judge noted a contemporaneous objection was required to preserve the issue with the solicitor's argument and indicated he could not give a curative instruction in light of the untimeliness of defense counsel's objection. (Tr. p. 364). Defense counsel then indicated he also objected to the solicitor's argument regarding Appellant's drug usage without identifying a basis for his objection, and the trial judge overruled that objection as well. (Tr. p. 364).

Subsequently, at the conclusion of trial, the jury convicted Appellant as indicted. (Tr. p. 368). Following the verdict, the trial judge sentenced Appellant to a twenty-five-year term of imprisonment. (Tr. p. 380).

ARGUMENT

Assuming defense counsel made a proper request for a limiting instruction regarding prior conviction evidence during trial, any error that could have resulted from the trial judge's failure to present such a limiting instruction to the jury was entirely harmless under the particular circumstances of Appellant's case because the jury was never asked to consider the evidence of Appellant's prior convictions for any purpose other than for the purpose of impeachment, the jury could not have logically found Appellant's prior convictions for burglary and grand larceny constituted substantive evidence of Appellant's guilt for the strikingly different offense of first-degree criminal sexual conduct with a minor, and the evidence of Appellant's guilt presented during trial was abundant and compelling.

Appellant contends the trial judge committed reversible error by failing to present a limiting instruction to the jury in regard to the limited purpose for which the prior conviction evidence admitted during trial could be considered. In support of that contention, Appellant maintains the trial judge erroneously and incorrectly ruled he could not give a "normal, proper, and standard jury instruction" indicating prior conviction evidence could only be considered for impeachment purposes based on defense counsel's failure to contemporaneously object to the remarks made by the solicitor during her closing argument.⁶ Assuming defense counsel's

⁶ In arguing a limiting instruction should have been presented during his trial, Appellant also appears to be contending his appellate arguments regarding such an instruction are applicable to the testimony presented regarding his use of illegal drugs. Importantly though, the testimony regarding Appellant's use of illegal drugs was **not** evidence of a prior conviction admitted for the limited purpose of impeachment. Instead, Appellant personally elected to admit evidence of his prior drug usage without restriction or limitation in an effort to explain why he hid from Deputy McJunkin prior to his arrest. Under those circumstances, the solicitor could properly explore that evidence and the inferences raised by that evidence without restriction, and that particular evidence simply had no connection to the issue raised regarding the trial judge's failure to give a limiting instruction on the prior conviction evidence. See State v. Spinks, 260 S.C. 404, 407-408, 196 S.E.2d 313, 314-315 (1973) (holding the solicitor was permitted to fully explore evidence related to Spinks prior bad acts when Spinks himself offered evidence related to those acts "without any limitation or statement as to its purpose"); see also State v. Warren, 341 S.C. 349, 351, 534 S.E.2d 687, 688 (2000) (holding the trial judge did not err by refusing to give a limiting instruction related to prior bad act evidence where that evidence was not presented by the State and, instead, was largely elicited through defense counsel's questioning); State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999) ("[W]hen a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the

arguments during trial were sufficient to constitute a proper request for a limiting instruction such that the issue was properly preserved for appellate review, any error resulting from the trial judge's failure to present a limiting instruction to the jury was entirely harmless under the circumstances of Appellant's case.⁷ Specifically, the absence of a limiting instruction could not have had any impact on the outcome of Appellant's trial in light of the fact the jury was not asked at any point during trial to consider the evidence of Appellant's prior convictions for any purpose other than impeachment, the jury could not have logically found Appellant's prior convictions for crimes strikingly different from the charged offense constituted substantive

latter evidence would have been incompetent or irrelevant had it been offered initially.”); see generally *State v. Pitts*, 256 S.C. 420, 428, 182 S.E.2d 738, 742 (1971) (recognizing a solicitor is permitted to comment on the evidence adduced during trial and the inferences he or she believes should be drawn from it).

