

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to York County

Honorable R. Lawton McIntosh, Circuit Court Judge

LEONARD E. JENKINS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001971

APPENDIX

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1 STATE OF SOUTH CAROLINA) Court of General Sessions
2 COUNTY OF YORK) 2012-GS-46-02101
3
4 _____)
5 State of South Carolina) Transcript of Record
6 vs.) VOLUME 1
7 Leonard Jenkins)
8 _____)

8 Date: August 13, 2013
9
10

11 BEFORE: The Honorable Donald Hocker
12

13
14 APPEARANCES:

15 Jennifer Desch, Assistant Solicitor
16 Attorney for the State.

17 Daniel Hall, Assistant Public Defender
18 Attorney for the Defendant.

19 Tracy Childers,
20 Court Clerk.

21 Phyllis M. Campo, RPR
22 Court Reporter.
23
24
25

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1 (Whereupon, STATE EXH. 1, CD/DVD, was
2 marked for identification.)

3 (Whereupon, STATE EXH. 2, Diagram of
4 Female Child, was marked for identification.)

5 THE JUDGE: We are on the record. This in
6 the matter of the state of South Carolina versus
7 Leonard Eugene Jenkins. Let the record reflect
8 that I had a pre-trial conference with the
9 attorneys and we just need to put those issues
10 on the record.

11 The defense has filed a motion in limine.
12 There are seven parts to that motion. Mr. Hall,
13 I will turn the record over to you and let you
14 put on the record the points of your motion and
15 then, Solicitor, if you will acknowledge what we
16 discussed back in chambers.

17 MS. DESCH: Yes, sir.

18 MR. HALL: Thank you, your Honor. May it
19 please the Court. On our motion in limine, our
20 first motion was to determine if the State has
21 complied with Rule 5 in Brady. They have
22 assured me that they have complied with the
23 rule, and we are satisfied with the points that
24 they have.

25 Number two, motion to determine the prior

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1 record of the defendant the State intended to
2 introduce should the defendant chose to testify,
3 and I will ask that Ms. Desch respond to that.

4 MS. DESCH: Thank you, your Honor. Your
5 Honor, as we discussed in chambers, there is a
6 2001 conviction for ABHAN, which was reduced
7 from a lewd act back in 2001. That is outside
8 the 10-year limit. We would not intend to
9 impeach him on that unless the door was opened.
10 Unless we got into some issues during his
11 testimony that opened the door, then we would
12 ask to do that. We have provided the case
13 summary from 2001 and the sentencing sheets and
14 the conviction to the defense.

15 The rest of his record, for the most part,
16 is outside the ten year and would not be
17 appropriate for impeachment.

18 THE JUDGE: Thank you, Solicitor.

19 MR. HALL: Thank you. Number three is a
20 motion for a list of witnesses with the criminal
21 history in the State's and law enforcement
22 witnesses. They have provided the rap sheet of
23 one of the witnesses they have given me. They
24 have not provided the other. I guess we will
25 deal with that. I think she potentially would

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1 be a witness on the impeachment issue as far as
2 former conviction, and I guess we will deal with
3 that if we get to that particular point.

4 MS. DESCH: Yes, sir.

5 MR. HALL: Number four, the motion to
6 determine the existence and admissibility of
7 prior bad acts the State may intend to use under
8 Rule 404(b) or under State v. Lyles. I believe
9 the State had said in chambers that at this
10 point, again, unless the door was opened, they
11 did not have any Lyle or bad acts.

12 MS. DESCH: Correct.

13 MR. HALL: I have number six, but it
14 should be number five.

15 THE JUDGE: Right.

16 MR. HALL: Motion to determine existence
17 and admissibility of any and all statements made
18 by the defendant which the State intends to use
19 for trial.

20 Again, in chambers the State indicated that,
21 and based on my review of the case, that he did
22 not make any statements pertaining to these
23 charges.

24 THE JUDGE: Ms. Desch.

25 MS. DESCH: Yes, your Honor, that is true.

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1 There is no statements that were made regarding
2 this particular case.

3 Your Honor, I did want to note for the
4 record for your background. There are two other
5 charges with a different victim by the name of
6 Minor2 . She is a relative of the wife of
7 the defendant. The investigation began with
8 that allegation. The statements were made
9 regarding that case. The only reason I am
10 bringing them up is there were no statements
11 regarding this. The State does not intend to
12 get into anything else, but if the defense were
13 to bring out that there were original denials,
14 or however that is brought out, I just want the
15 Court to be aware that we don't intend to get
16 into any of that. And really, the only
17 statement that was made in that was a denial of
18 it and some family issues. There is nothing
19 probative for the State, but we are trying very
20 hard to keep it with this particular case alone.

21 THE JUDGE: Okay. I appreciate that.

22 MR. HALL: Your Honor, lastly, again, I
23 have labeled it number seven. It should be
24 number six. Sort of just a notice, motion in
25 limine, based on recent case State vs. Kromah,

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1 motion to instruct the state to not elicit from
2 the forensic interviewer or Detective Carson any
3 of these kind of statements. I basically copied
4 what the Supreme Court said was improper during
5 this type of trial. That one, that the child
6 was told to be truthful, a direct opinion as the
7 child's veracity or tendency to tell the truth,
8 any statement that indirectly vouches for
9 child's believability such as stating the
10 interviewer believes the child's allegations in
11 the current matter; or lastly, an opinion from
12 the interviewer that the child's behavior
13 indicated that the child was telling the truth.
14 All those go to the detective, or in this case
15 the forensic interviewer/detective, being able
16 to vouch for the truthfulness or what he
17 believes to be the truth on this child's
18 statement.

19 Clearly, those are improper, and we ask
20 that he not make any of those kind of statements
21 and the State not elicit any answers like that
22 through their questioning.

23 Again, that's the motion in limine and we
24 certainly will deal with that at trial.

25 MS. DESCH: The State understands that

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1 the case is pretty clear on vouching for
2 credibility and we have gone over that with
3 Detective Neely, and we do not intend to elicit
4 that.

5 THE JUDGE: So it shouldn't be an issue.
6 Very good.

7 MR. HALL: I state at this point, there
8 was a video-recorded interview from the
9 detective with the 13-year old child. We
10 certainly don't have any objections if the state
11 intends or wishes to introduce that. So if we
12 get to that point and they want to introduce
13 that video of the interview then it would be
14 without objection from the defense.

15 THE JUDGE: Okay. Thank you very much.
16 Anything else in pre-trial we need to take up on
17 the record, Solicitor?

18 MS. DESCH: Your Honor, if I may, I just
19 wanted to reiterate this is going forward on
20 amended Indictment 2012-GS-46-02101. That was
21 amended after reviewing it with defense counsel
22 at a prior attempt of calling the case.
23 Originally, the State had put in minor child, 12
24 years old, with the date of birth, to keep the
25 child's name out of public record. I did amend

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1 that at the request of the defense to include
2 Minor1 , her name, date of birth, to make it
3 clear which case we were going forward on.

4 The defense has indicated to me that the
5 defendant does not wish to be arraigned on those
6 changes and we would just waive arraignment and
7 proceed on the amended indictment.

8 THE JUDGE: Is that correct, Mr. Hall?

9 MR. HALL: Yes, your Honor, that's
10 correct.

11 THE JUDGE: Very good. Thank you.

12 MS. DESCH: Your Honor, also, Katrina Babb
13 is the mother of Minor1 . They are both here
14 in the courtroom today. They are potential
15 witnesses. I just wanted to note for the record
16 that she is the only supporting witness for the
17 victim, and I ask that she be allowed to stay
18 with her daughter, if the Court were inclined to
19 do so.

20 THE JUDGE: Any objection to that,
21 Mr. Hall?

22 MR. HALL: No objection, your Honor.

23 THE JUDGE: Thank you very much. Without
24 objection, she can stay.

25 MS. DESCH: Thank you, your Honor.

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1 THE JUDGE: How long will it take if we
2 notify the Clerk's office that we are ready for
3 the jury panel? How long will that take?

4 THE BAILIFF: No more than 15 minutes as
5 they are all there.

6 THE JUDGE: Okay. Let's do this. I want
7 to kind of review, again, the requested voir
8 dire with my standard voir dire. So let's not
9 summon the panel quite yet. Let's take about a
10 10-minute break. I will come back in and then
11 we will request that the panel be brought up.
12 Thank you. Everybody be at ease.

13 (Court in recess at 10:01 a.m.)

14 (Whereupon, Prospective jurors entering
15 courtroom at 10:01 a.m.)

16 THE JUDGE: Good morning. I hope everyone
17 had a good afternoon and evening yesterday. I
18 told you yesterday that even though you were
19 being excused we were going to work, and we
20 worked all day yesterday up until about 5
21 o'clock.

22 Now, today, it is your turn to do some work.
23 We are going to start a trial in just a little
24 bit. So if you are selected or fortunate enough
25 to be selected on the jury then you will be

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1 doing some work today along with us.

2 Before we start into this case, I would
3 like to take this opportunity to introduce you
4 to some folks that are in this courtroom that
5 play a vital and very important role in this
6 process. The judge has a small part in all of
7 this. These folks are the ones that really make
8 things happen. I am going to try, and hopefully
9 won't mess up anybody's name, and get everybody
10 and introduce everybody to you.

11 We have some bailiffs, Mike Hampton over
12 here. Phyllis Campo is our court reporter. She
13 takes down everything that is said and done in
14 this proceeding. It is very important to keep
15 an accurate record. We have two fine ladies
16 from the Clerk's office. We have Cindy Meek and
17 Tracy Childers seated here. We have two law
18 enforcement personnel. We have Ron Outlaw and
19 Michael Robinson. At the back, we have two
20 other bailiffs, John Comber and Charles Dunlap.
21 Lastly, but not least, we have some excellent
22 attorneys. We have two attorneys with the
23 solicitor's office who will be prosecuting this
24 case, Erin Joyner and Jen Desch. Then Dan Hall
25 is from the Public Defender's office and will be

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1 defending this case.

2 I would mention that when we have
3 excellent attorneys, it makes the job of the
4 judge not easy but easier. So we have three
5 excellent attorneys. My job is going to be made
6 easier by virtue of these excellent attorneys.
7 Hopefully, I have covered everybody here.

8 Now, let me explain to you this is a
9 criminal case. There has been what is called an
10 indictment. This is merely a piece of paper.
11 It is not evidence. It is just the mechanism in
12 order to get a case to trial.

13 I am going to ask Mr. Jenkins if you would
14 stand please, sir, and I am going to publish the
15 indictment and explain a little bit more about
16 it in a moment.

17 The indictment states that the defendant,
18 Leonard Eugene Jenkins, a person over of the age
19 of 14 years, did in York County, South Carolina
20 during or about the month of May 2011 through on
21 or about the month of August 2011, willfully and
22 lewdly commit or attempt to commit a lewd and
23 lascivious act upon the body, or any part or
24 member thereof, of a child under the age of 16
25 years, to wit, by touching the vagina of a minor

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1 female child, Minor1 , whose date of birth is
2 , with the intent of arousing, appealing
3 to, or gratifying the lust or passions or sexual
4 desires of himself or of said child all in
5 violation of Section 16-15-140, South Carolina
6 Code of Laws, 1976, as amended.

7 Mr. Jenkins, you can take your seat,
8 please.

9 THE JUDGE: Now, ladies and gentlemen of
10 the jury panel, again, this is not evidence.
11 The State is still required -- and you will be
12 told this several times throughout this trial.
13 The State is required by law to prove each and
14 every element of this charge beyond a reasonable
15 doubt to you. So again, this indictment is just
16 merely the mechanism to get us where we are
17 today to start the trial.

18 Now, I will have to ask you several
19 questions to determine whether or not you are
20 qualified to sit on the jury in this particular
21 case. I will ask one of the clerks to swear you
22 in. If you will please stand.

23 (Jury panel being duly sworn.)

24 THE CLERK: Let the record show all
25 affirmed.

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1 THE JUDGE: Thank you, Madam Clerk. You
2 may have a seat.

3 Now, the same rules apply as they did
4 yesterday when we went through the general
5 qualification questions. If there is a
6 particular question that I ask you that you want
7 to respond to but you are reluctant to do it in
8 front of everyone here, then at the conclusion
9 of my questions I will mention that and you can
10 come down to the front and discuss that
11 particular question and response with me in the
12 presence of the court reporter. So just be sure
13 to keep a mental note of that particular
14 question that I ask and the response or concern
15 that you have. Fair enough?

16 Has anyone been related by blood or
17 marriage to either the defendant, Leonard Eugene
18 Jenkins, or to the alleged victim in this case,
19 Minor 1 ? If so, please stand.

20 Has anyone ever had a close personal or
21 social relationship with either the defendant,
22 Leonard Eugene Jenkins, or the alleged victim,
23 Minor 1 , in this case. If so, please stand.

24 I am going to provide you a list of
25 possible witnesses in this case. Those possible

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1 or potential witnesses that may testify in this
2 case are the following: Katrina Babb, Andrew
3 Mead, Pat Stajin, Minor1 , Detective Carson
4 Neely, Brandy Gibson Frierson.

5 Has anyone ever been related by blood or
6 marriage of any of the people I listed, or has
7 anyone ever had a close personal relationship or
8 social relationship with any of these people.
9 If so, please stand.

10 I have previously introduced to you the
11 attorneys in this case, the two solicitors, and
12 the one public defender. Has any member of the
13 jury panel ever been represented by any of the
14 attorneys involved in this case? If so, please
15 stand.

16 Is any member of the jury panel friends
17 with or associates with any person who has
18 worked for the York County Public Defender's
19 Office or any criminal defense attorney? If so,
20 please stand.

21 Has any member of the jury panel worked
22 for the York County Public Defender's Office or
23 any attorney engaged in criminal defense? If
24 so, please stand.

25 Is any member of the jury panel related by

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1 blood or marriage to, or close personal friends,
2 of any person who has now or ever been employed
3 by or volunteered with any city, county, state,
4 or federal law enforcement agency, or law
5 enforcement's victim witness assistance program?
6 If so, please stand.

7 Yes, sir. Your jury number and your name,
8 please.

9 PROSPECTIVE JUROR 113: Matthew Nicoll,
10 Number 113.

11 THE JUDGE: Yes, sir.

12 PROSPECTIVE JUROR 113: My cousin is
13 married to a retired Fort Mill police sergeant.

14 THE JUDGE: Would that affect your ability
15 to be fair and impartial to both the State and
16 the defendant in this case?

17 PROSPECTIVE JUROR 113: No, sir.

18 THE JUDGE: Thank you, sir, you can have a
19 seat.

20 PROSPECTIVE JUROR 8: Could you repeat the
21 question?

22 THE JUDGE: Could you stand, please,
23 ma'am. Your juror number and name.

24 PROSPECTIVE JUROR 8: Number 8, Charlene
25 Blanton.

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1 THE JUDGE: Yes, ma'am.

2 PROSPECTIVE JUROR 8: Could you repeat the
3 question?

4 THE JUDGE: Is any member of the jury
5 panel related by blood or marriage to, or close
6 personal friends to, any person who is now or
7 has ever been employed by or volunteered with
8 any city, county, state, or federal law
9 enforcement agencies or law enforcement's victim
10 witness assistance programs?

11 PROSPECTIVE JUROR 8: I am related to a
12 retired York County deputy.

13 THE JUDGE: Okay. How are you related?

14 PROSPECTIVE JUROR 8: First cousin.

15 THE JUDGE: The fact that you are related
16 as first cousin to a retired individual of law
17 enforcement, would that affect your ability to
18 be fair and impartial to both the State and the
19 defendant in this case?

20 PROSPECTIVE JUROR 8: No, your Honor.

21 THE JUDGE: Thank you very much, ma'am.

22 Has any member of jury panel either
23 presently or in the past ever been employed by
24 or volunteer with any city, county, state, or
25 federal prosecutor's office, or prosecutor's

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1 victim witness assistance program? If is to,
2 please stand.

3 Is any member of the jury panel related by
4 blood or marriage to or close personal friends
5 with any person who is now or has ever been
6 employed by or volunteered with any city,
7 county, state, or federal prosecutor's office or
8 prosecutor's victim witness assistance program?
9 If so, please stand.

10 Has any member of the jury panel, either
11 presently or in the past, ever been employed by
12 or volunteered with any city, county, state, or
13 federal law enforcement agency, or law
14 enforcement's victim witness assistance program?
15 If so, please stand.

16 Has anyone on the jury panel been related
17 by blood or marriage to, or ever had a close
18 personal social relationship with, any of the
19 attorneys involved in this case? If so, please
20 stand.

21 Has any member of the jury panel formed or
22 expressed an opinion about any issue or matter
23 involved in this case?

24 You are probably asking yourself, I don't
25 know anything about this case. But I'm required

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1 to ask you the question anyway.

2 I will repeat it again. Has any member of
3 the jury panel formed or expressed an opinion
4 about any issue or matter involved in this case?
5 If so, please stand.

6 Is any member of the jury panel aware of
7 by -- I'm sorry. Yes, ma'am. Your juror number
8 and your name, please.

9 PROSPECTIVE JUROR 212: 212, and I would
10 prefer to come up and tell you in person.

11 THE JUDGE: Okay. If you will do that at
12 the end.

13 PROSPECTIVE JUROR 212: Okay.

14 THE JUDGE: Thank you, ma'am.

15 Is any member of the jury panel aware of
16 any bias or prejudice toward either the State or
17 the defendant in this case? If so, please
18 stand.

19 Is there any member of the jury panel that
20 was a member of the grand jury which issued the
21 indictment in this case? If so, please stand.

22 Is there any member of the jury panel who
23 is a member of or a contributor to any group
24 which has as its primary concern the promotion
25 of law enforcement or victim's rights. These

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1 groups would include but not limited to MADD,
2 SADD, or CAVC, and that acronym stands for
3 Citizens Against Violent Crime? If so, please
4 stand.

5 Has any member of the jury panel or a
6 member of your family been a victim of a
7 sex-related crime? If so, please stand.

8 THE JUDGE: Now, if any of you would like
9 to discuss that with me at the very end of the
10 voir dire, then you just have a seat.
11 Otherwise, if you will -- well, everybody is
12 sitting down. Okay. All right.

13 Has any member of the jury panel, or a
14 member of your immediate family, been accused of
15 or convicted of a sex-related crime. If so,
16 please stand, or come down to the front at the
17 conclusion of the voir dire.

18 Has any member of the jury panel, or a
19 member of your immediate family, ever been
20 suspected of or investigated or arrested for an
21 offense of lewd act upon a minor for criminal
22 sexual conduct, incest, or other similar crime
23 or any crime against a child? If so, please
24 stand, or come down to the front at the
25 conclusion of the voir dire.

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1 Does any member of the jury panel have any
2 beliefs, religious or otherwise, that would
3 prevent you from rendering judgment against
4 another person? If so, please stand.

5 Does any member of the jury panel know of
6 any reason whatsoever why you should not serve
7 as a juror in this case with particular emphasis
8 being placed on your ability to be fair and
9 impartial to both the State and the Defendant?
10 If so, please stand.

11 Now, what I am going to do is ask the
12 bailiffs to assist those who want to come down
13 in front with the court reporter, the attorneys
14 present, and just stand in a line and we will
15 bring you down one at a time.

16 (Jurors forming line.)

17 THE JUDGE: Juror number.

18 PROSPECTIVE JUROR 8: Number 8, Charlene
19 Blanton.

20 THE JUDGE: Okay. And Ms. Blanton, what
21 do you need to tell me?

22 PROSPECTIVE JUROR 8: The relationship I
23 would have would be that my grandchildren, four,
24 five children were involved in a case where one
25 was a victim and three were witnesses in a trial

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1 against someone accused of lewd acts. He was
2 convicted.

3 THE JUDGE: Okay. The fact that your
4 grandchildren were involved in that case, would
5 that affect your ability to be fair and
6 impartial for the State and defense?

7 PROSPECTIVE JUROR 8: I feel like I could
8 judge unbiasedly. I do not feel it would --

9 THE JUDGE: Would not affect your ability?

10 PROSPECTIVE JUROR 8: It would not affect
11 my ability. I would have to divulge the
12 information.

13 THE JUDGE: Any additional questions from
14 the defense or the State?

15 Yes, ma'am, your number and name?

16 PROSPECTIVE JUROR 69: Number 69, Trina
17 Hill.

18 THE JUDGE: What do you need to tell us?

19 PROSPECTIVE JUROR 69: I have a first and
20 second cousin -- the second cousin was convicted
21 of a sexual crime and my first cousin, I don't
22 know if he was convicted, but he went to jail
23 for stepchildren, some kind of sex crime.

24 THE JUDGE: The fact that your two
25 cousins were involved in sex-related crimes,

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1 would that affect your ability to be fair and
2 impartial to the state and to the defense?

3 PROSPECTIVE JUROR 69: I don't know.

4 THE JUDGE: You don't know. Is there a
5 possibility that you could not be fair and
6 impartial?

7 PROSPECTIVE JUROR 69: If I say yes, what
8 will happen?

9 THE JUDGE: I am not going to tell you the
10 outcome. I need to know if you could be fair
11 and impartial to both the State and defense?

12 PROSPECTIVE JUROR 69: I could be fair.

13 THE JUDGE: And impartial? The fact that
14 your cousins were involved in these cases would
15 not have any bearing on your ability to be fair
16 and impartial?

17 PROSPECTIVE JUROR 69: It might.

18 THE JUDGE: It might have some affect?

19 PROSPECTIVE JUROR 69: Because they were
20 saying that they were innocent and they were
21 found guilty. He was saying he was innocent.

22 THE JUDGE: So you are telling me it could
23 affect your ability? Is that what you are
24 telling me? I am not trying to put words in
25 your mouth. I just need to know and these

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1 lawyers need to know.

2 PROSPECTIVE JUROR 69: I could be fair.

3 That's all I can say.

4 THE JUDGE: You can be fair and impartial
5 to the state and defense?

6 PROSPECTIVE JUROR 69: I can try to.

7 MR. HALL: We are satisfied with that.

8 THE JUDGE: Any additional questions from
9 the State?

10 MS. JOYNER: No.

11 THE JUDGE: You are going to try to be?

12 PROSPECTIVE JUROR 69: I can be fair.

13 THE JUDGE: All right. Have a seat.

14 Thank you, ma'am.

15 Your number and name?

16 PROSPECTIVE JUROR 121: 121 Brenna
17 Pavlinchak.

18 THE JUDGE: Spell your last name, please.

19 PROSPECTIVE JUROR 121:

20 P-A-V-L-I-N-C-H-A-K.

21 THE JUDGE: What would you like to tell
22 me?

23 PROSPECTIVE JUROR 121: I have actually
24 been raped twice.

25 THE JUDGE: I'm sorry. The fact that you

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1 had that experience in your life on two separate
2 occasions, would that affect your ability to be
3 fair and impartial to both the state and
4 defense?

5 PROSPECTIVE JUROR 121: I don't know. I
6 do still have issues with it a lot of times
7 myself.

8 THE JUDGE: Okay. You think that would
9 have an affect on it?

10 PROSPECTIVE JUROR 121: When I did find
11 out it was this type of case, I did think about
12 that.

13 THE JUDGE: Okay.

14 PROSPECTIVE JUROR 121: I have a thing for
15 faces.

16 THE JUDGE: Excuse me?

17 PROSPECTIVE JUROR 121: I have a thing for
18 faces. I recognize people's faces. I don't
19 know how. I can't remember anybody's names.
20 Somehow I recognize his face. I don't know how.
21 I don't know him. I just recognize his face. I
22 wanted to bring it out. I don't know how.

23 THE JUDGE: But you think you would have
24 difficulties being fair and impartial in this
25 case?

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1 PROSPECTIVE JUROR 121: Yes.

2 THE JUDGE: I am going to excuse you for
3 this case. Just go back to your seat. You will
4 not be selected on this case. Juror Number 121
5 will be excused for this case.

6 PROSPECTIVE JUROR 7: Number 7.

7 THE JUDGE: Last name.

8 PROSPECTIVE JUROR: Thomas.

9 THE JUDGE: What would you like to tell
10 me?

11 PROSPECTIVE JUROR 7: My sister and I
12 both were abused as teenagers by a family
13 member. I would not be fair.

14 THE JUDGE: Okay. You will be excused for
15 this case. Just go back and have a seat where
16 you were. Juror Number 7, Ms. Thomas, will be
17 excused.

18 Yes, ma'am, your number and your last
19 name?

20 PROSPECTIVE JUROR 144: Number 144,
21 Sexton.

22 THE JUDGE: Ms. Sexton, what would you
23 like to tell me?

24 PROSPECTIVE JUROR 144: In 1990 my 14-year
25 old daughter was sexually molested by a friend's

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1 stepfather. He pled to a thing where he didn't
2 admit guilt but he didn't admit innocence.

3 THE JUDGE: The fact that you had that
4 experience in your life, would that cause --

5 PROSPECTIVE JUROR 144: It would.

6 THE JUDGE: You would be unable to be
7 fair and impartial?

8 PROSPECTIVE JUROR 144: Yes, because he
9 did not serve time.

10 THE JUDGE: I am going to excuse you for
11 this case, and have a seat back in the jury
12 panel.

13 PROSPECTIVE JUROR 144: I want to say I
14 would love to serve on a jury but not this one
15 because I could not be impartial.

16 THE JUDGE: We need fair and impartial
17 jurors and the Court appreciates that. Juror
18 144 will be excused from the trial of this case.

19 Your number and your last name?

20 PROSPECTIVE JUROR 112: Morrison.

21 THE JUDGE: Yes, ma'am, Ms. Morrison.

22 PROSPECTIVE JUROR 112: My granddaughter
23 was just subjected to this. I think the trial
24 -- I don't know if the trial has started, but
25 they have indicted him and it hasn't been that

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1 long. It happened this year. She cooperated,
2 but still, I wanted you to know. As far as my
3 decision, it wouldn't affect my judgment.

4 THE JUDGE: You could be fair and
5 impartial?

6 PROSPECTIVE JUROR 112: Yes. I promise
7 you. I just needed you to know that. I do have
8 two nephews that work in a detention center,
9 Charles Morrison and Dion Thompson.

10 THE JUDGE: Would you still be able to be
11 fair and impartial?

12 PROSPECTIVE JUROR 112: Yes, sir, I could.

13 THE JUDGE: Any additional questions from
14 the State?

15 MS. JOYNER: No.

16 THE JUDGE: Defense?

17 MR. HALL: No, your Honor.

18 THE JUDGE: Your name.

19 PROSPECTIVE JUROR 5: Juror 5, Berry.

20 THE JUDGE: Berry -- B-E-R-R-Y?

21 PROSPECTIVE JUROR 5: That's correct.

22 THE JUDGE: What would you like to tell
23 me?

24 PROSPECTIVE JUROR 5: Before I go into
25 details, all records have been quashed and found

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1 nonplausible. My ex-wife while we were in child
2 custody had trumped up charges of improper
3 touching, which was not proven, no way, no how,
4 couldn't have. It was denied.

5 THE JUDGE: Were you ever formally charged
6 or allegations made?

7 PROSPECTIVE JUROR 5: That's where the
8 problem was. In the two counties I lived,
9 Broward County where it supposedly happened, and
10 my wife lived in a separate county. They
11 brought me to court. But in the meantime, I
12 voluntarily proved my innocence, but I had to go
13 to Broward County Police Department voluntarily
14 to take a lie detector and they determined 100
15 percent there was no way, no how, and it was
16 given to the child protective services, and they
17 reported it to the judge.

18 So when we went to court, they again tried
19 to, because I was driving back and forth 4 1/2
20 hours, so they tried to delay everything. When
21 I spoke to the judge and stated the facts, the
22 judge immediately quashed all the records.

23 THE JUDGE: The fact that you had those
24 allegations made, would that prevent you from
25 being fair and impartial?

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1 PROSPECTIVE JUROR 5: Absolutely not. It
2 is my civic duty.

3 THE JUDGE: Thank you very much, sir.
4 Your number?

5 PROSPECTIVE JUROR 83: 83.

6 THE JUDGE: Last name?

7 PROSPECTIVE JUROR 83: Kilburn.

8 THE JUDGE: Spell that for me.

9 PROSPECTIVE JUROR 83: K-I-L-B-U-R-N.

10 THE JUDGE: What would you like to tell
11 me?

12 PROSPECTIVE JUROR 83: I know Ms. Desch.
13 She was involved in my case that I was charged
14 with -- not charged, DUI.

15 THE JUDGE: She prosecuted you?

16 PROSPECTIVE JUROR 83: No -- yes, yes.

17 THE JUDGE: Okay. The fact that Solicitor
18 Desch prosecuted you on another case, would that
19 prevent you from being fair and impartial?

20 PROSPECTIVE JUROR 83: No.

21 THE JUDGE: Any additional questions from
22 the state?

23 MS. JOYNER: No, sir.

24 MR. HALL: No, sir.

25 THE JUDGE: Okay. Thank you, sir.

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1 Yes, ma'am, your number and your last
2 name?

3 PROSPECTIVE JUROR 164: Number 164.

4 THE JUDGE: Last name?

5 PROSPECTIVE JUROR 164: Tidwell.

6 THE JUDGE: Yes, ma'am, Ms. Tidwell.

7 PROSPECTIVE JUROR 164: Yes, sir. I was
8 molested when I was young until I started my
9 period.

10 THE JUDGE: The fact that you had that bad
11 experience in your life, would that prevent from
12 you being fair and impartial?

13 PROSPECTIVE JUROR 164: Yes. As soon as
14 you said it, I knew I could not.

15 THE JUDGE: You could not be fair and
16 impartial?

17 PROSPECTIVE JUROR 164: No, sir.

18 THE JUDGE: Okay. Have a seat. Juror
19 Number 164 will be excused from the trial of
20 this case.

21 Your name?

22 PROSPECTIVE JUROR 35: 35.

23 THE JUDGE: Last name?

24 PROSPECTIVE JUROR 35: Kenneth Cooper.

25 THE JUDGE: Mr. Cooper.

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1 PROSPECTIVE JUROR 35: I was involved in
2 domestic violence with my ex-wife. She attacked
3 me and my children, and the State represented
4 us, and I didn't know if that was part of it or
5 not. It was in 2006.

6 THE JUDGE: You were a victim in a case,
7 and of course, the solicitor's office prosecuted
8 that case against someone?

9 PROSPECTIVE JUROR 35: Yes.

10 THE JUDGE: Would that prevent you from
11 being fair and impartial to both the state and
12 defense?

13 PROSPECTIVE JUROR 35: No, sir.

14 THE JUDGE: Any questions from the State?

15 MS. JOYNER: No, sir.

16 THE JUDGE: Defense?

17 MR. HALL: No, sir.

18 THE JUDGE: Thank you. Have a seat.

19 Your number?

20 PROSPECTIVE JUROR 176: 176.

21 THE JUDGE: Mr. Stone?

22 PROSPECTIVE JUROR 176: Yes.

23 THE JUDGE: What would you like to tell
24 me?

25 PROSPECTIVE JUROR 176: One of my

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1 daughters was raped. She was in college.

2 THE JUDGE: How long ago?

3 PROSPECTIVE JUROR 176: Twenty years ago.

4 THE JUDGE: The fact that your daughter
5 had that terrible experience in your life, would
6 that prevent from you being fair and impartial?

7 PROSPECTIVE JUROR 176: I am sure I could
8 not be objective.

9 THE JUDGE: Okay. I will excuse you from
10 this case. Have a seat back there. Juror 176
11 will be excused from the trial of this case.

12 Your number?

13 PROSPECTIVE JUROR 76: Number 76,
14 Hudson-Lucas.

15 THE JUDGE: Yes, ma'am.

16 PROSPECTIVE JUROR 76: My sister and my
17 niece were both victims of sexual abuse as
18 minors.

19 THE JUDGE: How long ago was that?

20 PROSPECTIVE JUROR 76: One was 30 years ago
21 and one was about 12 years ago.

22 THE JUDGE: Would that prevent from you
23 being fair and impartial to both the State and
24 defense in this case?

25 PROSPECTIVE JUROR 76: No, sir.

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1 THE JUDGE: Any additional questions from
2 the State?

3 MS. JOYNER: No, sir.

4 THE JUDGE: From the defense?

5 MR. HALL: No, your Honor.

6 THE JUDGE: Thank you, ma'am.

7 PROSPECTIVE JUROR 53: Juror 53,
8 Fitzpatrick. I was the victim of attempted
9 sexual assault.

10 THE JUDGE: How long ago was that?

11 PROSPECTIVE JUROR 53: Seven years.

12 THE JUDGE: Okay. Would that prevent you
13 from being fair and impartial to both the state
14 and defense in this case?

15 PROSPECTIVE JUROR 53: I think it would.

16 THE JUDGE: Okay. Have a seat in the
17 back. Juror Number 53 is excused from the trial
18 of this case.

19 Yes, ma'am, your number?

20 PROSPECTIVE JUROR 44: 44, Davis.

21 THE JUDGE: What would you like to tell
22 me?

23 PROSPECTIVE JUROR 44: One of the people I
24 work with is Jeff Babb and he has three
25 daughters, and I don't know if this is one of

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1 them.

2 THE JUDGE: You work with Jeff Babb?

3 PROSPECTIVE JUROR 44: Yes, and his wife
4 is Amy, and he has three daughters. I don't
5 know their names and ages.

6 THE JUDGE: Would counsel stipulate there
7 is no relation?

8 MR. HALL: Can I ask a question? Do you
9 know where he lives?

10 PROSPECTIVE JUROR 44: He lives off 55
11 toward Lake Wylie.

12 MR. HALL: I don't know.

13 MS. JOYNER: Not that we would be aware
14 of, your Honor.

15 THE JUDGE: Okay. If there is no
16 relationship, would you --

17 PROSPECTIVE JUROR 44: That's fine. I
18 wanted to let you know that. I know one
19 daughter is Maddey and one girl is Sarah, and
20 one is in high school and he has another one,
21 and I don't know her name and I don't know her
22 age, but they just moved to Clover about year
23 and a half ago.

24 MS. JOYNER: This is not the same people.

25 PROSPECTIVE JUROR 44: Okay.

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1 MR. HALL: May we approach?

2 THE JUDGE: Certainly.

3 (Whereupon, a bench conference was held
4 off the record in the presence of the jury, but
5 out of the hearing of the jury.)

6 THE JUDGE: For the record, any additional
7 voir dire questions from the State?

8 MS. JOYNER: No additional questions, your
9 Honor.

10 THE JUDGE: And from the defense?

11 MR. HALL: None, your Honor.

12 THE JUDGE: Madam Clerk, if you will
13 proceed.

14 THE CLERK: If your name is called, please
15 bring any personal belongings you have and come
16 stand by the bailiff.

17 Number 129, Emily Prescott.

18 What say ye for the State?

19 MS. DESCH: Please present the juror.

20 THE CLERK: Defense?

21 MR. HALL: Please swear the juror.

22 THE CLERK: Number 112, Barbara Morrison.

23 What say ye for the State?

24 MS. DESCH: Please present the juror.

25 THE CLERK: Defense?

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1 MR. HALL: Please excuse the juror in this
2 case.

3 THE CLERK: Number 56, Michael Franklin.
4 What say ye for the State?

5 MS. DESCH: Please present the juror.

6 THE CLERK: Defense?

7 MR. HALL: Please swear the juror.

8 THE CLERK: Number 8, Charlene Blanton.
9 What say ye for the State?

10 MS. DESCH: Please present the juror.

11 THE CLERK: Defense?

12 MR. HALL: Please excuse the juror in this
13 case.

14 THE CLERK: Number 146, Iris Smith.
15 What say ye for the State?

16 MS. DESCH: Please present the juror.

17 THE CLERK: Defense?

18 MR. HALL: Please swear the juror in this
19 case.

20 THE CLERK: Number 50, Daniel Erdy.
21 What say ye for the State?

22 MS. DESCH: Please excuse the juror.

23 THE CLERK: Number 89, Anissa Lee.

24 What say ye for the State?

25 MS. DESCH: Please present the juror.

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1 THE CLERK: Defense?

2 MR. HALL: Please swear the juror.

3 THE CLERK: Number 5, Donald Berry.

4 What say ye for the State?

5 MS. DESCH: Please excuse the juror.

6 THE CLERK: Number 69, Trina Hill.

7 What say ye for the State?

8 MS. DESCH: Please excuse the juror.

9 THE CLERK: Number 168, Ruby Watts.

10 What say ye from the State?

11 MS. DESCH: Please present the juror.

12 THE CLERK: Defense?

13 MR. HALL: Please swear the juror.

14 THE CLERK: Number 181, Gary Kirsh.

15 What say ye for the State?

16 MS. DESCH: Please present the juror.

17 THE JUDGE: Defense?

18 MR. HALL: Please swear the juror.

19 THE CLERK: Number 25, Marion Caughman.

20 What say ye for the State?

21 MS. DESCH: Please excuse the juror.

22 THE CLERK: Number 35, Kenneth Cooper.

23 What say ye for the State?

24 MS. DESCH: Please present the juror.

25 THE CLERK: Defense?

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1 MR. HALL: Please excuse the juror in this
2 case.

3 THE CLERK: Number 76, Lisa Hudson-Lucas.
4 What say ye for the State?

5 MS. DESCH: Please present the juror.

6 THE JUDGE: Defense?

7 MR. HALL: Please excuse the juror in this
8 case.

9 THE CLERK: Number 178, Drew Archer.
10 What say ye for the State?

11 MS. DESCH: Please present the juror.

12 THE CLERK: Defense?

13 MR. HALL: Please swear the juror.

14 THE CLERK: Number 141, Bradley Sabelli.
15 What say ye for the state?

16 MS. DESCH: Please present the juror.

17 THE CLERK: Defense?

18 MR. HALL: Please excuse the juror in this
19 case.

20 THE CLERK: Number 175, Michael Wright.
21 What say ye for the State?

22 MS. DESCH: Please present the juror.

23 THE CLERK: Defense?

24 MR. HALL: Please swear the juror.

25 THE CLERK: Number 124, Carla Peoples.

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1 What say ye for the State?

2 MS. DESCH: Please present the juror.

3 THE CLERK: Defense?

4 MR. HALL: Please swear the juror.

5 THE CLERK: Number 95, Taylor Lyman.

6 What say ye for the State?

7 MS. DESCH: Please present the juror.

8 THE CLERK: Defense?

9 MR. HALL: Please swear the juror.

10 THE CLERK: Number 28, Mary Chisholm.

11 What say ye for the State?

12 MS. DESCH: Please present the juror.

13 THE CLERK: Defense?

14 MR. HALL: Please swear the juror.

15 THE CLERK: Number 179, Cindy Burton.

16 What say ye for the State?

17 MS. DESCH: Please present this juror.

18 THE CLERK: Defense?

19 MR. HALL: Please excuse the juror in this
20 case.

21 MS. DESCH: Your Honor, may we approach?

22 THE JUDGE: Can I see the attorneys,
23 please.

24 (Whereupon, a bench conference was held
25 off the record in the presence of the jury, but

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1 out of hearing of the jury.)

2 THE JUDGE: Juror 179, Cindy Burton, the
3 strike was an error. You are seated on this
4 jury. One alternate.

5 THE CLERK: This is for the alternate.

6 Number 180, Jazmine Kirk.

7 What say ye for the state?

8 MS. DESCH: Please present the juror.

9 THE CLERK: Defense?

10 MR. HALL: Please excuse the juror in this
11 case.

12 THE CLERK: Number 113, Matthew Nicoll.

13 What say ye for the State?

14 MS. DESCH: Please present the juror.

15 THE CLERK: Defense?

16 MR. HALL: Please excuse the juror in this
17 case.

18 THE CLERK: Number 83, Benjamin Kilburn.

19 What say ye for the State?

20 MS. DESCH: Please excuse this juror.

21 THE CLERK: Number 4, Jeffrey Benson.

22 What say ye for the State?

23 MS. DESCH: Please present the juror.

24 THE CLERK: Defense?

25 MR. HALL: Please swear the juror.

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1 THE JUDGE: Ladies and gentlemen of the
2 jury, I am going to ask that you for a few
3 moments retire to the jury room. The bailiffs
4 can show you where your headquarters are going
5 to be for whatever period of time it takes to
6 try this case and get you acclimated and a
7 little comfortable in the jury room. We will
8 bring you out shortly.

9 Let me remind you, too -- I am going to
10 tell you this a lot. Don't start talking about
11 this case among yourselves. Talk about anything
12 else that you would like other than anything
13 related to this case. Thank you very much. We
14 will bring you out in a few moments.

15 (Whereupon, the jury exited the courtroom
16 at 11:16 a.m.)

17 THE JUDGE: From the State, any objections
18 to the manner in the selection of the jury?

19 MS. DESCH: Nothing from the State.

20 THE JUDGE: Other than one point you
21 brought up at side bar, Mr. Hall, any objection
22 to the manner in selection of the jury?

23 MR. HALL: No, your Honor, and I would
24 like to be heard on that.

25 THE JUDGE: We will do that in just a

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1 moment. Thank you, sir.

2 Ladies and gentlemen of the remaining jury
3 panel, let me just tell you, don't take offense
4 to those of you who were not selected, who
5 received a strike in some fashion. Don't take
6 offense to that. These lawyers have their
7 reasons for picking the jury. So don't take it
8 personally.

9 I don't know what else we have scheduled
10 for this week, but you still may have an
11 opportunity to serve on a jury. I have been
12 instructed by the clerk's office for you to call
13 after 1 p.m., and I assume the number is on
14 their badges. Call after 1 p.m. and you will be
15 instructed on what to do for tomorrow and the
16 remainder of the week.

17 With that being said, you are now excused.
18 There is one juror that I would like to come up
19 to the front. Daniel Erdy, if you would come up
20 here one second, please. The rest you may go.

21 (Off the record discussion at the bench.)

22 THE JUDGE: Mr. Hall, I would be glad to
23 hear from you, sir.

24 MR. HALL: May I please the Court. We
25 had a discussion at sidebar regarding the number

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1 of peremptory challenges allowed in this case.
2 Certainly, under the old law, a lewd act was
3 entitled to five strikes for the defense. The
4 statute 14-7-1110 states that any defendant
5 arraigned for the crime of murder, manslaughter,
6 burglary, arson, criminal sexual conduct, and in
7 the enumerated offenses after that is entitled
8 to peremptory challenges not exceeding ten, and
9 the State in these cases are entitled to
10 peremptory challenges not exceeding five.

11 We had that discussion with the Court
12 indicating that they would limit the defense to
13 five under the old law. I would just argue that
14 my client is entitled to any benefit in any
15 changes of the statute as far as being repealed.
16 The lewd act statute was repealed and replaced
17 by criminal sexual conduct with a minor in the
18 third degree, which has the exact same language
19 as the old lewd act statute.

20 According to the peremptory challenges
21 today for a criminal sexual conduct third degree
22 with a minor, my client or the defense would be
23 entitled, we would argue, to ten strikes. I
24 understand the Court's ruling, that we are
25 limited to five. I wanted to put that objection

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1 on the record.

2 THE JUDGE: And your point is certainly
3 well taken, Mr. Hall. The Court felt like since
4 your client is being prosecuted under the old
5 law, that everything that goes with that,
6 including the number of peremptory strikes, that
7 you would be entitled to -- would go along with
8 that too. So your objection is so noted and
9 overruled.

10 MR. HALL: Thank you, your Honor.

11 THE JUDGE: Anything further we need to
12 take up on the record before we get started?

13 We will take a 10, 15 minute recess.

14 (Whereupon, court in recess at 11:20 a.m.)

15 (Court resumes at 11:42 a.m.)

16 THE JUDGE: Let me make a brief comment to
17 the attorneys. This preliminary charge that I
18 use is a little longer than a lot of the other
19 charges until I get a little bit more
20 comfortable to call out and add to and that sort
21 of thing. So it is a little bit longer than I
22 really think is necessary. But with that said,
23 I am going to give it as I have it here. Please
24 bring the jury out, please.

25 (Whereupon, the jury came into open court

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1 at 11:43 a.m.)

2 THE JUDGE: Let the record reflect that
3 the jury has returned. Madam Clerk, would you
4 swear the jury in please.

5 (The jury is being duly sworn by the Court
6 Clerk.)

7 THE CLERK: Let the record show all
8 confirmed.

9 THE JUDGE: Ms. Lee, I am going to appoint
10 you as the foreperson of this jury. I am
11 confident that you will do an excellent job.
12 You will be fine. You will always take the seat
13 right here where this gentleman is. So every
14 time you come out, you take that seat. The
15 alternate, Jeffrey Benson, you will always take
16 the seat that you are in. Everybody else, you
17 are free to sit wherever you would like. So
18 those two seats are reserved.

19 One thing before I start with my
20 preliminary charge. I failed to introduce you
21 to my law clerk. This is Lyon Bixler. Lyon is
22 a graduate of the Law School in Charleston. He
23 has been with me now for a couple of months.
24 Law clerks are just vital and essential to
25 judges. He does a wonderful job in helping me

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1 with all aspects of my job as a Circuit Court
2 Judge. So I don't know why I failed to
3 introduce him, but I did.

4 Ladies and gentlemen of the jury, we are
5 about to start the case of the State of South
6 Carolina versus Leonard Eugene Jenkins. Now,
7 before we begin this trial, I want to tell you
8 that this trial will probably be different from
9 what you might expect. Many people do not have
10 the chance to attend actual court sessions as
11 you are doing now, and may think from watching
12 television or movies or reading books that
13 trials are always full of high drama, intense
14 action and riveting circumstances.

15 While all of these things may be true at
16 times, this trial is not for entertainment. It
17 is a fundamental part of our democracy, a search
18 for the truth in an effort to make sure that
19 justice is done between the parties before the
20 Court.

21 Searching for the truth and making sure that
22 justice is done is often slow, deliberate and
23 repetitive, the opposite of what you may have
24 seen on television or in movies or have read in
25 books. This courtroom is a place of honor,

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1 dedicated to the protection and preservation of
2 citizens' rights through what many have called
3 the greatest justice system ever created.

4 The attorneys appearing for you are
5 advocates for the parties they represent, the
6 solicitor is for the State and the public
7 defender for the defense. First and foremost,
8 they are officers of the Court sworn to uphold
9 the integrity and fairness for our judicial
10 system and to help you in the search for the
11 truth. You should expect them to be
12 exceptional, confident, and ethical in the
13 representation of their client's interest. I am
14 sure they will be. You are also expected to be
15 professional, reasonable, and ethical. I want
16 to thank you for accepting the important
17 responsibility of jury service and for your
18 contribution today for our justice system.

19 What I will now say is intended to serve
20 as an introduction to the trial of this case.
21 These remarks are not a charge on the law in
22 this case. I will instruct you on the law
23 applicable to this case at the end of the trial
24 before you retire to consider your verdict.
25 This is merely an explanation of the procedure

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1 that we will follow in the trial of this case so
2 that you may better understand what may be
3 happening. You are not allowed to take notes
4 during this trial.

5 As I stated previously, the defendant is
6 charged by an indictment filed in this Court and
7 is charged with the crime of a lewd act upon a
8 child, Section 16-15-140 of the South Carolina
9 Code of Laws. The elements of this charge I
10 will explain to you at a later time.

11 As I stated to you previously, the
12 indictment is simply the charge by which the
13 case is brought into court, and it is not in any
14 sense evidence of any of the allegations it
15 contains.

16 The defendant has pled not guilty to this
17 indictment. The State, therefore, has the
18 burden of proving each of the elements of the
19 indictment beyond a reasonable doubt. It will
20 be your duty, ladies and gentlemen, to decide
21 whether the state has met that burden.

22 Your purpose as jurors is to find and
23 determine the facts. You are the sole judge of
24 the facts. If at any time I make any comment
25 regarding the facts, you must disregard it. You

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1 are to determine the facts from the testimony
2 you hear and the other evidence introduced in
3 court. It is up to you to determine the
4 inferences which you feel may properly be drawn
5 from the evidence. It is especially important
6 that you perform your duty of determining the
7 facts diligently and conscientiously because
8 ordinarily there is no way to correct an
9 erroneous determination of the facts by a jury.

10 On the other hand, Madam Forelady, ladies
11 and gentlemen of the jury, with equal emphasis,
12 the same law that makes you the judges of the
13 facts makes me the judge of the law. The law as
14 given by the Court is the only law you may
15 consider. You must accept to follow it even
16 though you may disagree with it. I cannot tell
17 you what the facts are and you cannot tell me
18 what the law is or should be. Your job is to
19 take the law as I give it to you and apply it to
20 the facts as you find them from the testimony of
21 the witnesses and any other evidence that is
22 introduced. After doing that, you will render
23 your verdict, a verdict under the solemn oath
24 that you just took as jurors.

25 Until I tell you that you may begin to

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1 deliberate, you must not discuss this case with
2 anyone including your fellow jurors, friends,
3 family members, and anyone involved in the case.
4 The attorneys and the parties in this case have
5 been advised that they are not to talk to you at
6 all. So if you see anyone involved in the case
7 and they may not even say hello, they are not
8 being unfriendly, they are just following my
9 instructions.

10 Now, during your deliberations, you may
11 only discuss the case in the jury room with your
12 fellow jurors because they have seen and heard
13 the same evidence that you have. However, you
14 must not discuss the case with anyone else until
15 you return a verdict and the case is at an end.

16 You must decide this case based solely on
17 the evidence presented here in the courtroom.
18 This means that during the trial you must not
19 conduct any independent research about the case,
20 the facts of the case, the evidence presented in
21 the case, or the people, or organizations
22 involved in any way in the case.

23 Please do not try to find out information
24 from any source outside of this courtroom. In
25 other words, you must not look at dictionaries

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1 or other references or materials, search the
2 internet, websites, or blogs, or use any other
3 electronic tools to get information about this
4 case or to help you decide the case. You may
5 not use computers, telephones, cell phones,
6 smart phones, tablets, internet or other tools
7 of technology with communication capabilities at
8 any time while you are in the courtroom or
9 during your deliberations.

10 During your breaks, if necessary, outside
11 of the courthouse, you may use these devices,
12 naturally. However, you must not use these
13 devices to communicate with anyone about the
14 case until the case is completely over with.
15 This means you must not use phone calls,
16 e-mails, text messages, instant messages,
17 Twitter or any blog, chat room or website
18 including Facebook, Google Plus, My Space,
19 Linkedin, Youtube or social media Seitz to send
20 or receive information about this case. This
21 includes information about a party, a witness
22 and attorney, court officer, news accounts about
23 the case, research on any topics raised, any
24 topics you may think would be helpful in
25 deciding the case, or any testimony presented by

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1 any witness.

2 During this trial, do not read, listen to,
3 or watch any news reports, if any, about this
4 case. This includes anything that may be in the
5 newspapers or on the internet, radio,
6 television. You must not consider anything you
7 may have read or heard about the case outside of
8 the courtroom whether before or during the
9 trial. Information on the television, radio,
10 internet or from other sources might be wrong or
11 incomplete. In our judicial system, it is
12 important that you are not influenced by
13 anything or anyone outside of this courtroom.
14 If you become aware of another juror's violation
15 of these instructions, please inform me
16 immediately.

17 It is important that you keep an open mind
18 and not decide any issues in the case until all
19 of the evidence has been presented, the parties
20 have made their closing arguments, and I have
21 instructed you on the law in this case. It is
22 your solemn responsibility to determine the
23 guilt or innocence of the defendant, and your
24 verdict must be based solely on the evidence as
25 it is presented to you in this trial and on the

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1 law as I instruct you during and at the close of
2 the trial.

3 In just a moment one of the solicitors
4 will make what is called an opening statement in
5 which the solicitor will explain to you the
6 issues in this case, or at least what the
7 solicitor thinks the issues are in the case.
8 The attorney for the defendant may also make an
9 opening statement.

10 What the attorneys tell you during their
11 opening statements is not evidence in the case.
12 It is only their contingent and position as to
13 what the issues are. The evidence in this case
14 will be presented to you by the testimony of
15 sworn witnesses from this witness stand and any
16 exhibits that may be introduced into evidence.

17 From time to time during the trial you may
18 hear one of the lawyers say something like, your
19 Honor, I believe we have a question of law or a
20 matter of law to discuss with you; or your
21 Honor, may we approach the bench. Sometimes I,
22 myself, might find it necessary to excuse you
23 from the courtroom for a short while so the
24 attorneys and I can discuss a matter of law.
25 The reason for this is you are the judges of the

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1 facts in this case. Sometimes when I am
2 discussing matters of law with the attorneys, it
3 may be necessary for me to make some comment as
4 to the facts in connection with ruling whether
5 or not a particular law applies. I am not
6 supposed to tell you what I think the facts are
7 so I will excuse you from the courtroom while
8 these discussions take place so that in no way
9 will you be influenced by anything that I might
10 say or do in connection with the facts.

11 After determining what the true facts are
12 in this case, you must decide whether or not the
13 testimony of the witnesses is believable. It
14 will be my responsibility to rule as a matter of
15 law as to whether certain testimony is
16 admissible at all or not. Once the testimony is
17 admitted, whether or not you believe it is
18 solely for you to determine. In deciding
19 whether to believe a witness, you have the right
20 to consider the interest of any witness, the
21 bias of any witness, the prejudice of any
22 witness, the opportunity for the witness to have
23 seen the matters and things about which the
24 witness may testify and the way the witness acts
25 on the witness stand. You have a right to

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1 consider anything that is in the record that
2 will help you to evaluate the testimony of
3 witnesses. That means that it is your duty to
4 pay close attention to these witnesses, to
5 observe witnesses, to listen to the witnesses,
6 and to pay close attention to the attorneys and
7 to the Court. Don't let your thoughts wander,
8 but give strict attention to the testimony in
9 this case so that at the end of all of the
10 testimony, after the arguments of counsel and
11 charge on the law by the Court, you will then be
12 in a position to determine what the true facts
13 are and to apply the law to those facts and thus
14 render a verdict.

15 It is your added duty, Madam Forelady, to
16 preside in the jury room and be the jury's
17 spokesperson here in court. It will also be
18 your duty to write the verdict, but I will give
19 you further instructions about that at the
20 conclusion of the case.

21 Now, in order to preserve everyone's
22 rights in this case, I will first ask the state
23 for any exceptions to the preliminary charge
24 from the Court?

25 MS. DESCH: No exceptions from the State.

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1 THE JUDGE: Any from the defense?

2 MR. HALL: None from the defense, your
3 Honor.

4 THE JUDGE: Okay. We will now begin the
5 trial of the case. I will turn the record over
6 to the solicitor.

7 MS. DESCH: Thank you, your Honor. Your
8 Honor, could we approach briefly before we get
9 started?

10 THE JUDGE: Certainly.

11 (Whereupon, a bench conference was held
12 off the record in the presence of the jury, but
13 out of hearing of the jury.)

14 THE JUDGE: You may proceed with openings,
15 Solicitor.

16 MS. DESCH: Thank you, your Honor.

17 Minor1 is now a 14-year old girl. She
18 lives down the street here in York County. She
19 lives across the street from Mr. Jenkins, who is
20 here before you. She is here today to come in
21 and talk to you about something that happened to
22 her two summers ago.

23 The difficult part about these cases is
24 not just the subject matter. The fact that
25 these are lewd acts, something that is quite

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1 personal, something that is hard to talk about,
2 something that is hard to hear. There is not
3 much I or anyone else in this courtroom can say
4 about it. Only Minor1 can. She is going to come
5 in and she is going to take the stand. I
6 anticipate she will be able to look at you and
7 talk about playing with her friend Kacie or
8 going to school or being a kid. But she is
9 going to have to get into a tough subject
10 matter, and I certainly appreciate your patience
11 and your attention to that.

12 It is the State's burden to prove this
13 case beyond a reasonable doubt. You may hear
14 that on TV, and you heard some instructions from
15 the Court, but is a tough concept. It is very
16 important that we present our case, and that it
17 is our burden because the justice system is very
18 important and it is what we count on in the
19 United States, different than any other country.

20 We are presenting the evidence that we
21 have. We are presenting Minor1 . Through
22 her testimony to you, we have to prove that she
23 is under 16 years old. We have to prove
24 Mr. Jenkins is over 14, and those are the ages
25 at the time of the incident. We have to prove

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1 that it happened here in York County. We have
2 to prove that Mr. Jenkins touched Minor1
3 lewdly, lasciviously, in an inappropriate
4 manner.

5 The one thing I would ask you to consider
6 or be weary of, there is a difference between a
7 lewd act and criminal sexual conduct charge.
8 There is a very important difference. In our
9 state we differentiate a touching versus a
10 penetration. So criminal sexual conduct is what
11 you believe to be a rape, a penetration.

12 This case is about the inappropriate
13 touching. Minor1 is here to tell her story, and
14 I do thank you for listening.

15 THE JUDGE: Thank you, Solicitor.
16 Mr. Hall.

17 MR. HALL: May it please the Court?

18 THE JUDGE: Yes, sir.

19 MR. HALL: On February 14, 2012, Detective
20 Carson Neely went to the door of the residence,
21 the home of my client, Eugene Jenkins. He
22 knocked on the door. Mr. Jenkins responded to
23 the door. When he opened the door and met
24 Detective Neely, he received life-changing,
25 shocking, and vicious news. He was arrested by

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1 Detective Neely when he was taken to jail. The
2 allegations that brought Detective Neely to the
3 door of my client's home has been raised one
4 week earlier by his neighbor, Katrina Babb.
5 Katrina Babb is a neighbor that lives across the
6 street from Gene Jenkins. She came up on
7 February the 7th and gave a written statement to
8 York County Sheriff's Department about
9 allegations of inappropriate touching by her
10 across the street neighbor, Gene Jenkins. The
11 allegation is that touching took place some six
12 to eight months earlier during the summer of
13 2011. That is what Katrina Babb, the mother of
14 Minor1 , told the Sheriff's Department on
15 February 7th. One week later, my client was
16 arrested and that's when he received that, in
17 his life, life-changing, shocking and vicious
18 news.

19 The State is correct, the only alleged
20 witness in this case is Katrina Babb's daughter,
21 Minor1 . We expect and anticipate we will
22 hear from Minor1 on what she talked to the
23 police about.

24 You are going to also anticipate here how
25 the circumstances and the story that has been

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1 told has changed and been added to many times
2 during the 18 months from the time there was the
3 knock on the door of Gene Jenkin's house and
4 what we hear today.

5 You see, the State has the burden of proving
6 Gene Jenkins guilty of the crime of lewd act
7 beyond a reasonable doubt. The prosecutor
8 talked to you about reasonable doubt. Now, each
9 element -- she didn't give you all of the
10 elements. The Court at the appropriate time
11 will give you all of the elements the State must
12 prove beyond a reasonable doubt. They have to
13 do that with clear, unchanging evidence,
14 credible evidence.

15 This is not a case about Minor1 versus
16 Leonard Jenkins. It is not what the case is
17 about. This case is about the State of South
18 Carolina versus Gene Jenkins. The State of
19 South Carolina has to present credible, clear,
20 unchanging evidence to you that proves beyond a
21 reasonable doubt the guilt of Gene Jenkins.

22 I ask you to listen carefully to the
23 evidence, to weigh the testimony that you are
24 going to hear, and at the conclusion of the
25 case, render a verdict of not guilty. Thank

Minor 1 - DIRECT EXAMINATION

1 you.