⁷ Arguably, defense counsel failed to preserve any issue related to a limiting instruction on prior conviction evidence because, in light of the manner in which the issue was raised, the trial judge appeared to have interpreted the issue being raised by defense counsel during trial as a non-contemporaneous objection to the solicitor's closing argument instead of a request for an additional jury instruction pursuant to the requirements of the South Carolina Rules of Criminal Procedure. See *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (instructing an issue must be raised in a sufficiently specific manner to call attention to the **exact error** to the trial court in order for the issue to be properly preserved for appellate review); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (“[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error **so it can be reasonably understood by the trial judge.**” (emphasis added)); see also *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (“[I]t must be clear that the argument has been presented on that ground.”); see generally Rule 20(b), SCRCrimP (“Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection.”); *State v. Black*, 319 S.C. 515, 521-522, 562 S.E.2d 311, 315 (Ct. App. 1995) (finding Black's issue with the trial judge's failure to take action in response to an allegedly improper closing argument was not properly preserved for appellate review due to the fact Black's trial objection to the argument was not timely made since “he waited until after the charge and after the jury had retired to deliberate before stating the basis for his objection and motion for a mistrial”); cf. *State v. Vaughn*, 124 Idaho 576, 581, 861 P.2d 1241, 1246 (Idaho Ct. App. 1993) (“Vaughn's request for a limiting instruction, made after the state and the defense had presented their evidence and at a time the court and counsel were preparing the final jury instructions, came too late[.]”).

evidence of Appellant's guilt, and the evidence of Appellant's guilt presented during trial was abundant and compelling. Accordingly, Appellant's conviction should be affirmed.

Once an error is discovered on appeal, the appellate court must then determine whether the error was harmless. See State v. Northcutt, 372 S.C. 207, 217, 641 S.E.2d 873, 878 (2007) (“Determining the trial judge committed error is the first step of our analysis. Next we must determine whether the error was harmless.”). Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). The question of whether an error is harmless is necessarily dependent on the particular circumstances of each individual case. State v. Salley, 398 S.C. 160, 172, 727 S.E.2d 740, 746 (2012). Importantly, “[n]o definite rule of law governs this finding; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case.” State v. Reeves, 301 S.C. 191, 193-194, 391 S.E.2d 241, 243 (1990); see State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (recognizing an error is harmless “if its impact is minimal in the context of the entire record”); see also United States v. Hastings, 461 U.S. 499, 509 (1983) (“[T]he [United States Supreme] Court has consistently made clear it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations[.]”). Ultimately, if an error did not contribute to the verdict, that error is harmless beyond a reasonable doubt, and an appellate court will not reverse on appeal. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008); see United States v. Mechanik, 475 U.S. 66, 72 (1986) (“The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. . . . These

societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.” (citations omitted)).

In the case at bar, even assuming defense counsel’s belated—and inaccurate—objection to the solicitor’s closing argument remarks was somehow sufficient to constitute a timely request for a curative instruction or could somehow be construed as a timely and proper request for an additional jury charge pursuant to the mandates of South Carolina’s criminal procedure rules, there can be no question a jury instruction indicating prior conviction evidence admitted for impeachment purposes can only be considered for those limited purposes and not as substantive evidence of guilt for the charged crime constitutes a correct statement of the law in our state. See State v. Smalls, 260 S.C. 44, 47, 194 S.E.2d 188, 189 (1973) (“[W]here the evidence of other crimes is admissible only to impeach an accused when he testified, the court, particularly on request, should instruct the jury that such evidence shall be considered by the jury only on the question of the credibility of the accused, and not to show his guilt.”). However, notwithstanding the fact such a limiting instruction accurately reflects the law, any error that possibly could have resulted from the trial judge’s decision not to give such an instruction was entirely harmless under the particular circumstances of Appellant’s case.