2 THE JUDGE: Thank you, Mr. Hall. Is the
3 State ready to call its first witness?

4 MS. DESCH: Yes, sir.

5 THE JUDGE: You may proceed.

6 MS. DESCH: We are going to call Minor 1

7

8 Minor 1__ .

9 being first duly sworn, testified as follows:

10 THE JUDGE: Minor 1, sit close to the
11 microphone so we can hear everything you have to
12 say. Your witness.

13 DIRECT EXAMINATION

14 BY MS. DESCH:

15 Q. Good afternoon, Minor 1?

16 A. Good afternoon.

17 Q. Can you please tell everybody what your full
18 name is?

19 A. My full name is Minor 1 .

20 Q. How old are you now?

21 A. I am 14.

22 Q. When were you born, Minor 1?

23 A. I was born in .

24 Q. So is your date of birth?

25 A. Uh-huh.

Minor 1 - DIRECT EXAMINATION

1 Q. I know it is summer now, but do you go to
2 school? Are you going to start school in a
3 couple of weeks?

4 A. Yes. I am going to start school on August 22nd,
5 going into the 9th grade.

6 Q. You going into high school. Are you nervous
7 about that?

8 A. Yes.

9 Q. Did you go to school last year?

10 A. Yes.

11 Q. Have you gone to school since kindergarten?

12 A. Yes.

13 Q. Where did you go to school for the 7th and 8th
14 grade?

15 A. For 7th and 8th grade, I went to York Middle
16 School.

17 Q. Who do you live with?

18 A. I live with my mom and dad, my two brothers, and
19 my brother's friend, Stephen.

20 Q. Who did you live with two summers ago?

21 A. Same. My brothers and my mom and dad.

22 Q. Are your brothers older than you?

23 A. Yes.

24 Q. How old are they?

25 A. Jordon is 18 and Brandon is 19.

Minor 1 - DIRECT EXAMINATION

1 Q. Do you have any pets?

2 A. Yes. I have two dogs, a bird, and about a
3 50-gallon aquarium.

4 Q. You have fish too?

5 A. Yes.

6 Q. Minor 1, do you know Leonard Eugene Jenkins?

7 A. Yes.

8 Q. What do you know him as? Do you know him as
9 Leonard or Gene?

10 A. Gene.

11 Q. Do you know who he is married to?

12 A. Janet Jenkins.

13 Q. Do they live near you?

14 A. Yes, right across the street.

15 Q. So Gene and Janet live across the street from
16 you, right?

17 A. Yes.

18 Q. Did they live there two years ago?

19 A. Yes.

20 Q. Do you know if there is any children in the home
21 with them?

22 A. There is Amber and Kacie S. and Gracey.

23 Q. So there is three girls in the home with them?

24 A. Yes.

25 Q. Are you friends with any of the kids?

Minor 1 - DIRECT EXAMINATION

1 A. I am friends with Kacie.

2 Q. Is Kacie your age?

3 A. She is one year younger than me.

4 Q. Minor 1, do you have lot of friends?

5 A. No.

6 Q. Do you know what we call the room that we are
7 in?

8 A. The courtroom.

9 Q. Do you know the difference between a truth and a
10 lie?

11 A. Yes.

12 Q. Is it good to tell the truth?

13 A. Yes, it is good to tell the truth.

14 Q. Is it good or bad to tell a lie?

15 A. It is bad to tell a lie.

16 Q. If you were to tell a lie to your mom, what
17 would happen?

18 A. I would suffer the consequences, grounding,
19 having to go to my room, et cetera.

20 Q. I know it is tough, but everybody has to hear
21 you back here. Okay?

22 A. Okay.

23 Q. I want go back to the summer of 2011. Can we do
24 that?

25 A. Yes.

Minor 1 - DIRECT EXAMINATION

1 Q. Do you see that lady in front of you, the court
2 reporter?

3 A. Yes.

4 Q. The reason I am bringing it up is because you
5 actually have to answer the question so she can
6 write it down.

7 A. Okay.

8 Q. What grade were you in just before the summer of
9 2011? Was that between 6th and 7th grade?

10 A. Yes.

11 Q. Did you go to the same school as Kacie back when
12 you were in 6th grade?

13 A. No. No, we didn't.

14 Q. How does it work -- when you go into 7th grade,
15 is that a separate school than the 6th grade?

16 A. Yes.

17 Q. So she is a year behind you. So when you went
18 into 7th and 8th grade, she was still back in
19 elementary school?

20 A. No. The school right beside mine has the 5th
21 and 6th graders. They just recently moved the
22 5th graders to that school.

23 Q. So back two years ago, she would have been in a
24 different school. You were friends because you
25 were neighbors?

Minor 1 - DIRECT EXAMINATION

1 A. Yes.

2 Q. What kind of things did you and Kacie do?

3 A. We would be outside, play, go around the
4 neighborhood. Sometimes if our mom's and dad's
5 let us we would walk on Christmas Drive, which
6 is maybe a few minutes down the road. We would
7 go in her yard and play on the trampoline, and
8 occasionally go to the skating rink.

9 Q. Do you know why you are here today?

10 A. Yes.

11 Q. Why are you here today?

12 A. To give testimony against Gene because he
13 touched me.

14 Q. Can we go back to that moment. Can you tell the
15 jury what happened?

16 A. Yes. Well, we were outside and we had been
17 playing that day, and it had gotten really hot
18 because it was maybe around 12, 1 o'clock in the
19 afternoon. So we went inside to get something
20 to cool off. She went inside first, and I was
21 still outside. After a while, I decided to go
22 in after her to see what she was doing.

23 Q. Can I interrupt for one second. When you are
24 talking we and she, who are you talking about?

25 A. I'm talking about Kacie.

Minor 1 - DIRECT EXAMINATION

1 Q. So you and Kacie were playing outside. Was
2 anybody else playing outside with you?

3 A. No.

4 Q. You don't remember whether it was a weekend or a
5 school day or anything? You just remember it
6 was hot outside?

7 A. Yes.

8 Q. So Kacie goes into the house first. What did
9 you do then?

10 A. After about five minutes, I am like, you know,
11 it is getting too hot out here so I went inside
12 after her because, of course, I wanted to get
13 out of the heat. I went into the living room
14 and then went through the kitchen and into the
15 dining room to sit down on the couch to wait for
16 Kacie to get out of the bathroom.

17 Q. Whose house was it that you went into?

18 A. Gene and Janet's.

19 Q. Is that where Kacie lived?

20 A. Yes.

21 Q. What street do you guys live on?

22 A. .

23 Q. You lived on , and they live across the
24 street on ?

25 A. Yes.

Minor 1 - DIRECT EXAMINATION

1 Q. You went into Gene and Janet's house, who else
2 was inside the house?

3 A. Gene, Janet, Graceland and Amber.

4 Q. Is Amber older or younger?

5 A. Older.

6 Q. Was she out and about with her family or was she
7 somewhere else?

8 A. She was in her room.

9 Q. Do you know specifically where Janet was?

10 A. I believe she was in the living room watching
11 TV.

12 Q. You said earlier that you went into the living
13 room to sit down on the couch, was that the same
14 living that Janet was in?

15 A. No. It was right there in the dining room.
16 They have a couch in their dining room, and
17 there is also the living room where she was
18 sitting. They are both different rooms, but
19 sometimes I get them a little confused
20 sometimes.

21 Q. How many times have you been in this house over
22 the years?

23 A. Ever since the incident or?

24 Q. Just in general, hanging out with Kacie?

25 A. Me and Kacie would hang out just about every

Minor 1 - DIRECT EXAMINATION

1 day, whenever we got the chance whether it be --
2 if we did it out there or she would come and
3 knock on my door and say, can Minor 1 come over
4 and play? And my mom would say, sure, let me
5 get her. And we would go over there to play
6 until dark and each of us went our separate ways
7 and went home.

8 Q. So you kind of knew what the inside of the house
9 looked like?

10 A. (Nodding head yes).

11 Q. Where was Gene?

12 A. He was in the kitchen washing dishes.

13 Q. You mentioned Grace was in there as well?

14 A. Yes.

15 Q. Is she a baby, a toddler?

16 A. She is a toddler.

17 Q. When you went in through the kitchen and went
18 into what you call the living room to sit down.
19 Where was that again?

20 A. That was in the dining room.

21 Q. What did you sit down on?

22 A. I sat down on the three-seater couch.

23 Q. When you first went through the house to sit
24 down on the couch waiting for Kacie, was anybody
25 else in that room in the house when you first

Minor 1 - DIRECT EXAMINATION

1 got there?

2 A. No, ma'am.

3 Q. At some point did that change? Did somebody
4 come in the room with you?

5 A. Yes.

6 Q. Who came in the room where you were sitting?

7 A. Gene and Graceland.

8 Q. Gene and Graceland, the toddler, come into the
9 room with you?

10 A. Yes.

11 Q. What happened then?

12 A. He came over and sat down beside me. He was
13 holding Graceland and I was just sitting there
14 and he went and placed Graceland on my knee and
15 I started bouncing her up and down because I
16 knew that is one of the things I know she likes.
17 And she was giggling. He reached over like this
18 and touched me (indicating).

19 Q. Where was he when he put Graceland on your lap?

20 A. He was sitting beside me.

21 Q. So he sat down beside you and put Graceland on
22 your lap?

23 A. Yes.

24 Q. You said it was a three-seater couch. If you
25 were in one seat, where was he sitting?

Minor 1 - DIRECT EXAMINATION

1 A. This would be like the corner seat (indicating).
2 He was sitting on the middle seat and there was
3 the empty spot beside him.

4 Q. He hands Graceland to you who is a toddler?

5 A. Yes.

6 Q. And you are playing with her on your knee?

7 A. Uh-huh.

8 Q. Then what happens?

9 A. Then he reaches over and these three fingers
10 (indicating) go into the front of my shorts.

11 Q. Do you remember what you were wearing?

12 A. I was wearing my blue jean shorts with a blue
13 and white striped top.

14 Q. The shorts that you were wearing, do you
15 remember what kind of waistband it had?

16 A. It had a normal waistband, no adjustables or
17 nothing, like regular blue jeans.

18 Q. When he put his hands, where did he put them?

19 A. He put them right in front where the zipper is.

20 Q. Inside or outside? Underneath or over the
21 clothes?

22 A. Underneath.

23 Q. Could you tell the jury a little bit more about
24 where specifically?

25 A. Underneath the clothes and right down -- right

Minor 1 - DIRECT EXAMINATION

1 in the front, not between the legs but just like
2 right down there in the front.

3 Q. What do you call that area?

4 A. The privates.

5 Q. Did he touch you on the privates?

6 A. Yes.

7 Q. Was it skin to clothes or skin to skin?

8 A. Skin to skin.

9 Q. Did you still have Graceland on your lap?

10 A. Yes.

11 Q. What did you do when he touched your privates?

12 A. After he did that, I went and put Graceland back
13 down over on his lap and got up because right
14 then Kacie had gotten out of the bathroom and
15 had walked in there. I said, Kacie, come on,
16 let's go back outside, and we went back out and
17 played for the rest of the day.

18 MS. DESCH: May I approach?

19 THE JUDGE: Certainly.

20 BY MS. DESCH:

21 Q. I am going to show you what has been marked for
22 identification as State's Exhibit 2. Have you
23 seen these two pictures before?

24 A. Yes, ma'am.

25 Q. This one with the sticker right here, what do

Minor 1 - DIRECT EXAMINATION

1 you recognize that to be?

2 A. The front of a girl, front of a little girl.

3 Q. Is she wearing any clothes?

4 A. No.

5 Q. Do you recognize this to be the body of a little
6 girl?

7 A. Yes.

8 Q. Now, when we talk about Gene going inside your
9 shorts and his skin touching your skin on your
10 privates. When you are talking about privates,
11 do you recognize that body part on that picture?

12 A. Yes.

13 Q. Could you please mark on the picture what you're
14 referring to as privates?

15 A. (Marking).

16 Q. Did you circle something?

17 A. Yes.

18 Q. What did you circle?

19 A. The area between the legs right there on the
20 front.

21 Q. So the area that you are referring to as
22 privates, you have now marked on that page?

23 A. Yes, ma'am.

24 Q. Now, I know this is a drawing of a little girl.
25 That is not you, correct?

Minor 1 - DIRECT EXAMINATION

1 A. Yes.

2 Q. It is going to be a tough question, but do you
3 recognize that you have the same parts as the
4 girl on that drawing?

5 A. Yes.

6 Q. And in looking at what you marked on that
7 drawing, does that accurately represent to you
8 on your body where Gene touched you?

9 A. Yes.

10 MS. DESCH: The State would like to move 2
11 into evidence please?

12 MR. HALL: Without objection.

13 THE JUDGE: Without objection, State's
14 Exhibit 2 into evidence.

15 (Whereupon, STATE'S EXH. 2, previously
16 marked for identification, was received into
17 evidence.)

18 BY MS. DESCH:

19 Q. When Gene reached in underneath your clothes and
20 touched skin to skin on your privates, did he
21 get under the underwear as well?

22 A. Yes.

23 Q. Were you wearing underwear?

24 A. Yes, I was.

25 Q. I am just checking. So he got underneath the

Minor 1 - DIRECT EXAMINATION

1 underwear in your shorts and touched skin to
2 skin?

3 A. Correct.

4 Q. And you said it was just about that time that
5 Kacie comes back into the room?

6 A. Yes.

7 Q. And how did you react when you heard her coming
8 back into the room?

9 A. I quickly got up and tried to -- said, Kacie,
10 come on, let's go back outside and play. And
11 then I pushed the event to the back of my head
12 because I just wanted to try to forget about it.
13 I was not believing that it actually happened.

14 Q. Did you ever tell Kacie that day what happened?

15 THE JUDGE: Please make sure you answer
16 verbally instead of a nod of the head. Would
17 you repeat that question.

18 MS. DESCH: Yes, your Honor.

19 BY MS. DESCH:

20 Q. Did you tell Kacie that day about what happened?

21 A. No.

22 Q. Did you tell her in the next few days what
23 happened?

24 A. No.

25 Q. Who is Kacie to Janet and Gene Jenkins?

Minor 1 - DIRECT EXAMINATION

1 A. To Janet, she is her daughter. To Gene, she is
2 his stepdaughter.

3 Q. So Kacie and Amber are Janet's children prior to
4 her marriage, and Grace is the child between the
5 two, correct?

6 A. Yes.

7 Q. This occurred between your 6th and 7th grade
8 year?

9 A. Yes.

10 Q. On , correct?

11 A. Yes.

12 Q. Do you see the Gene Jenkins that touched you on
13 your privates in the courtroom today?

14 A. Yes.

15 Q. Could you point him out for the record?

16 A. He is over there wearing the black shirt with a
17 blue tie.

18 Q. So a black and blue tie. We are talking Gene
19 Jenkins here next to his attorney?

20 A. Yes.

21 Q. Did you go on any vacations that summer, summer
22 of 2011?

23 A. Two weeks after the summer started I went to
24 Georgia to stay with my grandma until about a
25 week before school started then I came home.

Minor 1 - DIRECT EXAMINATION

1 Q. So some time in June 2011, you left and went to
2 your grandmother's?

3 A. Yes.

4 Q. And you stayed there for the summer?

5 A. Yes.

6 Q. At some point before school started, did you
7 come back?

8 A. Yes.

9 Q. Did you tell your mom what happened during that
10 summer?

11 A. No.

12 Q. At any time in the summer?

13 A. No.

14 Q. Did you tell your grandmother or anybody?

15 A. I told nobody.

16 Q. How come?

17 A. Because I really didn't want to lose one of my
18 friends that I had on that road. She was the
19 only girl around I had to play with.

20 Q. So you were afraid if you told what happened
21 with Gene that you would lose Kacie as a friend?

22 A. Yes.

23 Q. When you were trying to narrow down when this
24 happened, you remember that it was hot. You
25 don't remember much about the timeframe of

Minor 1 - DIRECT EXAMINATION

1 school, correct? Was it before you went to
2 Georgia for the summer?

3 A. Yes.

4 Q. When you came back, did you continue to play
5 with Kacie when you went into the 7th grade?
6 Did you guys play at home?

7 A. We still played together then.

8 Q. Did you see Gene after that?

9 A. Yes, but I would mostly tend to stay outside on
10 the road and play out there and not go into the
11 yard unless we went straight to the backyard to
12 play on the trampoline.

13 Q. So after you got back from Georgia, you still
14 played with Kacie but you didn't put yourself
15 anywhere near Gene, if you could help it?

16 A. Yes.

17 Q. Were you ever alone with Gene after that?

18 A. No.

19 Q. You turned 13 in , correct?

20 A. Yes.

21 Q. Did something happen about that time that led
22 you to tell your mom what happened?

23 A. There was this news cast on about somebody being
24 reported for something similar to this case, and
25 my mom was trying to tell me if anything

Minor 1 - DIRECT EXAMINATION

1 happens, if anything went wrong with this, to
2 tell her. She is my best friend. She is always
3 there for me. And at that moment, I said to
4 myself that I needed to tell her. So I told
5 her. It came out stuttering at first; and then
6 finally, I managed to blurt it out to her. And
7 right after that, she called the police and
8 reported the incident.

9 Q. So there was some report on TV that triggered it
10 and you told your mom?

11 A. Yes.

12 Q. And she immediately called the police?

13 A. Yes, afterwards.

14 Q. Did you have to go talk to the police at that
15 point?

16 A. Yes. When I got there and I told them, and I
17 was too nervous myself to do it, so my mom had
18 to write down what I told her had happened
19 because I just -- I was on the verge of a
20 breakdown.

21 Q. Did you tell her in great detail or did you get
22 out what you could barely get out?

23 A. I got out what I could get out.

24 Q. Then did you meet with Detective Neely who is
25 here in the courtroom?

Minor 1 - CROSS EXAMINATION

1 A. Yes.

2 Q. When you met with him, were you alone?

3 A. I was with my mom and he went -- then my mom
4 went out, and me and him were talking in
5 private.

6 Q. After the police got involved, were you able to
7 be friends with Kacie?

8 A. No. We didn't speak or play with each other for
9 a long time. We never really saw each other.

10 MS. DESCH: Minor 1, thank you. Please
11 answer any questions Mr. Hall may have.

12 THE JUDGE: Cross-examination.

13 MR. HALL: May it please the Court.

14 CROSS-EXAMINATION

15 BY MR. HALL:

16 Q. Minor 1, I am Dan Hall. If you have any questions
17 that you don't understand, please stop me. I am
18 going to sit right here so I am not looking down
19 to you so we can talk about what happened.

20 Minor 1, you testified that this happened at
21 the beginning of June 2011; is that right?

22 A. Yes.

23 Q. You remember you were interviewed by Detective
24 Neely?

25 A. Yes.

Minor 1 - CROSS EXAMINATION

1 Q. And you remember him videotaping everything?

2 A. Yes.

3 Q. At that time, you told him -- and that was a
4 year and a half ago, isn't that right?

5 A. Roughly, yes.

6 Q. At that time, that was right after your mom had
7 reported to the police; is that right?

8 THE JUDGE: You need to answer.

9 A. Yes. Sorry I am choked up a little bit.

10 Q. That's all right. You are just nervous. That
11 would have been June, July, August, September,
12 October, November, December, January, February,
13 about eight or nine months since what you say
14 happened occurred; is that right?

15 A. Yes.

16 Q. So you told your mom in on your
17 birthday; is that right?

18 A. Yes.

19 Q. It had happened some eight to nine months
20 earlier. Do you remember telling Detective
21 Neely when he asked you when it happened, at
22 that time you told him it happened two to three
23 months ago? Do you remember that?

24 A. Yes. I mean, I hadn't really a good time -- I
25 was trying to remember exactly when it happened

Minor 1 - CROSS EXAMINATION

1 because I tried as best as possible, but it
2 slipped my head because I was so nervous.

3 Q. But at that time when you were in the Sheriff's
4 Department with just him, you initially said two
5 to three months ago. And then do you remember
6 then saying, well, it happened right before
7 school started? Do you remember that? In fact,
8 have you seen the video?

9 A. No.

10 Q. You haven't been shown the video? The
11 prosecutor didn't let you review everything that
12 you said on that video?

13 A. No, sir.

14 Q. So you have never seen the video?

15 A. (Nodding head no).

16 Q. I know this is a picky little thing. Your
17 testimony today is that you had on a blue and
18 white top when it happened; is that right?

19 A. Yes.

20 Q. And then on the video, do you remember telling
21 the officer -- you opened your coat up and said,
22 I had on exactly the same top. Do you remember
23 telling that to the detective?

24 A. I believe so, yes.

25 Q. And the top you had on that day was sort of an

Minor 1 - CROSS EXAMINATION

1 olive green T-shirt. Maybe we will have an
2 opportunity to -- but do you remember telling
3 him that you had on -- the top you had on that
4 day was the one you had on?

5 A. I mean, I can't remember exactly what the top
6 was. It was -- it was either blue or green. I
7 can't really remember.

8 Q. Again, you have not seen the video at all?

9 A. No, I have not.

10 Q. You testified that it happened in the couch in
11 the -- you call it the dining room; is that
12 right?

13 A. Yes.

14 Q. When you go in their house, it is a doublewide
15 trailer, right?

16 A. Yes, I believe so.

17 THE JUDGE: You will need to speak up a
18 little bit. I'm having a hard time hearing you
19 and maybe the jury is too so sit close to the
20 microphone, ma'am.

21 THE WITNESS: All right.

22 BY MR. HALL:

23 Q. I won't bite you. You and your mom and your
24 family live across the street in a single wide
25 mobile home; is that right?

Minor 1 - CROSS EXAMINATION

1 A. Yes.

2 Q. When you go into Gene's house -- when you open
3 the door to the front door, that is -- and you
4 step right inside the door, that is the room you
5 were in; is that right?

6 A. Yes.

7 Q. It is actually a big room, right? And the
8 kitchen is part of it? The kitchen and dining
9 area and sitting area, adults may call that a
10 great room, sort of a big room. It is all one
11 room, isn't that right?

12 A. Yes.

13 Q. I think you drew a diagram for Detective Neely
14 about it, right?

15 A. Yes.

16 Q. You, in fact, testified you knew where everybody
17 else was in the house, right? That you knew
18 everybody that was there. That it was Gene, and
19 Janet, right?

20 A. Yes.

21 Q. And their daughter, Amber?

22 A. Yes.

23 Q. Janet's daughter Amber, and your friend Kacie;
24 is that right?

25 A. Yes.

Minor 1 - CROSS EXAMINATION

1 Q. And then the youngest child, what is her name?

2 A. Graceland.

3 Q. Graceland. Is Graceland what we would call a
4 Down's child. Do you know what a Down's
5 child --

6 A. Down Syndrome.

7 Q. Down Syndrome. Isn't that how we would describe
8 Graceland?

9 A. Yes.

10 Q. Very loving, affectionate, really fun children
11 to be around, aren't they?

12 A. Yes.

13 Q. She is fun, isn't she? Likes to give a lot of
14 hugs?

15 A. Yes, she does.

16 Q. And your testimony is that he put her on your
17 lap, that Gene put her on your lap; is that
18 right?

19 A. Yes.

20 Q. And do you remember the testimony in your --
21 when you talked to Detective Neely, right when
22 this was first reported on the video, that you
23 stated that when Gene touched you, you had your
24 knees almost up to your chest; isn't that right?

25 A. Yes.

Minor 1 - CROSS EXAMINATION

1 Q. And you had your legs spread, right?

2 A. Yes.

3 Q. Do you remember telling him that?

4 A. (Nodding head yes).

5 Q. And that's what you told him then. Now, you
6 also said on the video that he never said a word
7 to you, did he? In fact, you never said
8 anything either, did you?

9 A. Not until after Kacie came back in there.

10 Q. You didn't say anything to Gene?

11 A. No.

12 Q. Then you indicated that you and your mom were
13 watching the news, so that was on February 7th.
14 You had been to school that day, right?

15 A. Yes.

16 Q. And your testimony is that you all were watching
17 the news and she called the police; is that
18 right?

19 A. After I told her about the incident, yes.

20 Q. She went straight to the Sheriff's Department.
21 Do you know that?

22 A. No. I know she called the police and they came
23 there and I reported -- she and I both reported
24 the incident because she was out there talking
25 to them and they told me to come down and write

Minor 1 - CROSS EXAMINATION

1 down my side of the story about what happened.

2 Q. Did you do that?

3 A. Yes.

4 Q. You wrote a statement?

5 A. I had to have her do it because I was on the
6 verge of a breakdown.

7 Q. I need to get this clear. Was that in you all's
8 yard or up at the Sheriff's Department?

9 A. On the porch.

10 Q. On the porch. Where were you when your mom was
11 writing the statement?

12 A. I went back inside to try and sit down.

13 Q. You were back in the house?

14 A. I was back in the house, back in my room.

15 Q. Then a week later you met with Detective Neely?

16 A. Yes.

17 Q. And then that's when you did the video and told
18 him exactly what happened, right?

19 A. Yes.

20 Q. And have you met with -- you met with the
21 solicitor in the case, right?

22 A. Yes.

23 Q. Have you met with her several times?

24 A. Yes, sir.

25 Q. At what point did you realize that it could not

Minor 1 - CROSS EXAMINATION

1 have been the end of August because you were on
2 vacation?

3 A. What do you mean it couldn't have been the end
4 of August?

5 Q. When you talked to Detective Neely, do you
6 remember telling him it happened right before
7 school started?

8 A. I think what I meant to say was that it was
9 right before school ended, it was right about
10 then.

11 Q. When did you realize that it was wrong and it
12 could not have happened right before school
13 started?

14 A. After I talked to him and I realized the slip
15 up.

16 Q. After you talk to who?

17 A. After talking to the -- I believe it was after I
18 talked to Neely or the solicitor, I can't
19 remember which.

20 Q. Did they tell you that you slipped up?

21 A. I believe not.

22 Q. But at some point after talking to them, you
23 realized you needed to get your stories right;
24 is that right?

25 A. Yes, I tried to get my story right, sir.

Minor 1 - CROSS EXAMINATION

1 Q. Ma'am?

2 A. I said I was trying to get my story right, sir.

3 Q. How many times did you meet with the prosecutor,
4 solicitor?

5 A. I believe I met with her four or five times
6 maybe.

7 Q. Five times?

8 A. Yes.

9 Q. How many times have you been in this courtroom?

10 A. This will be the third time.

11 Q. The third time you sat in that stand?

12 A. This is only the second time. The first time
13 was yesterday when we were doing practice run.

14 Q. You did a practice run yesterday?

15 A. Yes.

16 Q. On the video you did not tell Detective Neely
17 about not telling anyone because it would get
18 you in trouble with your friendship with Kacie?
19 You didn't tell him that on the video, did you?

20 A. I thought I had.

21 Q. You think you had?

22 A. Yes, I thought I had.

23 Q. Maybe we will get an opportunity to see that.

24 MR. HALL: Court's indulgence.

25 THE JUDGE: Certainly.

Minor 1 - CROSS EXAMINATION

1 BY MR. HALL:

2 Q. Do you remember telling Detective Neely on the
3 video that -- I think your words were, I think
4 that his hand was touching -- do you remember
5 saying that? You don't remember that?

6 A. No.

7 Q. But after meeting with the solicitor, you are
8 clear about it, right?

9 A. Yes.

10 MR. HALL: Court's indulgence.

11 THE JUDGE: Certainly. Take your time.

12 BY MR. HALL:

13 Q. Minor 1, you -- let me get this right as far as
14 the house and the diagram. When you go in the
15 front door, your testimony was that Gene was
16 washing dishes; is that right?

17 A. Yes.

18 Q. And that Janet was somewhere else in the house.
19 You thought she was back in the other living
20 room -- what you called the living room?

21 A. Yes.

22 Q. So you knew she was back there. You knew that
23 Amber was in the house, right?

24 A. Yes.

25 Q. I believe when you talked to Detective Neely,

Minor 1 - CROSS EXAMINATION

1 you had said that Amber was in one of the
2 bedrooms that was right beside that room, right?

3 A. Yes, I believe she was in her bedroom.

4 Q. It is right beside that big room you were in,
5 right?

6 THE JUDGE: Answer, please.

7 A. Yes.

8 Q. And Kacie, I think you testified that she came
9 out of the bathroom, is that the bathroom just
10 to the right, right up side that big room?

11 A. When you go down the hallway, it is right there
12 beside it.

13 Q. Because there is two bedrooms there on the
14 right; is that correct?

15 A. Two bedrooms on the left then there is a
16 bathroom and there is another bedroom on the
17 right.

18 Q. Then Gene brought Gracie to you to put on your
19 lap?

20 A. Yes.

21 Q. So you -- would it be fair to say that Gene knew
22 who all was in the house as well?

23 A. Yes.

24 MR. HALL: Thank you for answering my
25 questions, Minor 1

Minor 1 - REDIRECT EXAMINATION

1 THE JUDGE: Redirect, Solicitor?

2 MS. DESCH: Briefly, your Honor.

3 REDIRECT EXAMINATION

4 BY MS. DESCH:

5 Q. Minor 1, one of the times that we met, did you and
6 your mom draw a more detailed diagram to kind of
7 help me understand what you were telling me?

8 A. Yes, ma'am.

9 (Whereupon, STATE EXH. 3, Diagram of
10 House, was marked for identification.)

11 BY MS. DESCH:

12 Q. I am going to show you what has been marked
13 State's Exhibit 3. Do you recognize that?

14 A. Yes.

15 Q. What do you recognize that to be?

16 A. A drawing of their house.

17 Q. Is that something that you and your mother put
18 together for me?

19 A. Yes.

20 Q. And can you look at that, and does it accurately
21 reflect what you remember Gene's house to look
22 like?

23 A. Yes.

24 Q. And are there blue marks on there or black
25 marks?

Minor 1 - REDIRECT EXAMINATION

1 A. Yes.

2 Q. What are the blue marks?

3 A. Blue marks are the furniture, the piece of
4 furniture where the incident happened, and then
5 the black is the tracing on the outline of the
6 house.