Initially, that is true because the evidence of Appellant’s guilt presented during trial was abundant and compelling. Looking to that evidence, Victim specifically identified Appellant as the person who sexually abused her and consistently indicated the sexual abuse occurred on a camping trip from the moment she initially disclosed it through to when she testified about it during trial. Moreover, Appellant corroborated Victim’s testimony to some extent by

acknowledging he went on the camping trip with her, and, as Victim had been removed from the home Mother shared with Appellant prior to her disclosure of the abuse, there was no obvious or logical reason for Victim, who was nine years old at that time, to fabricate a claim of abuse involving Appellant that would be apparent from the record. Additionally, beyond the testimony presented, evidence was introduced establishing Victim was exhibiting signs of rape trauma subsequent to the incident, which constituted substantive evidence of the charged crime. See State v. Alexander, 303 S.C. 377, 381, 401 S.E.2d 146, 149 (1991) (holding rape trauma evidence is admissible to prove the elements of criminal sexual conduct because, when present, it tends to establish the offense has occurred); see also State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) (“The purpose of rape trauma evidence is to prove the elements of criminal sexual conduct since such evidence may make it more or less probable the offense occurred.”). Furthermore, testimony was presented establishing Appellant attempted to hide from Deputy McJunkin to avoid apprehension and arrest, which constituted evidence of his guilt, and, although Appellant denied sexually abusing Victim, his credibility was impeached by the evidence of his prior convictions. See State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) (“As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt.”). In light of the abundant and compelling evidence of guilt presented during trial, any harm that could have resulted from the trial judge’s failure to give the limiting instruction was greatly minimized and rendered harmless. See State v. Tench, 353 S.C. 531, 537, 579 S.E.2d 314, 317 (2003) (“Given the abundant evidence of Tench’s guilt, we find any error in admission of the seized items clearly harmless beyond a reasonable doubt.”).

Additionally, any error resulting from the trial judge's decision not to give the limiting instruction was further rendered harmless due to the fact the jury was **never** asked to consider the prior conviction evidence for any purpose other than as impeachment evidence adversely reflecting on Appellant's credibility. Critically, despite defense counsel's claim to the contrary during trial, the solicitor did **not** ask the jury to consider the prior conviction evidence as evidence of Appellant's guilt for the indicted offense of first-degree criminal sexual conduct with a minor. Instead, consistent with the sole purpose for which the evidence was admitted, the solicitor noted Appellant had previously been convicted of burglary and grand larceny during her closing argument and, based on those prior convictions, argued to the jury Appellant could not be trusted to tell the truth during his testimony and should not be found to be credible. Thus, the solicitor properly identified to the jury the correct purpose for which the prior conviction evidence was admitted during trial and solely asked the jurors to consider that evidence when evaluating the credibility of Appellant's testimony. In light of the fact it was made clear to the jury the prior conviction evidence was admitted for impeachment purposes and the jury was only asked to consider the prior conviction evidence in connection to Appellant's credibility without ever being asked to consider it for any impermissible purpose at any point during trial, it was unlikely the jury would have used that evidence in an improper manner, and the absence of a limiting instruction was entirely harmless under those circumstances. See State v. Arther, 290 S.C. 291, 296-297, 350 S.E.2d 187, 190 (1986) (holding the admission of several references to Arther's post-arrest silence was harmless where the references were not exploited during trial, such as by the solicitor asking the jury to use those references for an improper purpose); see generally Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974) (instructing courts "should not lightly infer" a jury will draw the most damaging meaning from closing argument remarks).

Finally and most importantly, outside of the impeachment value inherent in the prior convictions for burglary and grand larceny, Appellant's prior convictions had no logical connection to a charge of first-degree criminal sexual conduct with a minor. Cf. Haselden, 353 S.C. at 196, 577 S.E.2d at 448 (“Evidence Haselden had a tendency to golf, fish, or go to his mother's house is simply not evidence which would tend to prove he had a tendency toward abusing and murdering his two-year old son.”). Critically, the fact Appellant had previously committed burglaries and stolen the property of others on earlier occasions supported no conclusion whatsoever Appellant would have a propensity to digitally penetrate the vagina of a young child. See State v. Hebert, 158 N.H. 306, 317, 965 A.2d 1059, 1067-1068 (N.H. 2009) (“[W]e conclude that any improper inference that the jury drew from the defendant's habitual offender conviction was inconsequential because that conviction was significantly different from the assault offense for which the defendant was charged. The jury learned that the habitual offender conviction was based upon multiple motor vehicle violations. Thus, while the jury may have inferred that the defendant had contempt for motor vehicle laws or was an unsafe driver, we are convinced that the jury would not equate such violations with a propensity to intentionally commit a violent act against another, the nature of the charged offense.”). Simply put, there is no adage—old or otherwise—once a burglar and thief, always a child rapist. In light of the fact there was no logical connection between Appellant's prior convictions and the charged crime aside from their connection to the issue of credibility, the jurors who decided Appellant's case could not have logically concluded—and were not reasonably likely to have concluded—Appellant's prior convictions constituted substantive evidence of his guilt for first-degree criminal sexual conduct with a minor, and, thus, any error resulting from absence of a limiting instruction on prior conviction evidence was entirely harmless under those circumstances. Cf.