7 Q. So black is the outside of the house and blue is
8 where the incident occurred?

9 A. Yes.

10 Q. That's an accurate depiction of what it looks
11 like from -- that you drew that for me,
12 actually?

13 A. Yes.

14 MS. DESCH: The State would like to enter
15 that into evidence as Exhibit 3.

16 THE JUDGE: Any objection?

17 MR. HALL: I would like to take a look at
18 it. Without objection.

19 THE JUDGE: Without objection, it will be
20 admitted into evidence as State's Number 3.

21 MS. DESCH: Thank you, your Honor.

22 (Whereupon, STATE'S EXH. 3, previously
23 marked for identification, was received into
24 evidence.)

25 BY MS. DESCH:

Minor 1 - REDIRECT EXAMINATION

1 Q. There is also a blue mark on here that you
2 marked. What is this blue circle?

3 A. That would represent where the trampoline is.

4 Q. The trampoline in the backyard that you and
5 Kacie were playing on the day of the incident?

6 A. Yes.

7 Q. Did you come in the front door or the back door?

8 A. The back door.

9 Q. So if you came in the back door, what does that
10 represent on your diagram?

11 A. That represents right here on this porch where
12 the sliding door is right here (indicating).

13 Q. And according to your diagram, that leads into
14 what appears to be the kitchen, dining room
15 area?

16 A. Living room in here and then the kitchen which
17 goes to the dining room and the living room.

18 Q. Just for the record we have a back door that
19 sort of opens up onto kitchen, dining room,
20 front living room is how you marked it?

21 A. Yes.

22 Q. But when you go in toward the front door at the
23 bottom of this page here?

24 A. There is a window here and a couch right there
25 (indicating), is right there in front of it.

Minor 1 - REDIRECT EXAMINATION

1 Q. When Mr. Hall asked you about entering into the
2 front door into the front room, that is accurate
3 based on your diagram?

4 A. Yes.

5 Q. So when you indicated that Janet was in the
6 house in the front living room, that's separate
7 from the living room near the front door?

8 A. Yes.

9 Q. You were aware of where people were in the
10 house, but could you see Janet or Amber from
11 where you were sitting on the couch?

12 A. No.

13 Q. And could you see Kacie while she was in another
14 room?

15 A. No, I could not see her.

16 Q. Mr. Hall asked you about Grace and how she has
17 Down's and is a loving child that likes to give
18 hugs. Do you remember him asking about that?

19 A. Yes.

20 Q. Now, just to be clear, is there anyway that you
21 could have thought it was Graceland and not Gene
22 that touched you?

23 A. I am clear that it was Gene that touched me
24 because I remember it clearly.

25 Q. You have not seen the video, correct?

Minor 1 - REDIRECT EXAMINATION

1 A. No.

2 Q. In fact, you and I have never talked about the
3 video, correct?

4 A. No, we have not talked about it.

5 Q. So the video that was taken a year and a half
6 ago -- when you are answering Mr. Hall's
7 questions, are you just trusting he is giving
8 you what happened or do you have a recollection
9 of what you talked about?

10 A. I was pretty confused about what he was saying
11 is what he had gotten from the report.

12 Q. So you believe that he is telling --

13 MR. HALL: Your Honor, I object to her
14 stating what she believes. The form of the
15 question.

16 THE JUDGE: Restate the question,
17 Solicitor, if you would.

18 BY MS. DESCH:

19 Q. When Mr. Hall is asking you questions about what
20 is in the video, do you independently remember
21 or do you understand or trust that he is telling
22 you what he viewed on the video?

23 A. Um, kind of what he viewed on the video.

24 Q. He talks about trying to narrow down the time
25 this happened. You never actually said August

Minor 1 - REDIRECT EXAMINATION

1 of 2011, correct?

2 A. Yes, I have never said that.

3 Q. When you were talking with Detective Neely, you
4 were trying to remember?

5 MR. HALL: Your Honor, again she is
6 leading.

7 THE JUDGE: Restate. I believe it is
8 leading. Restate your question, Solicitor.

9 BY MS. DESCH:

10 Q. When you are answering the questions that
11 Detective Neely posed to you when he asked you
12 questions, how narrow was your answer on the
13 timeframe?

14 A. I was trying to narrow it between July -- well,
15 June of that summer and August because I
16 remember it was some time between then, right
17 about either the beginning of June or at the end
18 of August. That's really all I could remember.

19 Q. But you can't specifically remember when it
20 actually happened?

21 A. No, I cannot.

22 Q. Now, Mr. Hall asked you about things that were
23 slightly different in the video, about the fact
24 that your knees were up to your chest. What you
25 testified to was that you had Graceland on your

Minor 1 - REDIRECT EXAMINATION

1 lap and you were bouncing her up to your chest,
2 correct? Is that what you testified to?

3 A. Yes, ma'am.

4 Q. Are you okay?

5 A. Yes, I will be fine.

6 Q. So at some point when you have Grace on your lap
7 and you are bouncing her, are your knees up to
8 your chest?

9 THE JUDGE: Please answer.

10 A. I said yes.

11 Q. This is from you Minor 1. This is not what I am
12 saying. Okay.

13 A. Okay.

14 Q. So if I am stating it wrong, you correct me.
15 Are you okay?

16 A. I'm fine.

17 Q. Okay. I was just trying to make sure we went
18 back over when you testified, you talked about
19 Graceland being in your lap. Then what did you
20 say happened when you had Grace on your lap?

21 A. That Mr. Jenkins touched me.

22 Q. I know it is hard, but you have to talk so we
23 can hear you back here.

24 A. I said that he reached over and touched me. I
25 was bouncing Graceland on my lap.

Minor 1

- REDIRECT EXAMINATION

1 Q. While you had Grace on your lap and you are
2 bouncing her and your knees are coming up into
3 your chest area, Gene was able to reach in and
4 get down into shorts and underwear and touch
5 you?

6 MR. HALL: Your Honor, she is coaching it
7 as her version. She can tell what happened.
8 She can't give her comments on what she had
9 testified to. So for her to summarize what she
10 believes is -- if she just asks her what
11 happened. Again, this is outside the scope of
12 redirect. We have been over this.

13 THE JUDGE: I know that was covered in
14 direct. I assume it is in response to your
15 cross-examination insofar as holding the child
16 and what happened. Just ask her again what
17 happened without summarizing what she may have
18 said in direct testimony.

19 MS. DESCH: Yes, sir, thank you.

20 BY MS. DESCH:

21 Q. Minor 1, I hate to keep repeating the same thing,
22 but can you tell this jury what you were doing
23 with Grace when you had her on your lap?

24 A. I was bouncing her up and down.

25 Q. Would it be easier to show them what you were

Minor 1

- REDIRECT EXAMINATION

1 doing?

2 A. I was bouncing her, playing with her, holding
3 her arms making sure she would not fall off my
4 lap (indicating).

5 Q. Thank you. Do you remember having the interview
6 with Detective Neely in the conference room or
7 at the Sheriff's office, wherever you were?

8 A. Yes, ma'am.

9 Q. Did he tell you he was recording that interview?

10 A. Yes, I remember him saying that.

11 Q. Do you remember what you talked to him about,
12 about the incident itself, not about the clothes
13 or the time of year but the actual incident?

14 A. I can't remember a lot of it because it was
15 about maybe -- it was just a while ago and I
16 can't really remember exactly. But it was about
17 this general incident, about what happened, and
18 going over the papers and what happened, where I
19 was touched, what the body parts related as so
20 he would know what I was talking about when I
21 told him.

22 Q. Do you remember telling him that Gene touched
23 you, touched your skin, skin to skin? Do you
24 remember saying that he touched the tip of your
25 private area?

Minor 1 - REDIRECT EXAMINATION

1 A. Yes.

2 Q. Do you remember telling him that you remember
3 Kacie coming back in and you saying, Kacie,
4 let's go outside?

5 A. Yes.

6 MS. DESCH: Thank you Minor 1.

7 THE JUDGE: Any recross?

8 MR. HALL: No, your Honor.

9 THE JUDGE: Thank you, Minor 1 for your
10 testimony. You can step down.

11 (Witness excused.)

12 THE JUDGE: Madam Forelady, and ladies and
13 gentlemen of the jury, I think it will be a good
14 time now to break for lunch. It is 1 o'clock.
15 I have one short matter that I think we are
16 going to do at 2. So if you can be back by 2:15
17 in your jury room. Again, I remind you that you
18 cannot begin your deliberations. You cannot
19 discuss anything about this case among
20 yourselves or with anyone else. So have a good
21 lunch, and we will see you back here at 2:15.

22 (Whereupon, the jury exited the courtroom
23 at 1:00 p.m.)

24 THE JUDGE: We will be in recess until
25 about 2:15.

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1 MS. DESCH: Your Honor, may I put the jury
2 issue on the record before I forget?

3 THE JUDGE: Yes, Solicitor, I would be
4 glad to hear from you.

5 MS. DESCH: Your Honor, I wanted to point
6 out after we broke and left the room, my
7 paralegal, Dawn Carter, indicated she recognized
8 one of the jurors from working with her years
9 ago at a nursing home here in town. It was
10 years ago. Dawn's name was never mentioned on
11 the record so I don't know Ms. Watts would
12 remember who she was, but I wanted to let the
13 Court know and the defendant know that someone
14 from my office did recognize a juror but has no
15 familiar relationship.

16 THE JUDGE: Mr. Hall.

17 MR. HALL: I have no objection.

18 THE JUDGE: All right. Thank you very
19 much. So noted for the record.

20 I am going to go ahead to have your motion
21 in limine marked as a Court's exhibit just in
22 case an issue comes up so the record is
23 protected.

24 MR. HALL: Thank you, your Honor.

25 (Whereupon, COURT EXH. 1, Motion in

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1 Limine, was marked for identification and
2 received into evidence.)

3 THE JUDGE: We will be in recess until
4 2:15.

5 (Court in recess at 1:01 p.m.)

6 (Court resumes at 2:17 p.m.)

7 THE JUDGE: We are back on the record,
8 Solicitor. Are you ready to proceed?

9 MS. DESCH: Yes, your Honor, I would like
10 to take up a few matters outside the jury.

11 THE JUDGE: Yes.

12 MS. DESCH: Your Honor, the first thing I
13 would like to address before we get into the
14 detective's testimony. During the defense's
15 opening statement, he talked about that this
16 allegation was brought by Katrina Babb, who is
17 the mother of Minor1 , that it happened on
18 the 7th of February, being reported, and on 14th
19 of February, Detective Neely showed up at his
20 client's house with life-altering, surprising,
21 and vicious news.

22 Your Honor, I think that is disingenuous
23 to argue to the jury and puts us in a precarious
24 position with our detective. It did not occur
25 that seven days later this was the result.

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1 There was an allegation in January, earlier, and
2 this detective had started that investigation
3 with another young victim who was a family
4 member of, actually, Janet's niece, I believe.
5 The detective was very familiar with
6 Mr. Jenkins. In the reverse, Mr. Jenkins had
7 talked to the detective on several occasions.

8 When the detective first went out there with
9 Minor2 as the victim, they talked about it.
10 He denied it. He denied it, said it was a
11 family issue, said that they all hated him, that
12 it was made up, she was lying. They continued
13 the investigation. There was several phone
14 calls made in an attempt to schedule polygraph
15 appointments. There were two scheduled.

16 All of this, obviously, we cannot bring up
17 in front of the jury. But as far as the Court
18 here, the detective had talked to Ms. Jenkins on
19 a few occasions scheduling a polygraph.
20 Mr. Jenkins has not shown up to any of them, had
21 rescheduled, not shown up. Then when this
22 allegation came about, there was an
23 investigation -- it was pretty similar to what
24 Minor2 had done, plus it is pretty similar
25 to the incident in 2001, all with people in the

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1 house when this occurred, all touching under the
2 shorts. In one occasion -- there is actually
3 two allegations with Minor2 , one is waking
4 her up on a sleep over and touching her in the
5 chest area, but then there was a second
6 allegation. There is a third allegation that
7 there is no jurisdiction established. There was
8 a touching of the butt area at a pool party,
9 which was not charged. These are all of the
10 things the detective knew, the 2001, that
11 allegation where there is a touching of the
12 similar area to a young girl about the same age.
13 He plead guilty to that charge and now get into
14 Minor2 , that investigation, and then now
15 Minor1 .

16 I think it is little disingenuous to argue
17 to the jury that, surprise, he gets this call on
18 the 7th and shows up a week later at
19 Mr. Jenkin's house and has him arrested.

20 It puts us at a very difficult situation
21 because it really limits us as to how we can
22 respond to that. We have been trying to stay in
23 the parameters to keeping it to Minor1
24 alone, but that does go into the detective and
25 to what he knew and what he discussed to

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1 Mr. Jenkins, and I think the defense to argue
2 otherwise is misleading to the jury.

3 THE JUDGE: Mr. Hall.

4 MR. HALL: Your Honor, I am at a little
5 bit of a loss. We have one witness -- I assume
6 the State has other witnesses. Certainly, what
7 I tell the jury in opening, they will have to
8 decide whether I have met what I said. At this
9 point in the trial, I really don't what to say.
10 There is other witnesses, there is other
11 evidence, and we will deal with that, but
12 whether they believe it was shocking and
13 vicious, that will be something that they
14 determine all together. I don't know what she
15 is asking or what she is wanting to do.

16 THE JUDGE: I certainly understand your
17 point, Solicitor. I don't know what I can do
18 other than what I have already done and explain
19 to the jury that your opening, defense opening,
20 is not evidence. It is just purely argument. I
21 could even repeat that. I can call it a
22 curative instruction. I can repeat that once
23 they come out. I will just mention that both
24 opening arguments are not evidence, what the
25 lawyers say are not evidence. I can repeat

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1 that. I don't know what else I can do at this
2 stage to ease your concerns.

3 MS. DESCH: I think what I am saying is
4 that I believe it opened the door to another
5 investigation as to why he just showed up a week
6 later.

7 THE JUDGE: Can opening arguments open an
8 evidentiary door? That's the question I am
9 throwing out. Typically, the doors are opened
10 through witness' testimony or any other
11 evidence. I don't know if a lawyer's opening
12 statement necessarily opened the door. I kind
13 of throw that out as a question. What do you
14 think, Solicitor? And I will be glad to hear
15 from you, Mr. Hall.

16 MS. DESCH: I don't know the answer.

17 MR. HALL: I am certainly not going to
18 stand up in front of this jury and tell him that
19 he had no reason to go to this house to arrest
20 the man. I think in my opening it was that
21 Detective Neely went there, knocked on the door,
22 and yes, I couched it as in the words that I
23 used, but to say that opens the door to other
24 testimony about a sort of parallel investigation
25 or the reason he was there is because he had

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1 these other reports. I don't know that. I
2 mean, I don't know that for sure; but one, I
3 don't believe that I have gone outside of what I
4 am allowed to under the rules. And again, we
5 have more testimony to take.

6 So to bring the jury back in, in essence, to
7 recharge them, or to give them preliminary
8 instructions again about the nature of opening
9 statements, I think would be confusing to the
10 jury.

11 MS. DESCH: I agree with that. That's not
12 what I want at this point. I just wanted to
13 bring it to the Court's attention. Co-counsel
14 just gave me a good example. I think it would
15 be if we have a position with intention to
16 distribute the case, and the whole defense is my
17 client is a drug addict. When they start their
18 opening statements, my client is a drug addict.
19 They cross-examine people, my client is a drug
20 addict. Do you believe that he could be a drug
21 addict? Is he so bad that he is buying in bulk?
22 That I think opens the door that we can then
23 bring in prior either/or distribution charges,
24 we could bring that in with intent to sell. I
25 think that could the intent to it.

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1 I don't want any curative instructions at
2 this point, I agree, but I do want to make an
3 issue, and I am trying to limit myself and I am
4 anticipating what to limit from Detective Neely
5 because we are trying to keep it in our
6 parameters.

7 It also brings us to the issue the second
8 issue. The forensic video was taken of Minor 1

9 after she was -- the video taken was just
10 shortly after turning 13. The statute prohibits
11 us to bring it in. We did not intend to bring
12 it in. It is inadmissible. Case law says it is
13 inadmissible. Case law says that prior
14 consistent statements, and I have two cases that
15 I have referred to, and I have handed them to
16 the defense. There is many cases. State v.
17 Russell, 383 S.C. 447 (2009) and Vail v. State
18 of South Carolina, that is a 402 S.C. 77 (2012)
19 case. This is, of course, is just one of many
20 cases on the subject of prior consistent
21 statements. It talks about something we brought
22 up in pre-trial about that the forensic
23 interviewer or therapist could not vouch for the
24 credibility of the victim and consistent
25 statements. You have to meet several prongs of

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1 tests before you can bring in a consistent
2 statement, and one of the things that makes it
3 non-hearsay, which allows the state to bring in
4 prior consistent statements, is an allegation of
5 recent fabrication.

6 I do think we have that based on the fact
7 that during cross-examination Mr. Hall asked
8 Minor1 several questions about how many times she
9 met with me. In fact, at one point, he made
10 some comment about you have met with her enough
11 times and you need to get your story right.

12 I do believe there is an allegation of a
13 recent fabrication, that her story has changed
14 because she is talking to me. I do think we are
15 allowed to bring in the prior consistent
16 statement, which would take care of the video
17 prohibition based on age, but I think it is
18 essentially limited to time and place. We are
19 incredibly limited. The defense brought in the
20 fact that he made the video a huge issue, and
21 this is the difficult part I find myself in.
22 Either I am forced to put in, or he allows me to
23 put in something that is previously
24 inadmissible, and it changes my strategy or me
25 trying to stay within the rules of the Court,

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1 allowing it to go in.

2 If it is trial strategy, I believe the
3 Court has said that it is not a PCR issue as
4 long as it is trial strategy, and I think in
5 this case it is his strategy and not ineffective
6 assistance of counsel. I think he is very
7 effective.

8 So now we have gone out of PCR issue, and of
9 course, I think the Court can correct me, but
10 now it is changing my ability to stay within the
11 rules, and I am limited to prior consistent
12 statements if you find it is, in fact, a recent
13 fabrication to time and place, not into the
14 greater details. There is nothing that allows
15 us to get into the greater details of a prior
16 consistent statement. So I am limited from
17 bringing that in.

18 If I am then forced to put in the video then
19 that adjusts how the rest of the strategy goes,
20 how the rest of the evidence is played out.

21 If I do not put in the video, which I
22 believe to be inadmissible, then the defense
23 making such an issue of it to the jury has now
24 made it an issue and he could possibly argue
25 that we are trying to hide something by not

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1 putting in the video. So it puts me in a
2 difficult situation.

3 I think that the case law is clear that
4 because of a recent fabrication allegation
5 during cross-examination, I could get prior
6 consistent statements in through Detective Neely
7 or through the video, and I am asking if you
8 agree, and if I could get prior consistent
9 statements, but my understanding of the case law
10 is that I am limited to time and place. If I am
11 limited to time and place and I don't put the
12 video in, then I am stuck in a position where
13 that, because it has been made an issue, the
14 defense can argue that we are not putting it in
15 because we are trying to hide something, which
16 is not true. We are trying to stay within the
17 boundaries of the case law.

18 THE JUDGE: So you are wanting prior
19 consistent statements to be brought in, one,
20 through the detective and also through showing
21 the video?

22 MS. DESCH: I did not think the video was
23 admissible. Even if it is admissible now based
24 on either his waiver or the fact that I am
25 asking for a prior consistent statement under

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1 801(b), my understanding of the case law is that
2 I am limited to time and place.

3 THE JUDGE: Explain that for me. Limited
4 to time and place with respect to what? Define
5 that for me.

6 MS. DESCH: A victim of a CSE or, by
7 argument, a lewd act, her statement to bring in
8 a consistent statement in a video. So for
9 instance, if a therapist gets on the stand and
10 says she told me what happened to her, or we put
11 in the video and this is what happened to her,
12 and she is not a child, not a four or five year
13 old. She is under 12. Then it is bolstering
14 and the Court says you are not allowed to
15 continue to bolster the statement.

16 The exception to make it non-hearsay is to
17 say that there is some recent allegation of
18 fabrication. In this case, I am asking, one,
19 for a ruling that there wasn't a
20 cross-examination that alluded to the fact that
21 her testimony has changed because of meeting
22 with me. If that is the case, I am still only
23 allowed to get in prior consistent statements
24 prior to what would make her lie limiting to
25 time and place. So even if you rule recent

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1 fabrication, Detective Neely can't get into the
2 entirety of what did she tell you happened. I
3 can only draw questions that have to do with
4 when it happened and where.

5 THE JUDGE: When it happened and where it
6 happened. Mr. Hall.

7 MR. HALL: Your Honor, I am not objecting
8 to the whole video coming in. In fact, I think
9 there is exculpatory information on the video.
10 I think the rules, the statute, allowing if the
11 victim is 12 or under and gives testimony or
12 testifies in court, then the entire forensic
13 interview can be played under the statutory
14 rules. Initially, that was for the protection
15 of the defendant. The legislature deemed that
16 if the victim is 12 years or younger and would
17 testify then they would allow it in.

18 My client, and we are happy -- and if the
19 State has decided whether they want it in or
20 not, if they bring it in, we are not objecting.
21 I stated that earlier without objection because
22 I believe there is exculpatory information on
23 there, and that is not only a trial decision,
24 but that's looking at the evidence in the case.
25 There is certainly impeachment evidence. It is

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1 like a sworn statement is what it is. It is
2 like a handwritten sworn statement by -- well,
3 in essence, by the victim, and I tried to
4 cross-examine her on what I know and what I
5 believe was in the video. We would like the
6 video to come in. In fact, I think it presents
7 the true, clear picture to the jury of what she
8 said in her video and what she says today.

9 So as far as protecting my client's
10 rights, you know, we do not object to the video
11 coming in. In fact, we would like for it to
12 come in.

13 THE JUDGE: Solicitor, you don't want the
14 whole video to come in, correct?

15 MS. DESCH: It is not that I don't or I
16 do. If he would like to put it in, he could put
17 it in. He could put it in as a defense exhibit.

18 THE JUDGE: Okay.

19 MR. HALL: Your Honor, I will be honest
20 with you, if I put it in, I would argue that
21 they had an opportunity to put it in and they
22 are not putting it before you. I think they
23 can't stand behind a rule that it is
24 inadmissible when my client is willing to waive
25 and give up that and determine whether it is

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1 admissible. He wants it in. It does become a
2 trial strategy for them to decide if they want
3 to put it in and how they deal with it. I can't
4 tell them what to do. We would like it in. If
5 they are not going to put it in, I am going to
6 have to make a decision, trial strategy
7 decision, of whether I am going to put it in and
8 that will affect my argument. We certainly
9 don't have a burden to put it in, and I think
10 that that affects what I am able to argue to the
11 jury.

12 THE JUDGE: Okay. We need to go back to
13 your first issue about your opening. If neither
14 side wants a curative instruction then hopefully
15 the jury will remember I instructed them not to
16 consider as evidence and purely as argument the
17 opening statements. I don't know what else I
18 can do on that.

19 MS. DESCH: Your Honor, I --

20 THE JUDGE: Hold that thought, Solicitor,
21 please. We are back on the first issue,
22 Mr. Hall's opening argument. I am not deciding
23 whether or not you opened the door, but you can
24 open the door in an opening statement, and
25 that's the case of State vs. Dunlap, 2003 case.

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1 MS. DESCH: Your Honor, Ms. Joyner just
2 found this, and we have handed one to defense
3 counsel as well.

4 THE JUDGE: So we have two good minds
5 working here. Let's kind of focus on this first
6 issue before we get to the second one.

7 Refresh my memory of close to exact words
8 that Mr. Hall used that you remember, Solicitor,
9 is what?

10 MS. DESCH: Our understanding it was
11 life-changing, shocking, and vicious news.

12 THE JUDGE: Life-changing.

13 MS. DESCH: Or life-altering. He said it
14 two different times during opening, and he used
15 the word vicious and shocking.

16 THE JUDGE: And that was the detective
17 coming to the home?

18 MS. DESCH: Correct.

19 THE JUDGE: That was when he was arrested
20 or just to come talk with him?

21 MS. DESCH: That was when he was arrested,
22 and your Honor, to be clear, when Detective
23 Neely came to the home, he arrested Mr. Jenkins
24 on all three warrants.

25 MR. HALL: Your Honor, that is not an

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1 issue in this case.

2 THE JUDGE: Be at ease for just a moment.

3 It would appear that State vs. Dunlap is
4 somewhat different than our situation. The
5 attorney argued that he never sold drugs when,
6 in fact, he had some prior convictions for
7 distribution. I think that's somewhat different
8 than Mr. Hall arguing that when the detective
9 came there was a life-changing, life-altering,
10 vicious, shocking, when the defendant came and
11 arrested the defendant. So I think Dunlap is
12 somewhat different than our situation here. I
13 don't think that would be opening the door to
14 get into these other -- in and of itself,
15 opening the door to get into these other cases.
16 So without a curative instruction, I don't know
17 what else we can do on that particular issue.

18 MS. DESCH: Your Honor, if we could just
19 hold our objection in abeyance, we will get
20 through the other and maybe address it once the
21 rest of the testimony comes out on whether or
22 not --

23 THE JUDGE: You mean on the first issue?

24 MS. DESCH: On the first issue, yes, your
25 Honor.

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1 THE JUDGE: Okay. I will be glad to
2 revisit that issue.

3 Now, let me look at the State vs. Russell
4 and Vail vs. State.

5 (Judge reviewing cases.)

6 THE JUDGE: I have read both cases.

7 MS. DESCH: Thank you. I will try to lay
8 the record as best I can. The State's
9 contention is that statements made by a victim
10 in a forensic interview are inadmissible because
11 of 803(3) hearsay. One, if we put it into her
12 own testimony, we are bolstering the
13 consistency. Hearsay makes it inadmissible. If
14 during cross-examination there is a recent
15 fabrication allegation and will meet the
16 following: The one, the declarant, must testify
17 and be subject to cross-examination, which Minor1
18 did. The opposing party must have explicitly or
19 implicitly refused the declarant of recently
20 fabricating the statement or of acting under an
21 improper influence or motive. We contend that
22 the statement about meeting with me and making
23 her story right did that. The statement must be
24 consistent with the declarant's testimony and
25 the statement must have been made prior to the

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1 alleged fabrication or prior to the existence of
2 the alleged improper influence or motive.

3 If those are met, then that portion,
4 limited to time and space, is allowed through
5 801(d)(1)(b), and (d), which makes it
6 non-hearsay.

7 The defense has said that his client wants
8 it in. I understand that he may want it in, but
9 that does not make it admissible under the rules
10 of evidence. What is admissible, if you find
11 that those four were met, that they can talk
12 about the time and place.

13 The defense would be limited to
14 admissibility rules as we are. The time and
15 place does not get the whole video in. It only
16 gets where it happened and when it happened.

17 So we would argue that, one, we still
18 don't believe it is admissible in its entirety,
19 only admissible to time and place.

20 As you read in Vail v. State on Page 6,
21 for example, of the printed case handed to the
22 Court and defense, they clearly say that they
23 give examples of testimony that was given in
24 that particular case and say the Court finds
25 portions of the challenged testimony far

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1 exceeded the limitations provided in Rule
2 801(d)(1)(b) and (d).

3 With that, and those limits, the State is
4 saying that we are limited to time and place for
5 prior consistent statements if the Court were to
6 rule those four were met. For the defense to
7 then say, but we want it in, my client wants it
8 in, there is exculpatory evidence. If we do get
9 it in, and we are forced to put it in, we are
10 going to argue the State could have and didn't.
11 It is still not admissible. If they want to put
12 it in and they find a way to put it in then
13 that's their strategy, but it is still
14 inadmissible. If it goes in, they can't then
15 argue that the State had the opportunity to put
16 it in and did not because our contention is it
17 is still inadmissible. That's the ruling we
18 would like.

19 THE JUDGE: It certainly appears, without
20 answering the question whether or not the
21 defense has the right to put the whole video in,
22 it certainly appears that the State at this
23 point in time would have the right to put
24 evidence in as to prior consistent statements
25 because there has been allegations through

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1 cross-examination that there has been some
2 fabrication with this witness and your office.
3 So it would appear that at least that question
4 would appear that the State would have the right
5 to put in evidence of prior consistent
6 statements as to time and place.

7 I think even maybe the big hurdle that I
8 have would be is whether or not the defense
9 would have the right to put the whole video in
10 or not. Could we not, and I am not trying to
11 dance around the question, can we not -- and I
12 am going to hear from you, Mr. Hall, even though
13 I am kind of telling you where I am coming from
14 on this. I would be glad to hear from you. Go
15 ahead and allow the State to put up evidence as
16 prior consistent statements as to time and
17 place, and then at the appropriate time, if you
18 want to put the video in then we will address
19 that issue. You may decide not to, I don't
20 know, but could we handle it in that fashion?

21 I will be glad to hear from you, Mr. Hall.

22 MR. HALL: Your Honor, I certainly agree
23 with that analysis and the way to handle it. I
24 do believe that we are also under Rule 613,
25 prior statements of witnesses, that we are under

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1 Rule 613(b) extrinsic evidence of a prior
2 inconsistent statement of a witness. Extrinsic
3 evidence of a prior inconsistent statement by a
4 witness is not admissible unless the witness is
5 advised of such statement at the time and place
6 it was allegedly made and the person who made it
7 is given an opportunity to explain or deny. If
8 the witness did not admit that they made prior
9 inconsistent statements, extrinsic evidence of
10 such statement is admissible.

11 I think that's where -- as far as my
12 client, and I understand I may have the burden
13 of trying to figure out whether or not I want to
14 put it in or not, but however, I am at a little
15 bit of a quandary of how to introduce this
16 extrinsic evidence of a prior inconsistent
17 statement. I disagree with the solicitor in
18 that there are consistent statements in the
19 video, but I would allege, and my client will
20 allege, that there are a number of inconsistent
21 statements that are exculpatory. And certainly,
22 I did try to do those without showing the video
23 with the child victim to impeach her.

24 So we are at the position of if Detective
25 Neely gets on the stand -- normally, if this was

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1 a written statement and a witness denied making
2 statements in the signed written statement, then
3 through whoever the person was that witnessed
4 and took that statement, we could then introduce
5 that extrinsic evidence because it was
6 inconsistent through that person. So if the
7 Court's reasoning is that the State certainly is
8 not required to put it up, if they don't put it
9 up, then we would be left with the defense to
10 try to get it in. That would be my question,
11 can I -- what I would ask the Court is if
12 Detective Neely takes the stand, can I show
13 pertinent parts of the video without introducing
14 those parts into evidence as proof of
15 inconsistent statements made by the witness?

16 THE JUDGE: Typically, when you impeach a
17 witness' testimony with evidence of prior
18 inconsistent statements, you do it with the
19 witness himself or herself as a general rule.

20 MR. HALL: Right. If she denies making
21 that.

22 THE JUDGE: I understand that. Then you
23 put up your proof.

24 MR. HALL: Then I think we are still given
25 the opportunity to then put up the person who

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1 witnessed in the statement and took the
2 statement to say, you know, you were there on
3 such and such a date.

4 In other words, in this case, Detective
5 Neely, you did a video, right? And you recorded
6 everything she said when you interviewed her on
7 December 14th, right? And I don't know, if he
8 looked at the video or not. If he looked at the
9 video then say, well, you know, have you seen
10 the video? Is it a fair and accurate
11 representation of what you did? Then he will
12 try to introduce it. And they will use parts of
13 it, say -- or maybe it is just a matter of me
14 questioning her if she has seen the video to
15 say, did she tell you that she had on -- showed
16 you her shirt and it was green instead of blue
17 and white? Or do you remember her telling you
18 that she had her knees to her chest and her legs
19 spread open? Or do you remember her telling you
20 initially that it was two or three months ago
21 when it occurred.

22 And going through it like that -- maybe we
23 don't even need to worry about showing the video
24 or allowing me to state the objectives to deal
25 with those prior inconsistent statements with

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1 Detective Neely.

2 THE JUDGE: Solicitor, do you have an
3 issue with Mr. Hall cross-examining your
4 detective concerning whether or not Minor1 said
5 certain things during the interview? The fact
6 that there is video or not, he had an interview.
7 Did Minor1 tell you this? Did he tell you that?
8 I don't think you have an issue with that, do
9 you, Solicitor?

10 MS. DESCH: To be clear, the time and
11 place would incorporate the issues he has with
12 the two to three months she talks about the
13 weather and maybe later in the summer. I don't
14 have an issue with that. If you made a ruling
15 that we can talk about things that time would
16 include that interaction so he can decide at
17 that point if he wants to cross-examine on that
18 so I don't have an issue with that coming in
19 through Detective Neely because time and place
20 would be included with your ruling.

21 The issue I would have is he asked her
22 some questions, and I don't know how much of it
23 was inconsistent -- yes, it was inconsistent,
24 but how much was denied. I think even we have a
25 difference of recollection as to how she

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1 answered certain things. I don't personally,
2 and please correct me if I am wrong, but there
3 weren't any outright denials. I think there
4 were some things like, do you remember talking
5 about knees being up to chest? And they had a
6 conversation with that. I think walking her
7 through it, she did answer that.

8 I don't remember if there was any outright
9 denials. I think we would have to be very clear
10 what was an outright denial which triggers
11 extrinsic evidence.

12 She admitted to the fact that she had said
13 on direct a blue and white T-shirt and when
14 asked about the fact, well, do you remember you
15 were wearing an olive green one in the video?
16 She said, blue or green, I don't remember.
17 Those were things brought out to the jury. He
18 pointed out inconsistency there, and that was
19 brought out. I don't think he gets extrinsic
20 evidence on that. Obviously, my recollection
21 could be incorrect. I think we specifically
22 have to know which inconsistent statements were
23 denied during her testimony and I don't know how
24 to do that other than --

25 THE JUDGE: Well, according to my notes I

STATE OF SC VS. LEONARD JENKINS

1 know there was issues about the dates, about the
2 clothes, and holding the infant on the knees. I
3 think those were in very general terms those
4 were kind of the three areas that Mr. Hall had
5 kind of focused on during cross-examination that
6 may create some inconsistencies.

7 Let's do this: Let's go ahead -- and I am
8 going to allow you to put into evidence as prior
9 evidence of prior consistent statements based
10 upon the Vail vs. State and State vs. Russell
11 through the video and/or the detective and let's
12 see how that goes. Maybe we can revisit the
13 issue about, number one, what Mr. Hall
14 cross-examined the detective on and the use of
15 the video. So let's maybe approach it in that
16 fashion.

17 MS. DESCH: Thank you, your Honor.

18 MR. HALL: Thank you, your Honor.

19 MS. DESCH: For the record, the
20 admissibility statute that deals with
21 admissibility of out of court statements of
22 child under 12, that is 17-23-175.

23 THE JUDGE: Thank you. Are we ready for
24 the jury?

25 MS. DESCH: Yes, your Honor.

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1 MR. HALL: Defense is ready.

2 THE JUDGE: Thank you very much. Bring
3 the jury in.

4 (Whereupon, the jury came into open court
5 at 3:02 p.m.)

6 THE JUDGE: Let the record reflect that
7 the jury is present. Madam forelady, and ladies
8 and gentlemen of the jury, we kept you back in
9 the jury room a little bit longer than we
10 anticipated. There was some legal matters that
11 I had to take up with the lawyers. That's what
12 we were doing.

13 Now, we are ready to proceed with the
14 trial. Solicitor.

15 MS. DESCH: Thank you, your Honor. May it
16 please the Court. The State would next call
17 Detective Carson Neely.

18 DETECTIVE CARSON NEELY

19 being first duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MS. DESCH:

22 Q. Good afternoon.

23 A. Yes, ma'am.

24 Q. Could you please state your name for the record?

25 A. Carson Neely.

CARSON NEELY - DIRECT EXAMINATION

1 Q. Where do you work?

2 A. York County Sheriff's Office.

3 Q. How long have you been with the Sheriff's
4 Office?

5 A. Approximately 15 years. In 1998 I started
6 service.

7 Q. Did you do anything before the Sheriff's Office?

8 A. Yes, several, few different jobs. After high
9 school I went into the military. After the
10 military, somewhat of college, then I worked at
11 Grace Fabrication Industrial and then I came to
12 law enforcement.

13 Q. Law enforcement since 1998?

14 A. Correct.

15 Q. Are you assigned to any particular unit in
16 Sheriff's Office?

17 A. I am currently assigned to Violent Crime Unit in
18 the Sheriff's Office.

19 Q. What is the Violent Crime Unit?

20 A. It is basically any kind of crime against a
21 person. It can deal with fraudulent checks up
22 to homicide, any kind of personal assaults.

23 Q. Does it include sexual conduct or sexual
24 assaults?

25 A. Yes, ma'am, it does.

CARSON NEELY - DIRECT EXAMINATION

1 Q. You are a detective, correct?

2 A. Correct.

3 Q. How long have you been a detective?

4 A. Since December of 2005.

5 Q. Did you do patrol before then?

6 A. Correct, I did.

7 Q. What kind of training and experience have you
8 done in your years with the Sheriff's Office?

9 A. We get ongoing training. Each month we get a
10 six- to eight-hour block of instruction on
11 various types of training. Of course, there is
12 specialized training as well. Primarily, in
13 this unit, I received approximately 600 hours of
14 investigative type, specialized training, beyond
15 the normal requirements of keeping my
16 certification.

17 Q. As part of your duties in the Violent Crime
18 Unit, you said that you did sexual assault
19 cases, correct?

20 A. Correct.

21 Q. Is that with adult and children victims?

22 A. Yes, ma'am. Anywhere from the ages from, I
23 think the youngest victim I have dealt with is
24 approximately a year or so old and then, of
25 course, even up to elderly people.

CARSON NEELY - DIRECT EXAMINATION

1 Q. You have indicated you had about 600 hours or so
2 of training. Did that include anything specific
3 to sexual assault cases?

4 A. Yes. The investigator's training varies from
5 crime scene. It also covers interviews,
6 interrogation, statement analysis, child abuse,
7 child neglect, child sexual assault, adult
8 abuse, same things, various types of training in
9 those aspects.

10 Q. Interviewing techniques. What kind of
11 interviewing techniques have you been trained to
12 do?

13 A. Specifically, we are dealing with children.
14 There is two classes I went to that is
15 particularly geared towards that. One is called
16 finding words. I think it was January 2006 I
17 attended that class. It is a 40-hour class.
18 What it does is kind of give you a guideline or
19 a structured protocol, somewhat structured
20 protocol, of how to interview children. There
21 is an advanced section of that class as well.
22 It think it was 2010, I forget what month, I
23 attended that class as well.

24 Q. What is it called when you do that specific type
25 of interviewing?

CARSON NEELY - DIRECT EXAMINATION

1 A. There is a form we use is RATAAC. It is an
2 acronym for RATAAC. Basically, do you want me to
3 explain what that means?

4 Q. Is it forensic interviewing?

5 A. Forensic interviewing for children.

6 Q. It is specifically for dealing to make sure you
7 are discussing on the child's level or
8 understanding so you are on the same page?

9 A. Correct.

10 Q. For instance, in this case, when you are
11 interviewing someone like Minor1 and she
12 uses the word privates, how do you make sure
13 that when she says privates it is what you know
14 it as an adult to mean privates?

15 A. One of the steps in RACTAC, of course, is
16 building a rapport, the next one is anatomy. I
17 use diagrams, the diagram you presented earlier.
18 I have the child label body parts, what he or
19 she may call the body parts, that way I am not
20 influencing her or leading her or him as to what
21 words to use because it is important to get
22 their language.

23 Q. So you would not want to impose -- I hate to say
24 this -- you would not want to impose the word
25 vagina if she didn't know what that means?

CARSON NEELY - DIRECT EXAMINATION

1 A. Exactly.

2 Q. Did you do that with Minor1 ? Did you show
3 her the diagram?

4 A. Yes, ma'am, I did.

5 Q. You interviewed Minor1 in this particular
6 case, correct?

7 A. Yes, ma'am.

8 Q. Do you remember when?

9 A. It was February 14th of last year.

10 Q. How did it come to your attention that you had
11 to interview Minor1 ?

12 A. One of the road officers, and I don't remember
13 if I called him or he called me or if I heard it
14 on the radio. We talked via telephone -- well,
15 through the telephone. He told me about an
16 incident he was out on and if I would pick up on
17 the case.

18 Q. Was that an incident with Minor1 ?

19 A. Yes.

20 Q. Did you arrange to interview Minor1 ?

21 A. I did. I told him I would be in contact with
22 the mother and arrange a meeting and interview.

23 Q. Did you do so?

24 A. Yes, ma'am, I did.

25 Q. Is that with Katrina Babb?

CARSON NEELY - DIRECT EXAMINATION

1 A. Yes, ma'am, I did.

2 Q. Where did you conduct that interview?

3 A. In a conference room over at the Sheriff's
4 Office.

5 Q. When you brought Minor1 in to the conference
6 room, was she by herself during the interview?

7 A. During the interview, yes, ma'am. I met briefly
8 with the mother prior to the interview just to
9 build up a rapport and let her know she was in a
10 safe environment, and then excused her mother
11 and conducted the interview.

12 Q. When you interviewed her, did you use that RATAC
13 you described or forensic interview method?

14 A. Yes, ma'am, I did.

15 Q. That's different from regular interviews based
16 on what you explained?

17 A. Correct, yes, ma'am.

18 Q. Do you remember how old she was when you met
19 with her?

20 A. Thirteen.

21 Q. In fact, she had just turned 13?

22 A. That's correct, yes, ma'am.

23 Q. How long did you talk with Minor1 about this
24 incident that day?

25 A. Approximately 25 minutes, could have been a

CARSON NEELY - DIRECT EXAMINATION

1 little longer. The way the interview is geared
2 through this is not to have an extensive
3 interview, you tend to lose a child's focus. So
4 it is geared to have normally around 30 minutes
5 is the timeframe you want to conduct an
6 interview.

7 Q. How was the interview structured as far as
8 questions and answers?

9 A. It is very nonleading. It is nonleading,
10 open-ended questions. I asked her a question
11 and make sure it is her interpretation, her
12 words, kind of like she leads the interview for
13 the most part.

14 Q. Let me clarify. Are you asking the questions of
15 her?

16 A. Yes. Kind of open-ended, nonleading questions,
17 yes.

18 Q. So what happened, how it happened, where it
19 happened, that kind of question?

20 A. Correct.

21 Q. During your meeting with her at the Sheriff's
22 Office, was Minor1 able to identify who had
23 assaulted her?

24 A. Yes, ma'am.

25 Q. Was she able to identify specifically when it

CARSON NEELY - DIRECT EXAMINATION

1 had occurred?

2 A. No, ma'am, not specifically. It is pretty
3 common with interviewing children, not on
4 specific date or time.

5 Q. At some point during the 25-minute interview,
6 did you ask the question about when it may have
7 occurred?

8 A. To try to get a timeframe, I would ask questions
9 like, do you remember the weather? What was
10 going on basically, you know, in school, out of
11 school, those type of questions.

12 Q. In this particular case, what happened what
13 initially happened when you asked the question
14 when did this occur?

15 A. Well, are you asking me what she told me?

16 Q. Yes.

17 A. Okay. Initially, I think she gave an answer of
18 something like two to three months prior.

19 Knowing that interviewing children, even some
20 adults, they have a hard time with conception of
21 timeframe so it is important to ask questions
22 like, well, what was going on in that timeframe?
23 Was it hot outside or cold outside? That kind
24 of narrows down whether it winter or was it
25 summer. Was it in school out of school? That

CARSON NEELY - DIRECT EXAMINATION

1 kind of narrows down, you know, even narrows the
2 timeframe. That's kind of what we did.

3 Q. So after she said two to three months, do you
4 remember what happened after that? Did you
5 continue to try to clarify?

6 A. Yes, ma'am.

7 Q. What was dispatched from Minor1 about the time?

8 A. She recalled it being warm outside. If I
9 remember correctly, she said something like 70
10 plus degrees. It was hot, warm, that's why it
11 led to other things, but yes, ma'am.

12 Q. So as you continued to sort of narrow down the
13 time, she gets into a period of time where it
14 was 70 or so?

15 A. Correct -- in her words, 70 plus degrees but she
16 also said it was warm outside.

17 Q. At the time of the interview, this was February,
18 correct?

19 A. Correct.

20 Q. So did it make sense that she was saying it was
21 warm out, two to three months, how did you
22 differentiate?

23 A. That led into were you in school, out of school,
24 that type of question. My impression was it was
25 in-between school years, which would have been

CARSON NEELY - DIRECT EXAMINATION

1 the summer months.

2 Q. Did she talk about -- did she put the timeframe
3 within the school year? What was she able to
4 discern?

5 A. That it was summertime. It was out of school.
6 So between school years.

7 Q. In fact, at some point I think we addressed this
8 in cross-examination, there was some mention of
9 maybe toward the beginning of school or
10 something along those lines?

11 A. Correct.

12 Q. Is that uncommon for children or not? Based on
13 your 60 hours or many, many interviews with
14 people, what does that mean to you?

15 A. As far as timeframe or?

16 Q. Let me back up.

17 A. I'm sorry.

18 Q. No. It was my fault. Let me back up.

19 In your years as violent crime detective or
20 sexual assault detective, have you sat down with
21 many children in interviewing them?

22 A. Yes, ma'am.

23 Q. About how many?

24 A. As far as children, specifically, I don't know
25 an exact number. Maybe 100. That is a rough

CARSON NEELY - DIRECT EXAMINATION

1 guess. I don't have specific number to give.
2 Maybe more.

3 Q. You made mention of the fact that children have
4 difficulty in determining exact time, is that
5 your experience with interviewing children?

6 A. Yes, ma'am.

7 Q. During your discussion in this interview with
8 Minor1, did you pursue it any further or did you
9 just sort of leave it as it happened sort of in
10 the summer some time?

11 A. That was pretty much it because it was kind of
12 hard to determine specific date.

13 Q. This was, in fact, a late report?

14 A. Correct.

15 Q. Was she able to tell you where it happened?

16 A. Yes, ma'am.

17 Q. Where did it occur?

18 A. In the living room at Gene's house.

19 Q. Is that Gene Jenkins, the defendant, here today?

20 A. Yes, ma'am, it is.

21 Q. So during the interview she stated it happened
22 in the living room at Gene's house.

23 A. Correct. One of the living rooms. The way she
24 described it was there was two living rooms and
25 it occurred in one of the living rooms at Gene's

CARSON NEELY - DIRECT EXAMINATION

1 house.

2 Q. Where is Gene's house, do you know?

3 A. . Actual numerics, I am not sure.

4 Q. Is here in York County?

5 A. Yes, ma'am, it is.

6 Q. At some point, did you conclude the interview
7 with Minor1 for that day?

8 A. Yes, ma'am.

9 Q. Did you continue your investigation after the
10 7th of February?

11 A. Yes, ma'am.

12 Q. Did you eventually go out to Mr. Jenkins house
13 on the 14th?

14 A. I did.

15 Q. What happened when you went out to the house?

16 A. I knocked on the door. I basically served what
17 we call an arrest warrant. Do you want me to go
18 into detail as to what took place? I knocked on
19 the door. He invited me in. There was two
20 children present in the home, I think an 11-year
21 old. I am not sure how old she was. A smaller
22 kid, Grace, Gracey is her name, approximately
23 two-years old at the time. I told him I had an
24 arrest warrants for him. I didn't want to
25 discuss particulars in front of his children.

CARSON NEELY - DIRECT EXAMINATION

1 He understood. He asked to use my phone. I
2 believe he called his wife first, Janet first.

3 Q. Let me interrupt you. Was Janet not there at
4 the time?

5 A. Correct.

6 Q. Did she eventually come?

7 A. Yes, ma'am, she did.

8 Q. So when Janet got there, were they able to
9 separate the children?

10 A. Yes.

11 Q. So at some point the adults were separated and
12 the children were away. Did you actually arrest
13 him on the warrant you had?

14 A. Yes.

15 Q. How far away is from Moss Justice
16 Center?

17 A. About a four minute drive.

18 Q. So I am assuming you arrested him and put him in
19 the car?

20 A. Yes. He wanted to talk to his attorney as well
21 so he called an attorney, and I can't remember,
22 Neil, if I am correct. If I am incorrect, I'm
23 sorry. I let him do that first. We were
24 standing out in the yard. Everything was really
25 low key. I didn't want to put handcuffs on him

CARSON NEELY - DIRECT EXAMINATION

1 in front of his children. So I let him sit down
2 in the car in the passenger seat and put
3 handcuffs on him and transported him to the Moss
4 Justice Center.

5 Q. So had he a chance to talk to his attorney?

6 A. Yes. He wanted me to speak to him as well.

7 Q. Did you talk to the attorney?

8 A. Correct.

9 Q. Then after that, you took him in to transport
10 him to Moss Justice Center?

11 A. Correct.

12 Q. Did you then book him in -- what happened when
13 you got here?

14 A. I brought him to detention, served the arrest
15 warrants. And basically, the paperwork I did
16 was a medical screening form and booking sheet.

17 Q. When you did the paperwork with him, at some
18 point did you learn his date of birth?

19 A. Correct.

20 Q. Do you know what his date of birth is, do you
21 remember?

22 A. , I believe.

23 Q. So his date of birth is ?

24 A. I think that's correct.

25 MS. DESCH: Court's indulgence.

CARSON NEELY - DIRECT EXAMINATION

1 BY MS. DESCH:

2 Q. Once you finished the paperwork in booking, did
3 anything else happen?

4 A. No, ma'am.

5 MS. DESCH: Thank you. Please answer any
6 questions Mr. Hall may have.

7 THE JUDGE: Cross-examination, Mr. Hall?

8 MR. HALL: May it please the Court.

9 CROSS-EXAMINATION

10 BY MR. HALL:

11 Q. Detective Neely, let me see if I can get the
12 timelines straight. A road officer, in your
13 words, is who talked to Katrina Babb first; is
14 that right?

15 A. That's correct.

16 Q. You received information from that road officer,
17 right?

18 A. Yes, sir.

19 (Whereupon, DEFENDANT'S EXH. 1, Officer
20 Neely's Summary, was marked for identification.)

21 MR. HALL: May I approach?

22 THE JUDGE: Certainly.

23 BY MR. HALL:

24 Q. Detective Neely, I show you what has been marked
25 as Defense Exhibit 1. Have you ever seen that?

CARSON NEELY - DIRECT EXAMINATION

1 A. Yes, I have.

2 Q. What is that?

3 A. It is a written statement. It is a volunteer
4 statement on our county issued -- York County
5 Sheriff's Office Voluntary Statement form.

6 Q. When did you first see that?

7 A. I don't know exactly. It could have been the
8 very next day that I actually got this. To say
9 it was that day or the next day, I can't.

10 Q. When you say the next day, you testified that a
11 road officer interviewed Ms. Babb on the 7th?

12 A. Correct.

13 Q. And I think you -- and he got information from
14 Ms. Babb; is that right?

15 A. That's correct.

16 Q. Would that be part of the information that the
17 road officer got from Ms. Babb?

18 A. Yes, sir.

19 Q. When you say the next day, you mean the next day
20 after the 7th you had that or the next day after
21 the 14th?

22 A. I mean probably after the 7th. I can't say I
23 got this on the 7th. It could have been the 8th
24 when I actually received it.

25 Q. It became part of your investigation file?

CARSON NEELY - DIRECT EXAMINATION

1 A. Yes, sir.

2 Q. You testified that you have been through
3 training and you have been through what is known
4 as -- is it RAYTAC or RACTAC?

5 A. Forensic interviewing, the accepted
6 semi-instructor protocol is called RACTAC is
7 what it is called. It is the acronym.

8 Q. When you interviewed her on the 14th, that was
9 the protocol you used to interview her, correct?

10 A. Yes.

11 Q. Part of that interview process is that point in
12 time, it is a protocol to help you determine, in
13 fact, to glean facts, right?

14 A. Correct.

15 Q. And to be able to get a witness, or in this
16 case, a 13-year old girl to tell you what
17 happened?

18 A. Correct, what did or did not happen, yes, sir.

19 Q. You testified, I believe, that this was in
20 February of 2012 when you talked to her, right,
21 February 14th?

22 A. Yes, February 14th.

23 Q. So she just had her 13th birthday?

24 A. Correct.

25 Q. She clearly understood what you were asking?

CARSON NEELY - DIRECT EXAMINATION

1 A. Yes, sir.

2 Q. She didn't have any difficulty, right?

3 A. Just with remembering a timeframe, yes, sir.

4 Q. She is 13 years old?

5 A. Yes.

6 Q. When you refer to her as a child, when you say
7 child, that could be a big broad spectrum of
8 age, right?

9 A. Yes, sir.

10 Q. In fact, the interview lasted or -- you recorded
11 it, right?

12 A. Yes, sir.

13 Q. In your interview report, you had -- you wrote
14 the DVD is available for full details of the
15 interview; is that right?

16 A. Yes, sir, that's correct.

17 Q. How many times have you watched that interview
18 since you did the video?

19 A. I believe I watched it one full time and maybe
20 clips and pieces a couple of other times.

21 Q. When did you watch it full time?

22 A. Yesterday morning, I believe.

23 Q. So you have not watched it in full since
24 February the 14th, 2012 until yesterday morning?

25 A. That's correct.

CARSON NEELY - DIRECT EXAMINATION

1 Q. So when you prepared your interview report, you
2 had not watched the video in full; is that
3 right?

4 A. Correct.

5 Q. Do you remember when you did this -- do you
6 remember when you did your incident interview
7 report?

8 A. Following -- it could have been that day or the
9 next day. I don't remember exactly when I
10 actually typed that.

11 Q. Was that done from notes or done from memory?

12 A. Memory and notes.

13 Q. Did you bring those notes with you?

14 A. No, sir. They are summarized on that page. I
15 don't have them. That is pretty typical,
16 standard, jot down some notes. Nobody would
17 ever be able to read them so I summarized that
18 on that page.

19 Q. What did you do with those notes?

20 A. Destroyed them, yes, sir.

21 Q. Is that standard protocol for detectives to
22 destroy notes on a case they are investigating?

23 A. Yes, sir. If we are taking down notes for
24 something that doesn't make sense to somebody
25 else, we summarize it, yes, sir.

CARSON NEELY - DIRECT EXAMINATION

1 Q. It makes sense to you. You could look at your
2 notes and tell what is on there?

3 A. I say I might be able to. If I look at it a
4 year later, I might not be able to that's why I
5 do a summarization.

6 Q. You don't remember at what point you destroyed
7 the notes?

8 A. No, sir. When I typed that, like I said, it
9 could have been the next day.

10 Q. When you went out to Mr. Jenkins' house, you
11 testified that you met his children, his family,
12 or you saw them; is that right?

13 A. Yes, his two children were there.

14 Q. Did you see the two year old? Did it appear to
15 you that she is a Down's child?

16 A. I am not sure with the brief time with her. I
17 wouldn't know, no, sir.

18 Q. Now, when you talked to Minor1 in this case,
19 you -- I mean, that you got her to do a diagram.
20 She did the diagram in the house, right?

21 A. Yes, sir.

22 Q. You testified when you went out there to get
23 Mr. Jenkins, you went in the house. You didn't
24 take any pictures, did you?

25 A. No, sir, I didn't.

CARSON NEELY - DIRECT EXAMINATION

1 Q. You didn't draw a scale to the house, did you?

2 A. No, sir.

3 Q. You didn't go in and try to locate where any
4 bedrooms were, did you?

5 A. No, I did not.

6 Q. You didn't talk to -- you didn't talk to the
7 17-year old daughter, did you?

8 A. No, sir.

9 Q. And you didn't talk to the 11-year old -- well,
10 I guess now 12-year old child, did you?

11 A. Just briefly, yes, sir.

12 MS. DESCH: Your Honor, could we approach
13 briefly.

14 THE JUDGE: Certainly.

15 (Whereupon, a bench conference was held
16 off the record in the presence of the jury, but
17 out of the hearing of the jury.)

18 BY MR. HALL:

19 Q. When you talked to Minor1, and you knew that at
20 the time of the alleged incident Gene was in the
21 house, right?

22 A. Yes, sir.

23 Q. And his wife, Janet, was in the house, right?

24 A. Correct.

25 Q. And his daughter, Kacie, was in the house,

CARSON NEELY - DIRECT EXAMINATION

1 right?

2 A. Correct.

3 Q. And the other daughter, Amber, was in the house?

4 A. Right.

5 Q. And in fact, their young child, Gracie, was in
6 the house. All of those people were in the
7 house?

8 A. Yes, sir.

9 Q. In fact, on the video, it cut off, right?

10 A. Yes, sir, it did, toward the end.

11 Q. So there is portions of the video or your
12 interview that are not recorded anywhere, right?

13 A. Yes, sir, as I noted on the summary.

14 Q. And you don't have any notes of what was said
15 during that portion of the interview?

16 A. I can tell you there was no more disclosure
17 about it to answer that.

18 MR. HALL: Thank you. That's all of the
19 questions I have.

20 THE JUDGE: Redirect, Solicitor?

21 MS. DESCH: Court's indulgence?

22 THE JUDGE: Certainly.

23 REDIRECT EXAMINATION

24 BY MS. DESCH:

25 Q. Detective Neely, I want to clear up a few things

CARSON NEELY - REDIRECT EXAMINATION

1 brought up on cross. The day you went out to
2 the house with the warrant, it was just the
3 11-year old, Kacie, Grace, and Janet came home
4 in the middle of it, and Gene?

5 A. Yes, ma'am, that is correct.

6 Q. When you went into the house, was there two
7 living rooms that were described by Minor1?

8 A. Yes, ma'am. I did not walk through the house,
9 but yes, ma'am.

10 Q. But you could tell there was two separate living
11 areas like Minor1 said?

12 A. Correct.

13 Q. When the defense counsel was asking about your
14 incident interview report, was this what he was
15 referring to?

16 A. Yes, ma'am, it is. Yes, ma'am.

17 Q. So an incident interview report on your
18 stationary from work?

19 A. Yes, ma'am.

20 Q. And just for the record what this says is, An
21 Incident Interview Report, Case Number 2012,
22 last four digits 1789. That's what defense
23 counsel was referring to on cross-examination?

24 A. Yes, ma'am.

25 Q. I just want to make sure I have the right

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1 information. In that you write down your notes
2 from the interview -- this is the interview that
3 you participated in, correct?

4 A. Yes, ma'am, it is.

5 Q. It says date of interview, February 14th, 2012,
6 8:30 a.m., correct?

7 A. Yes, ma'am.

8 Q. There was some question as to your notes and
9 destroying your notes. Is the notes that you
10 destroyed, is that what was incorporated into
11 this interview report?

12 A. Yes, ma'am.

13 Q. Prior to destroying them, did you reaffirm that
14 everything in your notes was incorporated into
15 this?

16 A. Yes, ma'am.

17 Q. Did you leave anything out?

18 A. No, ma'am. There would be no reason to.

19 Q. Did you write this report contemporaneously to
20 the video or the interview with Minor1 ?

21 A. Yes, ma'am.

22 Q. The interview -- the video did cut off, did you
23 address that in your interview report?

24 A. Yes, ma'am, I did.

25 Q. Do you remember what you said in your interview

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1 report about the video cutting off?

2 A. Cut off toward the end. We discussed the
3 closing part of our RACTAC which is the --
4 talked about the importance of telling grown-ups
5 or your mother or someone that you can go to
6 when something like this happens.

7 Q. That's how you concluded your interview notes?

8 A. Yes, ma'am.

9 MS. DESCH: Thank you.

10 THE JUDGE: Any recross?

11 RECROSS-EXAMINATION

12 BY MR. HALL:

13 Q. Detective Neely, is it your testimony that
14 during the course of the interview with Minor1,
15 you were taking notes?