State v. Brown, 296 S.C. 191, 193, 371 S.E.2d 523, 525 (1988) (finding the failure to give a limiting instruction regarding prior conviction evidence especially prejudicial because Brown's prior conviction for armed robbery was the same offense for which he was tried in conjunction with a capital murder charge); State v. Staley, 294 S.C. 451, 452, 365 S.E.2d 729, 729 (1988) ("Nowhere in the judge's charge does he convey to the jury the limited use of evidence of prior convictions for impeachment only. This failure to charge was especially damaging **because appellant was on trial for the same offense for which he had previously been convicted.**" (emphasis added)).

In conclusion, as the jury was never asked to use Appellant's prior convictions for any purpose other than as impeachment evidence, the jury could not have logically considered Appellant's prior convictions to constitute substantive evidence of his guilt in light of the strikingly different nature of those offenses from the nature of the charged offense, and the evidence of Appellant's guilt was abundant and compelling, any error that could have resulted from the failure of the trial judge to present a limiting instruction to the jury in regard to the prior conviction evidence could not have reasonably affected the outcome of trial and, therefore, was harmless under the particular and unique circumstances of Appellant's case. See State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) ("Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it 'could not reasonably have affected the result of the trial.' " (citation omitted)); see also Calderon v. California, 525 U.S. 141, 146 (1998) ("The social costs of retrial or resentencing are significant. . . . The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court

must find that the defendant was actually prejudiced by the error.” (citations omitted)); cf. State v. Brown, 344 S.C. 70, 76-77, 543 S.E.2d 552, 555-556 (2001) (“Even if appellant is not held to have opened the door to this testimony, we find its admission was not so prejudicial as to require reversal. Whatever negative connotation appellant’s gambling may have had, it was not mentioned again during the trial and did not imply any propensity on appellant’s part to commit the violent crime with which he was charged. We find this evidence had minimal impact in the context of the entire record and any error in its admission was harmless beyond a reasonable doubt.”). Accordingly, Appellant’s conviction should be affirmed.

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

MARK R. FARTHING
Assistant Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY: 

Mark R. Farthing

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

ATTORNEYS FOR RESPONDENT

November 29, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
Honorable Thomas A. Russo, Circuit Court Judge
Appellate Case No. 2016-001652

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SC Court of Appeals

THE STATE,

Respondent,

vs.

JACOB MICHAEL HENDRICKS,

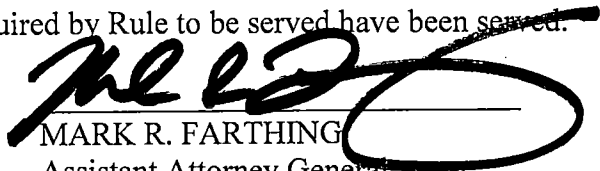
Appellant.

PROOF OF SERVICE

I, Mark R. Farthing, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

Robert M. Dudek, Esq.
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 29th day of November, 2017.


MARK R. FARTHING
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

November 29, 2017

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SC Court of Appeals

Robert M. Dudek, Esq.
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Jacob Michael Hendricks – Appellate Case No. 2016-001652

Dear Mr. Dudek:

I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: ~~Honorable Jenny A. Kitchings~~-(original enclosed)
Victim Services

P

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Assistant Attorney General Mark R. Farthing
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211