16 A. Yes, sir.

17 Q. You wrote those down on a pad?

18 A. Yes, sir.

19 MR. HALL: Thank you. Your Honor, we
20 have a matter to take up outside the presence of
21 the jury.

22 THE JUDGE: Are you finished with this
23 witness?

24 MR. HALL: No, your Honor. May we
25 approach?

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1 THE JUDGE: Yes. Approach and we will see
2 what we need to do.

3 (Whereupon, a bench conference was held
4 off the record in the presence of the jury, but
5 out of the hearing of the jury.)

6 THE JUDGE: Madam Forelady, and members
7 of the jury, we are going to take an afternoon
8 recess. We have a matter to deal with the
9 attorneys on so we will be taking a break but
10 also working as well. So I am going to ask that
11 you retire to the jury room.

12 Again, as previously instructed, do not
13 begin your deliberations, do not talk with one
14 another about any aspect, any fact, anything
15 related to this case.

16 (Whereupon, the jury exited the courtroom
17 at 3:36 p.m.).

18 THE JUDGE: Detective, you are free to
19 leave the witness stand but you cannot discuss
20 the testimony with anyone in this case, but you
21 are certainly not saddled to that chair right
22 now.

23 Do you need a few minutes? Let's take a
24 break and then we will take a look at the video.
25 Okay.

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1 (Court in recess at 3:38 p.m.)

2 (Whereupon, DEFENDANT'S EXH. 2, DVD/VIDEO,
3 was marked for identification.)

4 (Court resumes out of the presence of the
5 jury at 4:02 p.m.)

6 MR. HALL: May I please the Court. Your
7 Honor, one is that we had discussed at the
8 bench, and I had thought that Carson Neely had
9 not taken notes. When I reviewed the video, he
10 did take notes. Certainly, there is portions of
11 notes. I am not going to argue that he did not
12 take notes. I think we are at the point where
13 my position is that I would like to try to
14 introduce the video through Carson Neely on his
15 part of cross. I would like to proffer it
16 through him. I would let the Court look at it.
17 I believe it is admissible. One, it is not
18 hearsay because the detective has testified that
19 it also has a prior inconsistent statement, and
20 it certainly has testimony in there that is
21 consistent, and under the Rules of Completeness,
22 the jury has heard lots of information about
23 statements made in the video and it seems only
24 logical and fair, and so that the jury gets a
25 complete picture, that they see and hear the

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1 entire video.

2 So what I would like to proffer through
3 Detective Neely, let the Court look at it and
4 make a ruling to its admissibility. It is a
5 17-minute tape.

6 THE JUDGE: All right. Let's go ahead and
7 let's do the -- anything from the Solicitor's
8 side before we take the proffer and view the
9 video?

10 MS. DESCH: No, your Honor. I want to
11 reiterate that it is the State's position it is
12 inadmissible except provided under 801-613, and
13 if we could decide outside the purview of the
14 jury.

15 THE JUDGE: Sure. Let's go ahead and do a
16 proffer and see where it leads us and then we
17 can decide. I am thinking, depending upon how
18 long this is going to take. It may turn out we
19 might go ahead, because I would like to wrap up
20 today around 5 if that's suitable with
21 everybody.

22 MS. DESCH: Yes, sir.

23 THE JUDGE: So we may want to excuse the
24 jury. But let's go ahead -- how are you going
25 to do it, Mr. Hall? Are you going to play the

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1 video and then ask questions?

2 MR. HALL: I am going to show him the disc
3 and ask him if he watched the video and what is
4 on that disc is a fair and accurate
5 representation of what he made that day when he
6 interviewed her. He testified that he had seen
7 it yesterday, had it been altered or changed in
8 any way, and I am going to move it into
9 evidence, but I think subject to the Court
10 looking at it.

11 THE JUDGE: We need to see it. Okay. You
12 may proceed.

13 BY MR. HALL:

14 Q. Detective Neely, I will show you what has been
15 marked Exhibit 2.

16 A. Yes. This is a DVD copy of my interview with
17 Minor1 .

18 Q. Have you looked at this video?

19 A. Yes.

20 Q. Was this the video you made on February 14th,
21 2012?

22 A. Yes.

23 Q. And it fairly and accurately represents --

24 MR. HALL: In fact, what we would like to
25 do at this point, your Honor, rather than go

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1 into any other foundation, I would like to show
2 it to the Court and then I will ask him the
3 remaining questions after it has been shown.

4 THE JUDGE: So we are doing that right now
5 as a proffer outside the presence of the jury.
6 For purposes of the record, we are going to note
7 that the video is being played and no one is to
8 talk.

9 MR. HALL: That's correct.

10 THE JUDGE: While the video is being
11 played so the court reporter won't have to deal
12 with that.

13 (Playing video.)

14 THE JUDGE: Okay. Let the record reflect
15 that we outside the presence of the jury. The
16 interview with this detective that was done with
17 the child on February 14th, 2012 was played in
18 its entirety even though it does appear to have
19 some at the end missing for some technical
20 reason.

21 MR. HALL: That's correct.

22 THE JUDGE: All right. Do you want to
23 examine?

24 BY MR. HALL:

25 Q. Officer, you have seen the video?

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1 A. Correct.

2 Q. Is that a fair and accurate representation of
3 what has happened?

4 A. Yes, it is.

5 Q. Has it been altered or changed in any way?

6 A. No, sir.

7 Q. Can you tell us why it cut off?

8 A. I can't. Battery, possibly.

9 Q. How long did the interview last beyond that?

10 A. Maybe a minute or two. No more than four or
11 five minutes at the very most. Just a portion
12 of closing, the importance of telling someone.

13 Q. Just for clarification, and you may not know the
14 answer. Right at the end you asked, is there
15 anything else that she needed to tell me, and
16 then she says something and you cannot
17 understand it. Is that a glitch in the video or
18 do you know what she said?

19 A. Something to the vehicles are -- I think she was
20 asking about what kind of vehicles were in the
21 yard. I think that's what she said. I am not
22 100 percent sure.

23 Q. That's the video you took that day?

24 A. Correct, sir, yes.

25 MR. HALL: Your Honor, at this point I

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1 would like to have this presented to the jury,
2 move it into evidence. At this point, Under
3 Rule 801, it is not hearsay. Under 801(d),
4 statements which are not hearsay, if a statement
5 is not hearsay, it is a prior statement by a
6 witness that testifies at the trial or hearing
7 and is subject to cross-examination concerning
8 the statement. We certainly had an opportunity
9 to cross-examine her as far as the video, and
10 the statement is, A, inconsistent with the
11 declarant's testimony, I would argue that there
12 are portions of that statement that are
13 inconsistent with her testimony today. And B,
14 consistent with the declarant's testimony, which
15 there are some parts of it that are also
16 consistent with her testimony, is offered to
17 rebut and express replied charge against
18 declarant of recent fabrication of the
19 statement.

20 The State has indicated that they believe
21 there is consistent testimony in their direct to
22 rebut recent fabrication.

23 So one, I would ask it be admitted through
24 this witness because by definition it is not
25 hearsay. There are several parts as I would

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1 conclude, that are statements against interest,
2 or prior inconsistent statement under the rules,
3 and that this will give you an opportunity for
4 the jury to see that.

5 I was able to cross-examine her on that, but
6 in fairness, the totality of the video, which in
7 essence, is her statement, that under the rule
8 of completeness, the jury ought to be entitled
9 to see and hear the entire video.

10 What I would propose, if the Court allows
11 it in, when the jury comes back in is, in
12 essence, lay a foundation before the jury about
13 the video, show the video to the jury, and I
14 would not ask any questions concerning anything
15 in the video.

16 THE JUDGE: Okay. So you are basing your
17 putting the video into evidence under
18 801(d)(1)(a). Your claim is that there are
19 portions that are inconsistent with her
20 testimony today; is that correct?

21 MR. HALL: That's correct.

22 THE JUDGE: Now, I had somewhat of a
23 difficulty being able to hear her. I don't know
24 if you all had the same problem or not. Can you
25 point out where you believe the video -- what

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1 she said on the video is inconsistent with
2 today. I had a hard time -- I even had a little
3 bit of a hard time hearing the detective. It
4 may be bad hearing, I don't know.

5 MR. HALL: Well, certainly, as far as time
6 and place, she initially said it happened two to
7 three months prior. And then upon further
8 questioning, she said it happened at the end of
9 the summer, beginning of summer. The testimony
10 today is that it happened at the beginning of
11 summer. So I would say that would be one area.

12 Then the issue of -- she does not say
13 anything today about her knees being folded and
14 her legs being spread. That is what she did say
15 in the video. In her demonstration of how he
16 touched her in the video, she clearly cuffs her
17 hands and states that she reached to her blue
18 jeans and touched her private area with the tips
19 of his fingers. The testimony today seemed to
20 be that he put his entire hand in between her
21 underwear and private area and touched her
22 there. Those are some of the inconsistencies.

23 Again, the jury will have the entire
24 video, and based on their recollection of
25 testimony. So we have those as well.

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1 THE JUDGE: All right.

2 MR. HALL: I will state that there is
3 nothing on the video at all about her telling,
4 not telling because she would lose her
5 friendship with Kacie. On the video when she is
6 asked why she didn't tell anybody, she simply
7 said I was nervous. She says she was nervous,
8 and finally, when mom brought it up, I just
9 broke down. Again, I believe those are also
10 inconsistencies.

11 THE JUDGE: All right. Now, Solicitor,
12 you oppose it on what basis?

13 MS. DESCH: Your Honor, I oppose it. It
14 is a back door attempt to get it in with the
15 rule of completeness. I will go through exactly
16 why I oppose it based on 801 grounds.

17 Your Honor, when we get through the
18 initial talk on the video, talks about
19 truthfulness and nontruthfulness. That was a
20 motion in limine by the defendant. He didn't
21 want us talking about it. Now he wants that in.

22 THE JUDGE: Back up. Tell me that again.

23 MS. DESCH: In the very beginning of the
24 video, it starts with the detective introducing
25 himself, talking about why she's there, and it

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1 goes over the importance of truthfulness and
2 lies. Truth and lie is the beginning of every
3 forensic tape. I am bringing that separate from
4 the 801 argument.

5 THE JUDGE: Right, but now I think under
6 that case, it just prevents the witness from
7 commenting on witness' believability of the
8 truthfulness and credibility of the person. I
9 don't think it would necessarily exclude, and
10 you can correct me if I am wrong. I don't think
11 that 2012 case would preclude initially at an
12 interview to say, you know, be truthful and
13 don't tell lies.

14 MS. DESCH: Correct, your Honor. I agree
15 with you about Kromah. I was just referencing
16 there was a mention of the defense for not to
17 bring out from the detective about that
18 truthfulness or lie, which is part of the
19 forensic interview. That's my only point is it
20 was subject to motion in limine which then now
21 would be going against that. I agree that the
22 Kromah case deals with the fact that no witness
23 should vouch for the credibility of the forensic
24 interview.

25 MR. HALL: Your Honor, I think she asked

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1 those questions of the detective when he was on
2 the stand during direct about did she know the
3 difference between a truth and a lie, and I
4 didn't object. I certainly don't believe that
5 line has been crossed.

6 THE JUDGE: I don't think the solicitor
7 asked the witness that.

8 MS. DESCH: I did not.

9 MR. HALL: She did go through the protocol
10 of RACTAC, the interview structure, and
11 nonleading in opening to get out the truth. I
12 believe she said the truth, which again, I am
13 not objecting to any of that. I don't think the
14 questions that were asked on the video crossed
15 the line of the State vs. Kromah.

16 MS. DESCH: Your Honor, specifically in
17 going through the actual statements made, Gene
18 touched me inappropriately on the couch, Gracey
19 bouncing on the stomach, reached between legs,
20 fingers in front of the shorts. If that is
21 inconsistent -- if the defense is saying that it
22 is an inconsistent statement, it was not asked
23 or addressed with the witness who made that
24 statement. She was not availed the chance to
25 accept or deny. We would ask that no extrinsic

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1 evidence is proper with this particular witness,
2 and we would say that putting fingers in the
3 front of her shorts is not inconsistent. But if
4 the defense feels it is, it should have been
5 brought out on cross-examination.

6 THE JUDGE: So what you are saying,
7 Solicitor, is that to impeach with the video,
8 the impeachment would have to take place with
9 Minor1 and not this witness. Is that basically
10 what you are saying?

11 MS. DESCH: Correct. Prior inconsistent
12 statements, that if it is inconsistent, it
13 should be brought up with the person who made
14 it.

15 Your Honor, to be clear, I am not saying
16 it is inconsistent. It was one of the examples
17 that the defense brought up.

18 THE JUDGE: Okay. Let me stop you right
19 there. Let me look at something here.

20 Now, I am looking at -- this is on your
21 point, even though I worded it in the way with
22 impeaching with the prior inconsistent statement
23 must be done with the witness. I am looking at
24 Rule 613. That seems to suggest that, kind of
25 in support of your argument, and Mr. Hall, I

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1 will allow you to certainly respond. But it
2 seems to suggest to impeach with a prior
3 inconsistent statement, you have to do it with
4 the actual witness, the way I read that, 613.

5 MR. HALL: I don't see that in the rule.
6 It says if the witness does not admit that he
7 has made prior inconsistent statement, extrinsic
8 evidence of such statement is admissible.

9 THE JUDGE: I am looking at(b), extrinsic
10 evidence of a prior inconsistent statement by a
11 witness is not admissible unless the witness is
12 advised of the substance of the statement, time
13 and place it was allegedly made, and the person
14 to whom it was made, and is given the
15 opportunity to explain or deny the statement.
16 If the witness does not admit that he has made
17 the prior inconsistent statement, then extrinsic
18 evidence of such statement is admissible. If
19 the witness admits to making the prior
20 statement, then the evidence is not admissible.

21 So would that not be pretty much on point
22 here that Minor1 would have had to have been -- I
23 mean, I know you questioned her about the video,
24 but as far as impeaching her with this video
25 evidence, that was not done?

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1 MR. HALL: That's correct. I did not try
2 to impeach her with extrinsic evidence through
3 her.

4 THE JUDGE: So then explain to me then how
5 Rule 13 would not prevent you from trying to get
6 this video in with these prior -- assuming that
7 the statements are inconsistent, and I think
8 that they probably are. The solicitor is not
9 conceding that point. But then how does Rule
10 13, I mean, does it not prevent you from getting
11 it in through this witness?

12 MR. HALL: I don't read where it limits to
13 when that prior inconsistent statement comes in.
14 It doesn't -- the Court, I am sure, is reading
15 that if a witness does not admit that he made
16 prior inconsistent statement, extrinsic evidence
17 of such statement is admissible but must be
18 admitted through that witness. But that's not
19 what it says. It says extrinsic evidence of
20 such statement is admissible.

21 MS. DESCH: Could I interject?

22 THE JUDGE: Please.

23 MS. DESCH: To be clear, it is not that
24 the State is not conceding some prior
25 inconsistent statements. Of course, the shirt

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1 is an inconsistent statement. There are other
2 inconsistent statements in there.

3 My argument would be a couple of things.
4 She does have some inconsistent statements.
5 Mr. Hall crossed her on those statements. He
6 did the foundation. He did do you remember
7 having that conversation? Do you remember
8 saying that? She admitted most of them when
9 they were pointed out to her. So she was given
10 an opportunity to admit or deny certain things.
11 They discussed the shirt. She said blue and
12 white. In video she said it was olive green.
13 Her answer was, I thought it was blue or green.
14 So that was addressed. It would be a matter of
15 that particular inconsistent statement, if that
16 was a denial, that would bring in extrinsic
17 evidence.

18 There are certain things that I am
19 conceding were inconsistent and I think were
20 handled on cross-examination and for the most
21 part admitted.

22 My objection would be this: If there are
23 any inconsistent statements that were not
24 addressed on cross-examination then the victim
25 was not offered the opportunity to admit or

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1 deny, and if she is not offered the opportunity
2 to admit or deny what she said differently
3 before, then it is not proper to bring in
4 extrinsic evidence.

5 If she was afforded that opportunity and
6 the Court rules that her answer was a denial and
7 that extrinsic evidence was proper, then I would
8 agree, that he could get that in through
9 Detective Neely.

10 So my initial objection is there are
11 certain things that now Mr. Hall wants to get in
12 through Detective Neely that Minor1 was
13 never asked or given the opportunity to admit or
14 deny. Does that make sense?

15 THE JUDGE: So you are conceding that he
16 can get the video in through this witness if
17 Minor1 was afforded the opportunity concerning
18 the inconsistent statement and she denied it?

19 MS. DESCH: The statement itself. I am
20 not conceding that the entirety of the video
21 comes in. But if she was afforded the
22 opportunity, and I think very clearly on the
23 shirt issue, she was afforded the opportunity to
24 admit or deny. I think a couple of things that
25 were brought up by Mr. Hall about -- nothing

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1 today about the cuffing of the hands or any of
2 that. That was never addressed on cross. We
3 would argue when he says something along the
4 lines of seemed to be the entire hand, he is
5 speculating as to what her testimony would be
6 and that gets way outside of the inconsistent or
7 not consistent.

8 I don't know if this was another thing that
9 was brought up by defense, when she does the
10 diagram that almost touching the top of her
11 privates right at the top, hand and skin so
12 skin. Honestly, I don't view that as
13 inconsistent as how she testified today.
14 Obviously, the Court would have to make that
15 decision. I understand that the cuffing of the
16 hand is something that the defense is bringing
17 about. I don't know that there was actual
18 testimony about what his hand was doing. I
19 certainly don't remember testimony about the
20 entirety of his hand going down. I think she
21 managed to get through the testimony to talk
22 about that his hand went in under the shorts,
23 under the underwear, touched her privates and
24 then we got into having her talk about on the
25 diagram what she meant by privates.

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1 I think today she said front of privates,
2 but there was nothing about the entirety of the
3 hand. I think for us to now speculate versus
4 the fingers -- if that were inconsistent,
5 Mr. Hall should have asked her specifically, do
6 you remember giving testimony to Detective Neely
7 that it was fingers, not hand, and she should
8 have been offered the opportunity to admit or
9 deny.

10 THE JUDGE: Well, before we make a
11 decision on how we are going to handle this. I
12 think it is probably going to be wise to excuse
13 the jury for the remainder of the day. It is
14 already quarter to 5. So let's bring the jury
15 out. Let me excuse them for the day. Let's do
16 that. If you would bring them out.

17 (Whereupon, the jury came into open court
18 at 4:46 p.m.)

19 THE JUDGE: Let the record reflect that
20 the jury is back in. Madam Forelady, and ladies
21 and gentlemen of the jury, we are going to go
22 ahead and break for today. We have been
23 covering some legal issues. We will continue to
24 cover some legal issues today before we leave
25 the courthouse. I did not want you to sit back

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1 in the jury room any longer for today. We are
2 going to adjourn for today and start back at
3 9:30 in the morning. So if you would be
4 promptly back in the jury room no later than
5 9:30.

6 Again, I remind you not to discuss this
7 case, any aspect about the case, anything
8 related to this case among yourselves or when
9 you get home with your family or with your
10 friends. If someone asks you about the case,
11 just say the judge has told me I can't talk
12 about it and don't talk about it. Okay.

13 I hope everyone has a good and restful
14 evening and we will see you bright and early in
15 the morning at 9:30.

16 (Whereupon, the jury exited the courtroom
17 at 5:47 p.m.)

18 MR. HALL: May I please the Court.

19 THE JUDGE: Yes, sir.

20 MR. HALL: Your Honor, I think there is
21 another way I would like to get the video in
22 through Carson Neely is that he certainly spent
23 a great deal of his direct examination talking
24 about the protocol or RACTAC, in how he does
25 that, and he testified that he usually normally

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1 interviews the child for 25 minutes. In fact,
2 the video was 17 minutes. He testified that the
3 interview structure is not leading and
4 open-ended. I do believe that the form of his
5 questions, I would like to argue to the jury
6 that some of them, when the child says he
7 touched me, and he asks was it skin to skin or
8 on top of the clothes, could be interpreted by
9 the jury as a leading question. That she didn't
10 come up with skin to skin until the officer
11 brought it up. That he spent a great deal of
12 time talking about continuing to narrow the time
13 down, and that in the video she started two to
14 three months, then to specifically saying it was
15 warm, around mid '70s, trying to clarify. So I
16 think in fairness to the defendant, the jury,
17 even through Carson Neely, the way he handled
18 the video, that the opportunity to cross-examine
19 him or him to respond to or to show exactly what
20 happened, it should be through the interview,
21 through the video.

22 So I am not asking the Court to limit its
23 analysis to should have been entered through
24 Minor 1, it wasn't, and therefore, it is not
25 admissible. It is also admissible through

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1 Carson Neely for the jury to determine his
2 description of what he did, how he did it, and
3 me being able to argue what the defense's view
4 is of all of those things about as far as what
5 he did. So not only could it be introduced
6 through Minor1 but it could also be
7 introduced through Carson Neely because he is as
8 much a part of the interview as Minor1 .

9 THE JUDGE: Solicitor.

10 MS. DESCH: I just want to make sure I am
11 understanding this now. The defense is asking
12 you to put in the entirety of the video,
13 forensic video, that is inadmissible under our
14 rules.

15 First, you consider that there are prior
16 inconsistent and prior consistent statements
17 with the victim, Minor1 . That's his one
18 motion.

19 Now, the second motion is that there are
20 inconsistent statements with Detective Neely.

21 My answer to those is still limited to Rule
22 613 when you are impeaching a person, a witness,
23 a victim on the stand, if you are saying there
24 is an inconsistent statement, my understanding
25 of the rules is that that statement must be

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1 provided to the witness. The witness or the
2 victim should be afforded the right to admit or
3 deny, and only after that right is given, if it
4 is denied then extrinsic evidence is allowed.

5 My understanding of the defense motion is
6 he is asking you to kind of ignore that
7 procedure in saying the rule of fairness to the
8 defendant is that let's just ignore the rules of
9 evidence in that procedure and let it in anyway.

10 My objection is this: If there are
11 inconsistent statements, those specific
12 statements, whether they are written or oral,
13 should be provided to the person that made them
14 given the opportunity to admit or deny. If they
15 are admitted, extrinsic evidence does not come
16 in. In this case, the video recording of those
17 statements would be extrinsic evidence and not
18 be allowed in if that particular statement is
19 admitted by the witness. If it is denied, I
20 agree that extrinsic evidence is allowed. But
21 that is the limited purpose.

22 The defense then wants to piggy back the
23 rules of fairness and rule of completeness, and
24 I think that's a back doorway of getting around
25 the rules of evidence. There were inconsistent

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1 statements that defense knew about prior to
2 entering here. The video was reviewed. The
3 video -- inconsistent statements in the video
4 for Minor 1 , she was cross-examined on her
5 inconsistent statements. The Court will have to
6 decide that they were either admitted or denied.
7 Of course, my position would be that those that
8 were opposed to her were admitted, and
9 therefore, no need for extrinsic evidence. With
10 Detective Neely, none of what was just presented
11 to you was presented during cross-examination
12 for admit or deny.

13 MR. HALL: Your Honor, he is still on the
14 stand. He has not stepped down. I still have
15 an opportunity to cross-examine.

16 MS. DESCH: Correct. Given all of that,
17 I understand the Court has to make a ruling. I
18 would just ask that, regardless of the ruling of
19 whether it comes in or not, that a ruling be
20 made that given the limits of admissibility
21 under our Rules of Evidence and the State's
22 attempt to stay within those limits and the
23 rules of evidence, that even if you find that
24 you are allowing these statements to come in,
25 that the defense cannot then argue that we have

CARSON NEELY - RECROSS-EXAMINATION

1 had the opportunity to put it in and we did not.
2 Because it is still the State's contention, if
3 you are getting it in the back door of 613 and
4 801, that that's their presentation to the
5 Court, that it doesn't become admissible just
6 because they say it. We are asking, regardless
7 of your ruling, that that ruling be made.

8 THE JUDGE: Let me make two observations.
9 One, if I determine that I will allow the video
10 to come in, I don't think it would be
11 permissible to allow the defense to argue that,
12 you know, why didn't the state not put it in. I
13 don't think that -- it is evidence. I realize
14 it was generated from your side but that doesn't
15 mean that just because you've got evidence on
16 your side that you have to put it in.

17 MR. HALL: Your Honor I can stop that
18 right now. If the Court allows it in, I will
19 not say anything about the State not putting it
20 in. I will not mention that. I won't say
21 anything about it.

22 THE JUDGE: The second point is that I
23 think Mr. Hall's argument is that apart from
24 this inconsistent statement, consistent
25 statements, is that he believes that maybe this

CARSON NEELY - RECROSS-EXAMINATION

1 detective did not follow the proper procedure or
2 protocol and the method in which he used may be
3 using some leading questions or whatever. So he
4 is wanting to impeach this witness, not with the
5 inconsistent statements, but impeach him because
6 he didn't follow -- is it RACTAC. I think
7 that's the second basis of getting the video in.

8 MR. HALL: That's correct. I think it is
9 a jury question about what he said in court and
10 about what happened on the video and then they
11 can make a decision based on the video. The
12 jury may disagree with me. Certainly, they have
13 that right.

14 THE JUDGE: The limit that we all have,
15 the Court plus the State plus the defense, is
16 remembering specifically what Minor1 admitted or
17 denied. I mean, certainly, Mr. Hall did
18 cross-examine her and ask her questions about
19 the video and the interview that she had with
20 this detective. You know, my notes are general.
21 I did not specifically, and I don't think,
22 Solicitor, you did, Mr. Hall, I don't think you
23 did specifically write each question and whether
24 or not it was admitted or denied. So the
25 dilemma that we are in is trying to figure out

CARSON NEELY - RECROSS-EXAMINATION

1 what is consistent and what is inconsistent, if
2 that makes any sense.

3 MS. DESCH: Yes, your Honor.

4 THE JUDGE: I realize this is my problem
5 to decide and not your problem to decide. It is
6 your problem, but it is for me to decide.

7 I am going to have to give it thought and
8 if no one has an objection, I will make my
9 ruling first thing in the morning. That is
10 about the only way I can do it.

11 MS. DESCH: Yes, sir.

12 MR. HALL: Certainly, your Honor in
13 anticipation in the morning, if the Court denies
14 the motion to allow it to be admitted, I do
15 certainly then intend to have a series of
16 questions for Detective Neely while he is still
17 on the stand about what I perceive are
18 inconsistencies between what he testified to and
19 what is on the video. If he makes statements --
20 for simple. He testified he normally spends 25
21 minutes. Isn't it true the video is only 17
22 minutes? I assume his answer is going to be
23 yes, 17 minutes. He admits that. So that is
24 not an inconsistent -- that is an inconsistent
25 statement but he admits that so I would not

CARSON NEELY - RECROSS-EXAMINATION

1 necessarily be able to use the video. I am not
2 through with cross-examination of Detective
3 Neely, and I may have more cross-examination.

4 THE JUDGE: We will get to it when we get
5 to it. Unless there is anything else for the
6 record, let's go ahead and close the record for
7 today and adjourn until in the morning at --
8 let's try at least get together about 9:15.
9 Detective, again, I remind you, sir, that you
10 are still in the middle of your examination, and
11 you know, sir, I am confident that you cannot
12 talk with anyone about your testimony.

13 MS. DESCH: Your Honor, is the bond off
14 the defendant?

15 THE JUDGE: He is free to go. I am not
16 going to revoke his bond.

17 MS. DESCH: Can we give warnings that if
18 he does not come back tomorrow that we will
19 continue in his absence.

20 THE JUDGE: Yes, certainly. There no
21 question about that. I am not suggesting that
22 you will not appear, but if for some reason you
23 do not, then the trial will continue in your
24 absence. A lot of times in cases, and
25 certainly, Mr. Hall has tried a lot of them, and

1 he can explain to you that while the case is
2 going on the bond is revoked and you would be
3 incarcerated, but I am not going to do that.
4 You are free to go, but be sure to be back in
5 the morning.

6 MS. DESCH: Your Honor, and I don't mean
7 to keep belaboring things, just that it is
8 highly emotional case, just to make sure there
9 is no contact. They are neighbors. They can
10 pass each other on the street, but if we could
11 just --

12 THE JUDGE: That's right. And I am sure
13 that is a condition of the bond that you are on,
14 not to have any contact, and especially because
15 of the fact that you live in close proximity to
16 one another, no contact with whatsoever.

17 MS. DESCH: Thank you, your Honor.

18 THE JUDGE: Anything further before we
19 close?

20 MS. DESCH: No. Thank you very much.

21 (Whereupon, court adjourned at 5:00 p.m.)
22
23
24
25

C E R T I F I C A T I O N

STATE OF SOUTH CAROLINA
COUNTY OF YORK

I, Phyllis M. Campo, RPR, Official
Court Reporter for the Sixteenth Judicial
Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true,
accurate and complete Transcript of Record of
the proceedings at the time and place herein in
the above-entitled matter.

I do further certify that I am neither of
kin, counsel, nor interest to any party hereto.

October 25, 2013



Phyllis M. Campo
Official Court Reporter

Case No: 2012654602101Judge: Dona D HolkerPl./State: State of SCState/Plaint. Atty: Jennifer DeschDefendant: Leonard JenkinsDefense Atty: Dan HallCourt Reporter: Phyllis Campo

Juror No.	Name	Sex	Race	Strikes			
				Court	Plaintiff	Defense	Accept
~~109~~	Emily M. Prescott	W	W				✓
112	Barbara Morrison	F	B	D		✓	
56	Michael Franklin	M	W				✓
8	Charlene Blanton	F	W	D		✓	
146	Iris Smith	F	W				✓
50	Daniel Erdy	M	W	P	✓		
90	Anissa Lee	F	W	P			✓
5	~~James~~ Donald Berry	M	W	P	✓		
69	Trina Hill	F	B	P	✓		
168	Ruby watts	F	B				✓
181	Gary Kirsh	M	W				✓
25	Marion Caughman, III	M	W	P	✓		
35	Kenneth Cooper	M	W	D		✓	
76	Lisa ~~Hudson-Lucas~~ ~~Hudson~~	F	W	D		✓	
178	Drew Archer	M	W				✓
~~140~~							
141	Bradley Sabelli	M	W	D		✓	
175	Michael Wright	M	W				✓
124	Carla Peoples	F	W				✓
95	Taylor Lyman	M	W				✓
28	Mary Chisholm	F	B				✓
179	Lindy Burton	F	W	P		✓	✓
180	Jazmine Kirk	F	B	D		✓	

For the court column, please indicate who made the motion to strike the jurors "for cause" with a "C" for court, "P" for Plaintiff or "D" for Defense.

Case No: 2012GS4602101

Judge: Donald Hocker

Pl./State: State of South Carolina

State/Plaint. Atty: Jennifer Desch

Décédant: Leonard Jenkins

Defense Atty: Dan Hall

Court Reporter: Phyllis Campo

[illegible]

For the court column, please indicate who made the motion to strike the jurors "for cause" with a "C" for court, "P" for Plaintiff or "D" for Defense.

1 STATE OF SOUTH CAROLINA Court of General Sessions
2 COUNTY OF YORK 2012-GS-46-02101
3

4 _____ Transcript of Record
5 State of South Carolina

6 vs. VOLUME 2
7 Leonard Jenkins
8 _____

8 Date: August 14, 2013
9

10 BEFORE: The Honorable Donald Hocker
11

12
13 APPEARANCES:

14 Jennifer Desch, Assistant Solicitor
15 Attorney for the State

16 Dan Hall, Esq.,
17 Attorney for the Defendant

18 Tracy Childers,
19 Court Clerk

20 Phyllis M. Campo, RPR
21 Court Reporter
22
23
24
25

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STATE OF SC VS. LEONARD JENKINS - DISCUSSION

1 THE JUDGE: Dealing with the matter of
2 Mr. Hall, you wanting to impeach the testimony
3 of the child through Detective Neely, due to our
4 very able court reporter and her efforts, I have
5 a transcript of Minor1 testimony, direct and
6 cross. Of course, the cross will be what is
7 important. With the court reporter's
8 permission, she has consented to you guys
9 looking at it. She is not going to charge for
10 her time. So we are very grateful for her
11 efforts in that regard. So I have gone through
12 it. Let me just tell you my thoughts. I have
13 one copy so you all will need to share.

14 Based upon Mr. Hall's cross-examination,
15 beginning on Page 20, Minor1 did acknowledge the
16 interview with Detective Neely and the fact that
17 it was being videotaped. So she was put on
18 notice of that. She acknowledged that.

19 She did acknowledge saying in the
20 interview that the incident took place two to
21 three months prior to that. That's on Page 21.
22 Page 22, she admits in the video to saying that
23 she had the same top on during the alleged
24 incident as what she had on during the video.
25 She admitted to that on cross, even though I

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1 think that is a collateral issue, nonetheless,
2 that was something that was brought up. That
3 was on Page 22.

4 On page 25, she does admit on cross that
5 she said in the video she had her knees to her
6 chest and her legs were spread at the time of
7 the alleged incident. That was on Page 25.

8 On Page 29, she does acknowledge that she
9 did not tell Detective Neely during the
10 interview the reason for not telling anyone that
11 she did not want to affect the friendship with
12 Kacie. She acknowledges that she did not tell
13 Detective Neely that. That's on Page 29. And
14 also, on Page 29, she neither admits or denies
15 telling Detective Neely that the defendant's
16 hand was touching her. She said she did not
17 remember.

18 So based upon what was listed during
19 cross-examination, I do not believe the video
20 would be admissible for impeachment. So based
21 upon what she admitted to in cross-examination,
22 I think under the rules the video would not come
23 in for impeachment purposes. Now, with that
24 said, let's go off the record for a moment, and
25 like I said, we have one copy so you are going

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1 to have to look at it together, and if you
2 disagree with my summary of the testimony, then
3 I will be glad to hear from you. Again, I think
4 cross starts on Page 20.

5 MR. HALL: Your Honor, or maybe I need to
6 ask the court reporter, would it be appropriate
7 for us to make copies?

8 THE JUDGE: Off the record.

9 (Off-the-record discussion.)

10 THE JUDGE: Back on the record.

11 MR. HALL: Your Honor, I respect the Court
12 going through the testimony and pointing out the
13 things of what the record accurately reflects.
14 I don't need to do that. I respect the Court's
15 ruling on that. I have registered my objection.
16 Based on what it appears the Court is going to
17 rule, I have no further rationale to get the
18 video in for the purposes of impeaching Minor1
19 through this witness.

20 THE JUDGE: Very good. Thank you,
21 Mr. Hall.

22 All right. Are we ready to bring the jury
23 in and you can conclude your cross of Detective
24 Neely?

25 MR. HALL: Yes, your Honor. We may get to

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1 the point after I do some cross of Detective
2 Neely of seeking to introduce the video through
3 him for purposes of his testimony.

4 THE JUDGE: Let's see how that goes and
5 then we can deal with it. So for right now, the
6 video is not coming in for impeachment purposes
7 of Minor1 testimony.

8 MR. HALL: Your Honor, to be sure for
9 purposes of the record, that is over my
10 objection. I respect the Court's opinion, but
11 for the record, I do object to the Court's
12 ruling and you can certainly --

13 THE JUDGE: Your objection is certainly
14 noted and you are protected.

15 (Whereupon, the jury came into open court
16 at 9:31 a.m.)

17 THE JUDGE: Let the record reflect the
18 jury is back in. I hope everyone had a restful
19 evening and all of you are prepared to work
20 today. We are still in the cross-examination
21 by the defense of Detective Neely. So,
22 Detective, I remind you, sir, you are still
23 under oath from yesterday.

24 BY MR. HALL:

25 Q. Just a few more questions. When you were

STATE OF SC VS. LEONARD JENKINS - DISCUSSION

1 interviewing Minor1 18 months ago on
2 February 14th, your testimony is you showed her
3 some diagrams; is that right?

4 A. Yes, sir, that is correct.

5 Q. She pointed out the body parts on these
6 diagrams, right?

7 A. Correct. Well, I pointed to some body parts.
8 She named the body parts.

9 Q. She named them?

10 A. Yes, sir.

11 Q. In fact, you never showed her a diagram of a
12 female to point where the alleged touching took
13 place, did you?

14 A. During -- that's correct. During the touching
15 portion of the interview, she made it clear to
16 me where the touching took place.

17 Q. She made it clear to you by demonstrating with
18 her hand what she believed he had done, didn't
19 she?

20 A. She told me, yes, sir.

21 Q. She told you. Again, my question was, she
22 demonstrated -- are you disputing whether she
23 showed you anything?

24 A. I am not sure of your question. I don't want to
25 be incorrect. She didn't put her hand on her

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1 private. That's what I wanted to clear up.

2 Q. That's clear. You never asked her to point to
3 the diagram that you had her label, did you?

4 A. At that point, no, sir, but --

5 Q. You --

6 THE JUDGE: Let him finish his answer,
7 please.

8 A. Other than naming the body parts, that is
9 correct.

10 Q. During your entire investigation, you never had
11 her point to anywhere on the diagram or where it
12 took place?

13 A. Well, naming the body parts, she made it clear
14 what she called the vagina, which was the
15 private. During the interview, she told me what
16 he touched, which was the private.

17 Q. I clearly understand that. But my question is,
18 during the entire interview and for the past 18
19 months, you never showed her the diagram and
20 said point to where he touched you?

21 A. No, sir.

22 Q. In the video, when you interviewed her and you
23 asked her questions, she told you that he put
24 the tip of his fingers on the front of my
25 shorts, right?

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1 A. That could have been one of her statements. It
2 could have been.

3 Q. Do you remember that?

4 A. Not word for word like that. I don't remember
5 exactly her saying that.

6 Q. Do you remember her demonstrating when she said
7 that, with her curved fingers, how he had put
8 his hand on her shorts?

9 A. I don't recall how she held her fingers during
10 that portion.

11 Q. If you saw that portion of the video, would that
12 assist you in being able to determine that's
13 what she did in your presence?

14 A. It could, yes, sir.

15 MR. HALL: Your Honor, at this point in
16 time, I would like to refresh this witness'
17 memory of showing that portion of the video to
18 him.

19 THE JUDGE: Anything from the State on
20 that?

21 MS. DESCH: Your Honor, in general, your
22 Honor, I understand what the defense is trying
23 to do and taking that small portion is taking it
24 out of context. So I will say this to that
25 question. We believe the video is inadmissible

STATE OF SC VS. LEONARD JENKINS - DISCUSSION

1 based on the Rules of Evidence. At this point,
2 if the Court sees that this is a proper way to
3 put it in to refresh the recollection, we would
4 be happy for the jury to hear it. We just are
5 bound by the Rules of Evidence. So if we are
6 using a small portion to refresh our
7 recollection, the context is important.

8 THE JUDGE: All right. Let's do this.
9 Madam Forelady, and ladies and gentlemen, I am
10 going to ask that you retire to your jury room
11 very briefly. We are going to deal with this
12 matter of law and hopefully be able to get you
13 back out soon.

14 (Whereupon, the jury exited the courtroom
15 at 8:36 p.m.)

16 THE JUDGE: I was hopeful that -- I am not
17 being critical, Detective Neely, at all, but I
18 was hoping after we viewed the video yesterday
19 that certainly would have refreshed your memory
20 on all aspects of that 17-minute interview as
21 opposed to having to deal with this again.

22 Here is what I am concerned about. You
23 know, if we show the jury at least a portion it
24 is going to be kind of confusing. Can we not do
25 this, Mr. Hall, to accomplish what I think you

STATE OF SC VS. LEONARD JENKINS - DISCUSSION

1 want to accomplish is just let Detective Neely
2 view the video again and then we bring the jury
3 back out and ask him again and get him to admit,
4 yes, that is what happened on the video.

5 MR. HALL: I think that is a fair
6 resolution.

7 THE JUDGE: Right. I think that did cover
8 everybody's concerns. So do you want him to see
9 the whole video again or that portion you are
10 dealing with?

11 MR. HALL: I think I can boot it up to
12 that particular part.

13 THE JUDGE: I will leave that up to you.
14 For the record, I think where we were as far as
15 refreshing his memory, it is a little bit
16 different. It is the same as having a signed
17 witness recorded statement from the victim. In
18 this case, we have no notes. We have this is
19 the statement. Normally, we would be able to
20 hand him that and refresh his memory without
21 introducing the video. So I am happy if he sees
22 that portion.

23 Whatever portion or portions you need for
24 him to look at then let's do that. Then the
25 State's concerns are resolved as well.

STATE OF SC VS. LEONARD JENKINS - DISCUSSION

1 (Playing video outside the presence of the
2 jury.)

3 BY MR. HALL:

4 Q. Detective Neely, I have shown you part of the
5 video --

6 THE JUDGE: Do you want to examine him
7 outside the jury on this particular point?

8 MR. HALL: Yes, that's correct. I'm
9 sorry.

10 BY MR. HALL:

11 Q. Detective Neely, we have shown you portions of
12 the video that was earlier referred to as
13 Defense Exhibit Number 1. You have seen a
14 little short clip of it. Does that refresh your
15 memory?

16 A. Yes.

17 Q. And you are prepared to answer the question in
18 front of the jury?

19 A. I think so. Can you play that last three
20 seconds. I am sitting at an angle.

21 THE JUDGE: Why don't you come down and
22 stand wherever you need to stand.

23 (Playing video outside presence of jury.)

24 BY MR. HALL

25 Q. Detective Neely, you are sufficiently refreshed

STATE OF SC VS. LEONARD JENKINS - DISCUSSION

1 that you feel comfortable in answering the
2 questions before the jury?

3 A. Correct.

4 MR. HALL: Thank you. That's all I have.

5 MS. DESCH: Your Honor, just briefly.

6 There is a further portion of -- after they talk
7 about who is in the living room and who is
8 there, they get back to how she is sitting and
9 what happens and she talks again briefly about
10 his hand touching the tip of her private right
11 there on top, one hand, skin to skin. If we are
12 going to talk about this in front of the jury,
13 we want to put it in context. If the detective
14 needs to --

15 THE JUDGE: You would be able to on
16 redirect ask Detective Neely that. If you think
17 that he needs to see that portion then let's do
18 it then.

19 MS. DESCH: That's what I am asking.

20 THE WITNESS: Please do it now.

21 MR. HALL: Your Honor, I think we are
22 again as the whole point of the video, we are
23 chopping it up. The rule of completeness, so it
24 is not confusing to the jury -- the same thing
25 as if it had been a written statement, the jury

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1 sees that written statement.

2 THE JUDGE: I understand. Go ahead and
3 get to the part and let him view whatever part
4 you need for him to review. I don't want to
5 have to do this again and send the jury out. So
6 I want to do it now.

7 MS. DESCH: Your Honor, while we are
8 waiting for that to warm up. I fear that at
9 this point that the particular fight to get the
10 video in has taken the focus away from the
11 actual testimony from the victim about what
12 happened. I fear it has gotten to the point
13 where it is so confusing to the jury that I
14 don't know how you get back from that. If we
15 are going to continue to try different ways to
16 get the video in, at this point, if there is a
17 foundation that can be laid and the defense
18 moves it into evidence -- at some point, we are
19 getting so far away from what was actually
20 testified to and the focus is completely on a
21 video not in evidence, if there is a foundation
22 that is proper and the Court rules it in, then
23 we will deal with it.

24 THE JUDGE: Well, I mean, now, if the
25 State and the defense agrees that the video

STATE OF SC VS. LEONARD JENKINS - DISCUSSION

1 comes in as evidence, I don't have a problem
2 with that, but until I am informed that there is
3 an agreement then I have to handle it in best
4 way I can handle it.

5 The first -- not necessarily the first
6 mention, but the first real issue of the video
7 coming in was for purposes of impeaching Minor
8 testimony.

9 MS. DESCH: Correct.

10 THE JUDGE: And I dealt with that. Then
11 Mr. Hall has asked Detective Neely about the
12 interview and he had a right to have Detective
13 Neely's memory refreshed, and the only way to
14 refresh it is to look at the video. We are
15 doing it outside the presence of the jury. If
16 you want to agree, and Mr. Hall wants to agree
17 to put the video in, we will put the video in.

18 MS. DESCH: Everything that the Court has
19 done is absolutely correct and working what we
20 are working with. All I am saying is that we
21 could refresh the recollection and we could go
22 back to cross-examination and then the defense
23 might have another reason as to why it should
24 come in. I don't want to get so far from the
25 point of which we are here, and I feel like

STATE OF SC VS. LEONARD JENKINS - DISCUSSION

1 that's where we are going. It is putting us in
2 an awkward position. We have gone way past what
3 Minor1 testified to in front of this jury. So if
4 the defense wants to move it in to discuss it as
5 an exhibit, at this point I feel like we should
6 agree so that we don't continue to get away from
7 why we are actually here today.

8 THE JUDGE: Well, I mean, if you want to
9 take a moment and talk to Mr. Hall about that.
10 I will let you do that.

11 MR. HALL: Your Honor, from the get go, I
12 have said put the video in. I am happy to put
13 the video in. I reiterated this morning I will
14 move it in. Obviously, I understand that I
15 don't get last argument if I introduce evidence.
16 I am happy to move it into evidence. We are
17 fully aware of the consequences. I have moved
18 it into evidence and the Court over the State's
19 objection, and the Court in its wisdom is not
20 allowing it in. If they want to know where I
21 stand, I am ready to get it in.

22 THE JUDGE: At this point where we are,
23 until the State consents to it coming in, it is
24 staying out. It is going to be up to State what
25 they want to do.

STATE OF SC VS. LEONARD JENKINS - DISCUSSION

1 MS. DESCH: Your Honor, if the jury comes
2 back in and we get into cross, if the defense
3 moves it in, I will agree to have it come in,
4 but based on the fact that this is the ruling of
5 the Court.

6 THE JUDGE: Well, Mr. Hall has been pretty
7 creative so far. I don't know how much more
8 creative he can be in trying to get this video
9 in.

10 MR. HALL: Well, I guess I don't
11 understand the language. She is not going to
12 object to it but she wants to be sure on the
13 record the reason she is letting it in is
14 because it is the ruling of the Court. The
15 Court ruled it is inadmissible.

16 THE JUDGE: I think she is saying, and I
17 certainly don't have to speak for the solicitor.
18 Depending on what you do next may cause her to
19 say I am agreeing for it to come in. I think
20 that's what she is saying. Right now it is
21 still out, and we can let Detective Neely review
22 a portion that the solicitor wants him to view
23 for purposes of redirect. So let's go ahead and
24 do that.

25 MR. HALL: Well, I will tell you what I

STATE OF SC VS. LEONARD JENKINS - DISCUSSION

1 will do next, and I will tell the State what I
2 will do next. If he takes the stand and I ask
3 it to be introduced, I will lay the foundation
4 for video, him being there, him recording it,
5 and move it into evidence. Then I won't ask him
6 any other questions, show the video. He gets
7 through, and I will not ask him a question about
8 the video or anything he remembers.

9 THE JUDGE: I understand. I think right
10 now the State is not consenting. Let's continue
11 in the path I thought we were going in to
12 refresh his memory on another aspect of video
13 for purposes of redirect. Let's do that.

14 MS. DESCH: Yes, your Honor. I just want
15 to be clear, I am trying to lay the proper
16 record because as I read the case law it is
17 inadmissible so I fear that -- I also know we
18 are confusing the jury. So I am trying to lay
19 the proper record.

20 MR. HALL: Well, your Honor, if she is
21 trying to protect my client, I really appreciate
22 that. There is other ways I wish she would also
23 protect my client. That is certainly my duty.
24 My client and I are fully informed of the video,
25 and he is intelligently and knowingly asking

STATE OF SC VS. LEONARD JENKINS - DISCUSSION

1 that the video be introduced.

2 THE JUDGE: I understand. Let's go ahead
3 and view whatever portion the State wants
4 Detective Neely to view.

5 You are not going to do it on the screen?

6 MS. DESCH: We are having technical
7 difficulties, your Honor.

8 THE JUDGE: Let's go off the record and
9 let him view it on the computer. We want to get
10 this jury back out.

11 (Off the record to play the video.)

12 THE JUDGE: Back on the record. Are we
13 good now?

14 THE WITNESS: I assume so.

15 THE JUDGE: I don't like that word assume.

16 THE WITNESS: The portion I watched I am
17 good with.

18 THE JUDGE: Are we ready to get the jury
19 back out?

20 MR. HALL: Just one other matter, your
21 Honor. The Solicitor in front of the jury
22 basically recited the Court's ruling on the
23 admissibility of the tapes, and I ask she
24 refrain from doing that. That is certainly a
25 ruling -- the admissibility of the tape is

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1 something that was done outside the presence of
2 the jury. They are not to know about the
3 admissibility under the rules of evidence of the
4 videotape, and I asked her to refrain from that
5 in the rest of her testimony, and certainly, in
6 her closing as well.

7 MS. DESCH: Yes, sir.

8 THE JUDGE: All right. Again, I want to
9 make sure that the record is clear that,
10 Mr. Hall, you wanted the video to come in for
11 impeachment purposes. Impeachment purposes -- I
12 am not trying to lecture you guys because you
13 all know this. But when you impeach with
14 evidence, that only goes on the issue of
15 credibility. So if the video is inadmissible
16 coming in as evidence but it could have come in
17 for impeachment purposes on the sole issue of
18 credibility of a witness, but in light of the
19 fact that I deemed Minor1 having admitted
20 everything that you had asked her about what she
21 said on the video, then there was no need to
22 impeach. I just want to make sure we are all on
23 the same page on that particular issue.

24 All right. Let's bring the jury out.

25 (Whereupon, the jury came into open court

CARSON NEELY - CROSS-EXAMINATION

1 at 10:01 a.m.)

2 THE JUDGE: Let the record reflect the
3 jury is back in. Mr. Hall.

4 CROSS-EXAMINATION

5 BY MR. HALL:

6 Q. Detective Neely, you have had an opportunity to
7 view the portion of the video that we were
8 referring to earlier; is that correct?

9 A. Yes, I did.

10 Q. Isn't it true when you were interviewing Minor1
11 she demonstrated with her curved fingers how he
12 touched her, right?

13 A. Yes. She demonstrated going out and curving her
14 fingers, correct.

15 Q. And on the edge of her blue jean shorts, right?

16 A. That was one portion.

17 MR. HALL: Thank you. I have no further
18 questions.

19 THE BALIFF: Judge, one of the jurors was
20 in the bathroom.

21 THE JUDGE: Mr. Hall, would you please
22 repeat that last question that the juror missed.

23 BY MR. HALL:

24 Q. Detective, you have had an opportunity to review
25 the appropriate portion of the video, right?

CARSON NEELY - CROSS-EXAMINATION

1 A. Yes, sir, I did.

2 Q. In that portion when you questioned her, she
3 demonstrated how -- when she says Gene Jenkins
4 touched her, right?

5 A. Correct.

6 Q. In fact, on the video she uses her curved
7 fingers in demonstrating how he touched her,
8 right?

9 A. Yes. Right hand extended out and curved her
10 fingers.

11 Q. And that was while he was at the top of her blue
12 jean shorts, right?

13 A. That was one statement, yes, sir.

14 MR. HALL: Thank you. No further
15 questions.

16 THE JUDGE: Redirect, Solicitor?

17 MS. DESCH: Yes, sir. Thank you, your
18 Honor.

19 REDIRECT EXAMINATION

20 BY MS. DESCH:

21 Q. The video actually continued and she mentions --
22 does she mention it again?

23 A. Yes, ma'am.

24 Q. In what detail does she give when you come back
25 around to her actually demonstrating to you what

CARSON NEELY - REDIRECT EXAMINATION

1 happened?

2 A. At this time, the portion you are talking about,
3 she places her hand on the table and her finger
4 is extended demonstrating the touching.

5 Q. Is she talking to you at the same time she's
6 holding her hand out?

7 A. Yes.

8 Q. What is she saying when she is holding her hand
9 out and demonstrating?

10 A. She is describing how he touched her.

11 Q. What did that include? What did he touch?

12 A. Her privates, what was previously labeled as the
13 vagina, top of the private.

14 Q. At some point in the review to refresh her
15 recollection, do you remind her you had gone
16 over the diagrams about the body parts?

17 A. Correct.

18 Q. So you did refer the diagram you had gone over
19 with her and her labeling this area and the
20 privates, by this area I am pointing
21 (indicating)

22 A. Yes. She seemed confident to pull the diagrams
23 back out and lay them in front of her.

24 Q. And you felt confident you and she were on the
25 same page about what privates was?

CARSON NEELY - REDIRECT EXAMINATION

1 A. Correct.

2 Q. Did she disclose to you at that time that Gene
3 had actually gone inside, skin to skin, and
4 touched her privates?

5 A. That's correct.

6 MS. DESCH: Thank you.

7 THE JUDGE: Recross.

8 RECROSS-EXAMINATION

9 BY MR. HALL:

10 Q. She only asked when it was skin to skin after
11 you suggested, is it skin to skin or hand on top
12 of clothes, isn't that correct?

13 A. Somewhat I --

14 Q. She didn't say word skin to skin, did she?

15 A. No. I had to use that for clarification to make
16 sure he was not wearing gloves. It was for my
17 clarification, that's correct.

18 Q. So she didn't bring those words up at all, did
19 she?

20 A. No, she didn't say the words skin to skin. I
21 did it to make sure for my clarification, yes,
22 sir.

23 MR. HALL: Thank you.

24 THE JUDGE: Thank you for your testimony,
25 Detective Neely. You can step down, sir.

STATE OF SOUTH CAROLINA VS. LEONARD JENKINS

1 (Witness excused.)

2 THE JUDGE: Solicitor.

3 MS. DESCH: The State would rest, your
4 Honor.

5 THE JUDGE: Okay. Madam Forelady, and
6 ladies and gentlemen of the jury, in light of
7 the fact that the State has rested their case in
8 chief, there automatically is some matters of
9 law that the Court has to take up with the
10 attorneys. I will ask you to retire to your
11 jury room. Hopefully, it will not be too long.

12 (Whereupon, the jury exited the courtroom
13 at 10:06 a.m.)

14 THE JUDGE: Anything from the defense?

15 MR. HALL: Your Honor, at this point, we
16 would move for a motion for a directed verdict.
17 The elements of lewd act under 16-15-140 is
18 that, one, that there has to be an offense --
19 there has to be a touching of the body parts.
20 We don't have any issue with that. There
21 certainly is sufficient information for a jury
22 to determine whether there is touching.

23 There are two parts of the statute that
24 say it has to be a lewd or lascivious act.

25 Then secondly, it has to be with the

STATE OF SOUTH CAROLINA VS. LEONARD JENKINS

1 intent of arousing, appealing to, or gratifying
2 the lust or passions for sexual desires of the
3 defendant or the child. There is testimony --
4 the video that the Court has seen, or the part
5 that Detective Neely referred to in just his
6 recent testimony, is that he reached and touched
7 the top of her pants with his curved hand. It
8 was certainly very brief. She has a baby on her
9 lap, bouncing the two-year old up and down on
10 her lap, and there is no evidence of lewd or
11 lascivious act.

12 Secondly, even if there was a lewd or
13 lascivious act, the State has to produce
14 evidence of an intent to arouse, appealing to,
15 or gratifying the lust or passions or sexual
16 desires of the defendant or the child.

17 So very brief touching. The defendant
18 said nothing. The victim said nothing. There
19 were no other actions on the part of the
20 defendant. There is absolutely no -- the State
21 has presented no evidence of any intent to
22 gratify the lust or passions or sexual desires
23 of the defendant or child, one of the necessary
24 elements of lewd act.

25 Your Honor, my motion for directed verdict

STATE OF SOUTH CAROLINA VS. LEONARD JENKINS

1 is based on the insufficient showing by the
2 State's evidence that the alleged touching was
3 done with intent of gratifying passion or lust
4 of either himself or the victim. We ask that
5 you direct the verdict.

6 THE JUDGE: Thank you, Mr. Hall. State's
7 response.

8 MS. DESCH: Yes, sir, thank you, your
9 Honor. Your Honor, just for the record, this
10 was not brought up, but just to be clear, the
11 State feels in response to this motion that we
12 have certainly hit the elements. Minor1 not
13 only identified the defendant, she gave her date
14 of birth. She was clearly under the age of 16.
15 Detective Neely also identified the defendant as
16 the person that was complained on. He is the
17 accused. This did happen in York County. His
18 date of birth is 1964. Clearly, over the age of
19 14. So I think as Mr. Hall stated, those two
20 issues, those two elements are not being
21 challenged. I wanted to lay that record.

22 We get to the last one, the act committed
23 was done with the intent of arousing, appealing
24 to, or gratifying the lust, passions or sexual
25 desires of the accused or of the child.

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1 What we have in this situation is the
2 touching of a privates of a young child and it
3 is interrupted by Kacie coming back into the
4 room. There is at least some evidence of that
5 before the Court today. We would ask that you
6 consider in the light most favorable to the
7 State.

8 Frankly, your Honor, there is not a whole
9 lot of case law that actually fits under that
10 last element. I was able to find, and I will
11 explain to the court reporter first, 279-SC-409,
12 State vs. Madeira Hardy. I will hand that to
13 the Court. In that particular case, most of
14 this case, your Honor, is discussing the
15 sufficiency of the indictment, but it does bring
16 in part some of the discussions that were on the
17 appeal brought about by the appellant saying
18 there was an error in not directing for the
19 defense on a lewd act for that very reason.
20 Because in this case, they say there was not
21 enough evidence to that element, the intent to
22 arouse. I will say that part of this, and I
23 will hand it to the Court, the minor testified
24 he told his mother approximately three weeks
25 later --

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1 MR. HALL: Your Honor, I would like a
2 copy.

3 THE JUDGE: Let her go on and finish the
4 argument and we just pulled it up and she can
5 show it to you and I will give you a chance to
6 respond. Let her finish her argument.

7 MS. DESCH: Thank you, your Honor. This
8 is on Page 4 of the printed handout, footnote 12
9 and 13. The minor testified he told his mother
10 approximately three weeks later that the
11 appellant had put his hands in the minor's pants
12 and felt his private parts.

13 In that case, your Honor -- would you like
14 to see it first?

15 THE JUDGE: We have it pulled up. Thank
16 you.

17 MS. DESCH: In that case, there are other
18 issues in that case, but that was at least one
19 that was testified to and the Court did find
20 that that was sufficient evidence. Most of the
21 case law, your Honor, it is my understanding if
22 it is -- it is hard to find case law that goes
23 along with defining all of that.

24 There is another case, your Honor, again,
25 talking about the sufficiency of the indictment.

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1 In this particular case, it is Court of Appeals,
2 the State vs. Vernon Tumbleston. That is
3 376-SC-90. Most of this case is about the
4 timeframe and the indictment, but in it they
5 breakdown, because they are talking about the
6 indictment, they actually put the language in
7 the case. It is criminal sexual conduct and
8 lewd act, and in that case the defendant was
9 found guilty of the lewd act. It doesn't get
10 into great detail about what evidence came out
11 in court, but it does talk about -- it quotes on
12 Page 2 of the printout, on the right-hand side,
13 third paragraph down. It talks about the
14 evidence of the criminal sexual conduct. It
15 also talks about in a quote the evidence
16 regarding the lewd act. In that case, it was
17 put her hand on his private. In that case, the
18 Court found that sufficient to be a lewd act.

19 So there is not much guidance, but that's
20 what we would present to the Court to say we met
21 that burden. There is evidence that the hand
22 touched the private skin to skin.

23 THE JUDGE: Right. Certainly, in viewing
24 or determining the motion for directed verdict,
25 I have to determine that there is any evidence

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1 whatsoever and not look to the weight of the
2 evidence. I think on the two points, as far as
3 determining intent, I think it is determined
4 circumstantially because there is never going to
5 be any direct evidence of whether or not there
6 was intent to arouse. So I think there is
7 sufficient evidence presented to survive a
8 motion for directed verdict, and I will
9 respectfully deny your motion, Mr. Hall. Your
10 points are well taken.

11 MR. HALL: Your Honor, may I place one
12 thing on the record?

13 THE JUDGE: Sure.

14 MR. HALL: If the basis of the denial is
15 that this is a circumstantial evidence case as
16 far as the third element, there has to be -- to
17 get beyond a directed verdict, there has to
18 be -- or as far as circumstantial evidence --
19 I'm sorry, it escapes me right now. There has
20 to be more than just an indicia for
21 circumstantial evidence. There has to be --
22 your Honor, I am getting old.

23 THE JUDGE: That's all right, take your
24 time.

25 MR. HALL: There has to be more than an

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1 indicia and scintilla in a circumstantial
2 evidence case. There has to be, in essence,
3 strong circumstantial evidence to survive a
4 directed verdict, and I would like to put that
5 on the record.

6 THE JUDGE: All right. I understand. I
7 think the Hardy case is about -- I agree, there
8 is very little case law on it, but I think based
9 upon the Hardy case that the State argued,
10 certainly, would create enough basis for the
11 Court to deny.

12 MR. HALL: Your Honor, just for purposes
13 of preparing for instructions to the jury, I
14 would ask the Court to look at State v. Oddem,
15 which deals with circumstantial evidence. I
16 would be asking for a jury instruction at the
17 appropriate time based on the statement of State
18 vs. Oddem based on circumstantial nature of just
19 element of the crime, State vs. O-D-D-E-M.

20 THE JUDGE: All right. So I have a
21 general idea of what your plans as far as you
22 putting up?

23 MR. HALL: Your Honor, I would like to
24 call Katrina Babb who is the mother. I have
25 subpoenaed her. I don't know if she is here. I

STATE OF SOUTH CAROLINA VS. LEONARD JENKINS

1 hope she is here. She is under subpoena to be
2 here every morning this week. I need to check
3 on her status.

4 THE JUDGE: Is she here?

5 MS. DESCH: She is here, your Honor.

6 MR. HALL: I would like to call her as a
7 witness, and my client certainly needs to be
8 warned and advised about his right to testify.

9 THE JUDGE: Right. I plan to do that, but
10 I probably won't do that until the time that you
11 do intend to call him. I will then give him the
12 necessary charge.

13 MR. HALL: My only witness will be Katrina
14 Babb, depending on what my client decides to do.

15 THE JUDGE: Well, after you do Ms. Babb,
16 it would probably be a good morning break and
17 you could let me know and then I will charge him
18 regardless, whether he testifies or not
19 testifies, and you can kind of give me the heads
20 up. But that is the maximum, two?

21 MR. HALL: That's correct.

22 THE JUDGE: Solicitor, at this time, do
23 you expect any rebuttal case? I am not going to
24 hold you to your answer. I am just trying to
25 get a feel.

STATE OF SOUTH CAROLINA VS. LEONARD JENKINS

1 MS. DESCH: I would have to see how it
2 goes, but at this time, I don't.

3 THE JUDGE: All right. We need to work on
4 a charge, and I like to give you a copy of the
5 written charge so you can study on it. So I may
6 give them a long lunch break.

7 MS. DESCH: Yes, sir.

8 THE JUDGE: All right. Anything further
9 before we bring the jury out?

10 MS. DESCH: No, sir.

11 MR. HALL: Nothing from defense.

12 THE JUDGE: I will do a better job of
13 counting the number of jurors when they come
14 out. Bring the jury out, please.

15 (Whereupon, the jury came into open court
16 at 10:18 a.m.)

17 THE JUDGE: Let the record reflect that we
18 have 12 jurors and 1 alternate.

19 Mr. Hall, you may proceed, sir.

20 MR. HALL: Your Honor, the defense would
21 call Katrina Babb.

22 THE JUDGE: Come around, please, Ms. Babb

23 KATRINA BABB

24 being first duly sworn, testified as follows:

25

KATRINA BABB- DIRECT EXAMINATION

DIRECT EXAMINATION

1

2

BY MR. HALL:

3

4

5

6

7

8

A. Yes, sir.

9

10

Q. Ms. Babb, you have known Gene Jenkins, my client, for quite some time, haven't you?

11

A. Yes.

12

13

Q. In fact, you've been angry with him since 2007, at least, haven't you?

14

15

16

17

18

MS. DESCH: Your Honor, I object to this. First of all, this is his witness. They would be leading questions that he is starting right out with and laying absolutely no foundation about their past history.

19

20

THE JUDGE: All right. It is somewhat leading. So let's try to.

21

22

23

24

25

MR. HALL: Your Honor, I believe under the rules, I think, clearly, she would be identified as a hostile witness. She is the mother of the child, and I am allowed ask leading questions under that rule.

KATRINA BABB- DIRECT EXAMINATION

1 THE JUDGE: Well, that is correct, but I
2 don't know if she necessarily would be an
3 adverse or hostile witness.

4 MR. HALL: I will rephrase my question.

5 THE JUDGE: Try to rephrase it and maybe
6 we can get through that.

7 MR. HALL: Can I have this marked
8 Defendant's Exhibit 3.

9 (Whereupon, DEFENDANT'S EXH. 3,
10 Magistrate's Court Proof of Service, was marked
11 for identification.)

12 BY MR. HALL:

13 MS. DESCH: Your Honor, can we approach,
14 please?

15 THE JUDGE: Certainly.

16 (Whereupon, a bench conference was held
17 off the record in the presence of the jury, but
18 out of hearing of the jury.)

19 THE JUDGE: Please proceed.

20 BY MR. HALL:

21 Q. Ms. Babb, I am going to show you what has been
22 marked as Defense Exhibit 1. What is that?

23 A. This is the statement that I signed when the
24 police officer came out to the house to ask me
25 what happened with my daughter before I was

KATRINA BABB- DIRECT EXAMINATION

1 called up with him.

2 Q. You signed that, right?

3 A. Yes.

4 Q. At the top of the statement -- what is it
5 called?

6 A. Voluntary.

7 Q. How does it start?

8 A. Line 1 says: Statement written by mother,
9 Katrina Babb. That way they know it is me
10 writing it and not my daughter.

11 Q. I understand. At the top, what does the
12 sentence say?

13 A. I, Minor1 , know and understand my rights and
14 answer the questions at this time and made the
15 following statement. I made the statement for
16 her.

17 Q. The testimony is -- and where did this take
18 place?

19 A. At my house, on my deck.

20 Q. On your deck. Can you just read that statement,
21 what you wrote?

22 MS. DESCH: Your Honor, at this point, if
23 he is going to publish it, he should move it
24 into evidence and we would have no objection.

25 THE JUDGE: He can ask her questions about

KATRINA BABB- DIRECT EXAMINATION

1 it, but if you are going to go into, you know,
2 lengthy details about what is in the document
3 then certainly the State has a right to --

4 MR. HALL: Your Honor, it is one sentence.

5 THE JUDGE: You may proceed.

6 BY MR. HALL:

7 Q. Would you read that, please?

8 A. Minor1 was at Gene and Janet Jenkins' home when
9 Gene put Gracie, the youngest daughter of Gene
10 and Janet, on her lap and then went toward
11 Gracie on the couch and put his hand in her
12 shorts on her privates.

13 Q. What is the date of that?

14 A. 2-7-2012 is when I reported it, when the
15 detective came to my house.

16 Q. Then did you subsequently take your daughter up
17 to the York County Sheriff's Department?

18 A. After that, no, until he called to set up the
19 appointment.

20 Q. When was that?

21 A. We set the appointment up for the 14th when I
22 was here.

23 MR. HALL: Your Honor, that's all I have
24 for this witness.

25 THE JUDGE: Ms. Desch?

STATE OF SC VS. LEONARD JENKINS

1 MS. DESCH: Nothing for cross.

2 THE JUDGE: Thank you for your testimony.
3 You may step down, ma'am.

4 (Witness excused.)

5 THE JUDGE: I think at this time we are
6 going to take a morning break. You may say to
7 yourself, well, wait a minute, we have been
8 breaking all morning. We have not. I can
9 assure you that every time we send you out to
10 your jury room, we are working. So I think
11 these lawyers need a little break so we are
12 going to take about 15-minute morning break.

13 I remind you not to discuss this case, no
14 aspect about the case, none of the facts about
15 the case, amongst yourselves. Thank you very
16 much.

17 (Whereupon, the jury exited the courtroom
18 at 10:30 a.m.)

19 THE JUDGE: Mr. Hall, at this time, I am
20 going to examine your client concerning his
21 right to the testify and then you can take
22 whatever time you need to discuss that matter
23 with him and inform the Court.

24 Sir, would you raise right hand, please.

25

STATE OF SC VS. LEONARD JENKINS

1 LEONARD JENKINS,
2 being duly sworn, testified as follows:

3 THE JUDGE: Just remain standing. At this
4 time, I am going to explain to you some of your
5 rights. If you do not understand anything I
6 say, please let me know. If you want me to
7 explain anything in more detail, please let me
8 know. Do you understand that, sir?

9 THE DEFENDANT: Yes, sir.

10 THE JUDGE: We have now reached the stage
11 of the trial where you may present your defense
12 as far as your testimony, and you have the right
13 with the protections given to you by the Fifth
14 Amendment of the Constitution of the United
15 States. This amendment states, in part, no
16 person shall be compelled in any criminal case
17 to be a witness against himself. This means
18 that you cannot be required to testify in this
19 case. You have the right to testify on your own
20 behalf, however, no one can make you testify.

21 This is a personal right and no one can
22 waive this right accept you. If you decide to
23 testify, you will be subject to the same rules
24 that govern other witnesses, and you may be
25 examined and cross-examined on any relevant

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1 issue in this case.

2 In addition, if you any convictions
3 involving dishonesty or false statement or for
4 crimes punishable by imprisonment for more than
5 one year and this Court determines that the
6 probative value of admitting the evidence
7 outweighs the prejudicial effect to you, the
8 Solicitor will able to introduce your record to
9 attack your credibility.

10 If you decide to testify, this decision on
11 your part must be freely, voluntarily, and
12 intelligently made with knowledge of protections
13 given to you by the Fifth Amendment and the
14 consequences of your decisions to testify.

15 If you decide not to testify, I will
16 instruct the jurors that they can not give the
17 fact that you did not testify any consideration
18 whatsoever and that there is to be absolutely no
19 prejudice to you because you did not testify.

20 It is left entirely up to you whether or
21 not you testify. Certainly, I am going to give
22 you the opportunity to talk with Mr. Hall in
23 just a moment. You can talk with your family.
24 I think your wife is in the courtroom, and
25 anybody else to help you make that decision.

STATE OF SC VS. LEONARD JENKINS

1 But the final decision will be left entirely up
2 to you.

3 Do you understand what I have explained to
4 you?

5 THE DEFENDANT: Yes, sir, I do.

6 THE JUDGE: Do you have any questions
7 about what I have explained to you?

8 THE DEFENDANT: No, sir.

9 THE JUDGE: Okay. We will now take our
10 morning break. I will give you a chance to talk
11 to Mr. Hall and anybody else, and then when we
12 return to the trial, I will examine you about
13 whether or not you are going to testify. Thank
14 you.

15 We will be at recess about 15 minutes.

16 (Court in recess at 10:53 a.m.)

17 THE JUDGE: Okay. We are back on the
18 record.

19 Mr. Hall, what has your client decided to
20 do concerning the testimony?

21 MR. HALL: My client is not going to
22 testify. We would like to rest when the jury
23 comes in.

24 THE JUDGE: When we bring the jury back
25 out then I will ask you, and you can indicate in

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1 the presence of the jury that you rested.

2 Just so I can have an idea, Solicitor,
3 have you decided about a rebuttal case?

4 MS. DESCH: With that, we have no
5 rebuttal.

6 THE JUDGE: All right. I will also ask
7 you in the presence of the jury concerning that.

8 Well, what I am going to need to do then
9 is go ahead and give them an early and probably
10 a little longer lunch break, if that is
11 satisfactory with you, so that we can work on
12 jury charges and get each of you a copy so you
13 can study on it and see if you have any
14 problems. I will give you an opportunity to --
15 we can do it one of two ways. If you have some
16 request of charges, you can hand them to me now,
17 or in the near future, or wait until you get my
18 draft of the jury charges and then decide
19 whether or not there is something extra you need
20 for me to do. Okay?

21 MS. DESCH: Yes, sir.

22 THE JUDGE: It is about 11:10 now. Have
23 the jury back at 1. How would that work with
24 you all?

25 MR. HALL: That's fine with me, your

STATE OF SC. VS. LEONARD JENKINS

1 Honor.

2 MS. DESCH: Yes, your Honor.

3 THE JUDGE: That should give us enough
4 time to get the jury charges lined up and give
5 you all a chance to get your thoughts together
6 about closing and that sort of thing.

7 Bring the jury in, please.

8 (Whereupon, the jury came into open court
9 at 10:57 a.m.)

10 THE JUDGE: Let the record reflect all
11 jurors or present. Mr. Hall.

12 MR. HALL: Your Honor, at this time, the
13 defense rests.

14 THE JUDGE: Thank you very much, sir. Any
15 rebuttal case from the State?

16 MS. DESCH: No, your Honor.

17 THE JUDGE: Okay. Madam Forelady, and
18 ladies and gentlemen of the jury, that concludes
19 the evidence portion of this case. What we will
20 have remaining is closing arguments by the
21 attorneys, and then I will instruct you on the
22 law in this case. We need to do some work in
23 order to reach that point so what I am going to
24 do is give you an early and a little bit longer
25 lunch break. We are going to recess now for

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1 lunch, and I will need you to be back here at 1
2 o'clock. My watch says it is about 11. So it
3 is going to be about a two hour lunch break. So
4 if you will be back at 1.

5 Again, ladies and gentlemen of the jury,
6 do not discuss this case among yourselves. Do
7 not discuss it with anybody you may come in
8 contact with while you are on your lunch break.
9 We will see you back at 1 o'clock. Have a good
10 lunch.

11 (Whereupon, the jury exited the courtroom
12 at 11 a.m.)

13 THE JUDGE: All right. We will in recess
14 until 1 o'clock. As soon as we get something
15 for you to look at, we will track you down.

16 MR. HALL: May we approach -- well, I had
17 a discussion briefly about circumstantial
18 evidence.

19 THE JUDGE: We have a circumstantial
20 evidence charge, and probably what you want to
21 do is see our charge and then if you feel like
22 you want it added to or changed then we can do
23 that.

24 MR. HALL: Well, I guess what I am trying
25 to figure out, as far as at this point I might

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1 need to help preserve the record. I'm not sure
2 this is a circumstantial evidence case. It is
3 the direct testimony from the child. There is a
4 question about her credibility, believability of
5 it, but just to cap this as a circumstantial
6 evidence case when there is direct -- the only
7 real evidence is direct evidence from the child
8 that there was a touching -- well, you are
9 right, there is circumstantial evidence as far
10 as the other elements. I was just thinking
11 through that on those points that we will be
12 asking for circumstantial.

13 THE JUDGE: Wait and just take a look at
14 my charge and see if it is going to be what you
15 are looking for.

16 MR. HALL: That's correct. I am thinking
17 out loud.

18 THE JUDGE: All right. Anything further?

19 MS. DESCH: Nothing further.

20 THE JUDGE: We will be in recess until 1.
21 We will get back with you shortly.

22 (Court in recess at 11:01 a.m.)

23 THE JUDGE: We are back on the record. I
24 have provided a copy of the Court's jury charge
25 to both sides.

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1 Does the State have any objections or
2 exceptions to the charge?

3 MS. DESCH: No, sir.

4 THE JUDGE: How about the defense?

5 MR. HALL: None from the defense, your
6 Honor.

7 THE JUDGE: Thank you very much. Are you
8 ready for closing arguments?

9 MR. HALL: The defense is ready.

10 MS. DESCH: The State is ready.

11 THE JUDGE: All right. Bring the jury in.

12 (Whereupon, the jury came into open court
13 at 1:00 p.m.)

14 THE JUDGE: Let the record reflect that
15 the jury is present. Madam Forelady, ladies and
16 gentlemen of the jury, we are now at the stage
17 in this case where the attorneys will make their
18 final closing arguments to you. After that is
19 done then I will charge you on the law in this
20 case. So I would ask that you give both these
21 fine attorneys your undivided attention during
22 both of the closing arguments. You may proceed.

23 MR. HALL: May it please the Court?

24 THE JUDGE: Yes.

25 MR. HALL: This case is about an

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1 allegation, weak evidence, that changes over
2 time from the allegations, suggestive
3 questioning. The suggestions of skin on skin,
4 the suggestions of underneath the underwear.
5 Poor preparation. This case is about a victim
6 in the case who never saw the video of her, of
7 what she testified to, of what she gave 18
8 months ago. No pictures of inside the house for
9 you to see, destroyed notes about the interview
10 and what happened. Lots of testifying from the
11 State, lots of suggestive questioning and
12 suggestive answers.

13 In order to convict my client of a serious
14 criminal charge, the State must bring to you
15 evidence that proves beyond a reasonable doubt
16 that he is guilty.

17 Again, this is a case about allegations,
18 weak evidence, suggestive questioning, poor
19 preparation, testifying for the State. You
20 deserve more. You deserve more from the State
21 of South Carolina.

22 As I told you in opening, this is not the
23 case of Minor 1 , Katrina Babb versus Gene
24 Jenkins. This is the case about the State of
25 South Carolina bringing a serious criminal

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1 charge against my client, Gene Jenkins. You
2 deserve more.

3 Now, let's go through the elements of what
4 my client is charged with. Two elements: One,
5 is that the defendant in this case is over the
6 age of 18. There is direct evidence that he is
7 over the age of 18. Now, you can look at my
8 client and use your common sense. He is over
9 18. That's direct evidence. That's one element
10 of the charge. The State has proved that beyond
11 a reasonable doubt.

12 Secondly, that the minor in a lewd act on
13 a minor case is under the age of 18. The State
14 has proven beyond a reasonable doubt that Minor 1

15 is under the age of 18. You can use your
16 common sense and look at Minor 1 and tell she
17 is under 18, but she is under 18 because her
18 birthday is . The State has
19 proven those two elements beyond a reasonable
20 doubt.

21 But there are two other important elements
22 of the crime of lewd act on a minor. Those
23 elements in this case the State brings to you
24 circumstantial evidence, not direct evidence,
25 but circumstantial evidence. Those two elements

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1 are that, one, that my client, Gene Jenkins, or
2 a defendant in South Carolina, willfully and
3 lewdly committed or attempted a lewd or
4 lascivious act.

5 The other element -- these are separate
6 elements that the State must prove to you with
7 circumstantial evidence is that the act was
8 committed with the intent to arouse, appeal to,
9 or gratify the lust, passions or sexual desires
10 of the defendant or the child.

11 So let's look at that first element as far
12 as a lewd or lascivious act. The testimony, if
13 you recall, is that she testified that Gene
14 Jenkins touched her on top of her private.
15 That's what she testified to here. Eighteen
16 months ago when I questioned Detective Neely, he
17 testified that she initially said that the act
18 that she said that he touched me, and he
19 demonstrated with his curved fingers, on the top
20 of her normal blue jean shorts. I would submit
21 to you that this would be what she is talking
22 about, that on top of the blue jean shorts.

23 Later, after questioning more by the
24 prosecutor, and as they went through Detective
25 Neely, you know, what we would submit is

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1 suggested questioning that it goes beyond that.
2 But when she gave her statement 18 months ago
3 about something that happened two years ago when
4 it is fresh on her memory this is what she said.
5 That was where the state alleges was the willful
6 and lewd act or lascivious act committed by Gene
7 Jenkins.

8 Secondly, there is no evidence, no
9 evidence of any intent even if you had a lewd
10 act, lascivious act. You still have to ask your
11 question was there an intent to arouse, appeal
12 to, or gratify the lust, passion or sexual
13 desires of the defendant or the child. There
14 were no words. There were no actions. The
15 house was full of Gene Jenkins' family, his
16 wife, his 17-year old daughter, his 11-year old
17 daughter, his two-year old Down Syndrome child
18 he has placed in the lap of Minor1 , who was
19 in her normal blue jean shorts. It appears of
20 her testimony however long it was, we can
21 surmise that it was almost like a split second
22 or certainly a matter of a few seconds. It
23 happened and then Kacie came in the room, and
24 when she did, it had stopped.

25 There is no evidence, no evidence, of any

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1 intent to arouse him sexually or her sexually.
2 That is difficult to talk about in front of
3 people. It is difficult to talk in front of
4 jurors about sexual intent. We don't need to
5 talk about it too much. But my client has been
6 charged with a serious crime so we have to talk
7 about it. We have to talk about it.

8 Because it is circumstantial evidence, to
9 prove that element -- circumstantial evidence is
10 different than direct evidence. Direct evidence
11 is just like what I told you. The facts, or
12 something that we directly observed. The intent
13 of an individual or reading into the law of what
14 an individual actions are in this case is
15 circumstantial evidence. Unlike direct
16 evidence, you have to find as jurors, when you
17 are considering circumstantial evidence in this
18 case, that there are connected collateral facts
19 or other facts to prove what the State says. So
20 that's what circumstantial evidence is. You add
21 up -- sort of like a recipe. You know, you put
22 in all of the elements, ingredients of a recipe
23 and you come out with a product. I like to make
24 pancakes for my family. We have this scratch
25 recipe. You put in a cup of flour. You sift in

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1 little bit of salt, two tablespoons of baking
2 powder, one egg, a cup of milk. And to really
3 make it good, you add almond extract, and it
4 makes a great pancake. That's the recipe.

5 I can produce a pancake that looks good
6 and tastes good, and the circumstantial evidence
7 is if I have done it properly, you have a good
8 pancake if it was done right.

9 Now, the problem is -- I don't know if you
10 all cook much -- flour in pancakes can be a real
11 problem. Sometimes the flour -- I mix it up and
12 you get it rising to the top and then you get
13 the liquids on the bottom and it doesn't work
14 right, and so the type of flour you use really
15 helps. But if an ingredient is left out then
16 you don't have a pancake. That's what criminal
17 cases are like when they demand circumstantial
18 evidence. If there is not enough of the
19 ingredients then you don't have the prompt.

20 In this case, there is, again, no evidence
21 of any intent to arouse either my client or the
22 victim. No actions, no words, no threats,
23 nothing.

24 You heard this case. It hasn't been long.
25 My client, Gene Jenkins, asked to you follow the

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1 law. The law of is the presumption of
2 innocence. Gene Jenkins, you heard lots of back
3 and forth about the law in here, this courtroom.
4 Gene Jenkins by law is presumed to be innocent
5 just like anyone else who is charged with a
6 crime in this state. The judge is going to
7 charge you and tell you what the law is about
8 the presumption of innocence. He is going to
9 tell that you that each defendant is cloaked
10 with the robe of innocence. He is going to tell
11 you that that is his right. That is right.
12 That is not a privilege. That is his right.
13 The only way that robe of innocence can be taken
14 off of Gene Jenkins is if the State of South
15 Carolina brings evidence into this courtroom and
16 strips it away beyond a reasonable doubt. Not a
17 suspicion, not a possibility. Those things can
18 exist and may exist in this case, but only if
19 they prove with ingredients beyond a reasonable
20 doubt, can that road of innocence be removed
21 from him.

22 One, I ask you to follow the law of the
23 presumption of innocence, that substantial right
24 that belongs to Gene Jenkins and every other
25 person in the United States of America.

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1 The judge is going to charge you on the
2 law of credibility and believability. Three
3 witnesses in this case, State's witnesses are
4 Detective Neely and Minor1 . Your job is to
5 follow the law and determine their credibility,
6 their believability.

7 Gene Jenkins asks you to follow the law of
8 reasonable doubt. The judge will charge you and
9 give you instruction on reasonable doubt. Then
10 you must find my client has violated every
11 element of this charge beyond a reasonable
12 doubt. It is not like -- he will tell you, it
13 is not like a civil case where you have two
14 parties and it is often instructed it is like
15 giving you a set of scales. You put all of the
16 evidence on the scales and if it tips ever so
17 slightly for one party or another then you rule
18 for that party. Criminal cases are not like
19 that. The reasonable doubt standard is much
20 higher because people's liberty is at stake. So
21 you must prove beyond a reasonable doubt, which
22 means the State has to present enough evidence
23 not to just tilt it so slightly about a
24 possibility or suspicion, but they have to prove
25 beyond a reasonable doubt that someone has

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1 violated the law, and again, on each element.

2 The judge is going to tell you under
3 reasonable doubt that you must be firmly
4 convinced of Gene Jenkins' guilt, firmly
5 convinced.

6 He is going to charge you on the law of
7 inconsistent statements. You will have an
8 opportunity to apply that law to the facts in
9 this case. We ask you to follow that law. We
10 ask you to follow the law of circumstantial
11 evidence.

12 Gene Jenkins asks that you combine the law
13 with the facts as you heard them. Remember that
14 this case is about an allegation brought by
15 Katrina Babb, weak evidence, nothing more,
16 suggestive questioning of this 14-year old,
17 pretty articulate girl, who needed help
18 according to the prosecutor to refine her case,
19 and poor preparation. She has never seen the
20 video. The witness in the case never saw what
21 she told Carson Neely a year and a half ago.

22 From Minor 1 testimony, this is a
23 case about Gene Jenkins reaching down to get his
24 two-year old Down Syndrome toddler off her lap.
25 I ask you to combine the law with the facts, and

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1 when do you that, render a verdict at the
2 conclusion of this case that speaks the truth.
3 That verdict is that Gene Jenkins be found not
4 guilty. Thank you.

5 THE JUDGE: Thank you, Mr. Hall. Closing
6 from the State.

7 MS. DESCH: Thank you, your Honor. No
8 evidence, no actions, no words. The defense
9 wants you to believe that nothing was presented
10 to you about these allegations. You know, it
11 just struck me a minute ago, and it is kind of
12 catching me little off guard. Suddenly this
13 case is not about Gene Jenkins touching Minor1
14 in her privates. For the first time in two
15 days you just heard from the defense attorney
16 that this case is about Gene Jenkins reaching
17 down to get his two-year old Down Syndrome
18 daughter off Minor1 lap. That's the first
19 time you heard that, that any of us have heard
20 that, in closing arguments by Mr. Hall. No
21 evidence of that whatsoever.

22 Why does he keep bringing it up that this
23 young toddler had Down Syndrome? I am sure she
24 is a sweet little girl, but we are not to tug at
25 your emotional heart strings. We are here to

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1 present evidence to you, the judges of the
2 facts, to make sure that we meet our burden, to
3 make sure I, representing the State of South
4 Carolina, meets my burden. We take this equally
5 as seriously. We find it just as serious to
6 Minor1 as we do to Gene Jenkins.

7 So let's take a look at what the State must
8 prove because when the defense brought to your
9 attention their nuances, but there were a few
10 things that were misquoted. What he says, not
11 evidence. What I say, not evidence. The judge
12 tells you the law.

13 Let's talk about what my burden is to prove.
14 Lewd act on a minor. The State -- I am
15 representing the state in this case. This is
16 what we must prove to you. The defendant was
17 over the age of 14. That the defendant
18 willfully and lewdly committed or --very
19 important language -- or attempted a lewd or
20 lascivious act on, or with the body, or its
21 parts of a child under the age of 16. The lewd
22 act or intent at a lewd act with the intent to
23 arouse, appeal to, or gratify the lust, passions
24 or sexual desires of the defendant or of the
25 child.

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1 Those are the limits we have to prove here
2 today beyond a reasonable doubt. So what does
3 that mean? Willfully, voluntarily, or
4 intentionally, not by accident. Perhaps if you
5 go into -- if you have children and they have
6 friends over and you are waking them up and in
7 the morning to get them out to, I don't know, to
8 have some pancakes and you go into the girls and
9 you wake them up, and you lean down and shake
10 them up, and you grace maybe the chest area.
11 That certainly is not a lewd act. That is not
12 intentional. It is just you tried to wake them
13 up, they might have moved, your hand might have
14 touched it. That was an accident.

15 We have to prove this was done
16 deliberately. That the act was one that was
17 intentional.

18 Lewd, means obscene, lustful, indecent, or
19 lecherous. Obscene, we talk often about what
20 obscene means. In legal circles they talk about
21 cases that say when it comes to obscene material
22 you know it when you see it. It is hard to
23 define. Touching the tip of a private area on a
24 little girl. You know it when you see it.

25 I will break it down a little bit because

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1 I know it will get a little confusing with both
2 of us arguing and then hearing it from the
3 judge. The accused did willfully and lewdly
4 commit or attempt to commit an act with or upon
5 the body of a child under the age of 16.

6 Let's go through what evidence we presented
7 to you. Minor1 took the stand, and what she
8 tells you from this chair right here, that's
9 direct evidence. Her birthday date is

10 . She was born in 1999. She gets into the
11 timeframe of the incident about the summer of
12 2011. She doesn't know the exact date. She
13 remembers it was hot out. She remembers they
14 were playing outside. She remembers it was
15 between 6th and 7th grade. So in the summer of
16 2011 she was 12 years old at that time. She
17 might be an articulate 14 year old today before
18 you, but she was 12 years old. So clearly, we
19 have met that element. The child is under the
20 age of 16.

21 Let's see what else we can consider.
22 Minor1 tells you she was in the living room
23 by herself, that Gene brought Grace into the
24 living room, placed Grace on Minor1 lap. When
25 he reaches over, she says three fingers inside

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1 the front of my shorts. Put them underneath the
2 clothes, right down in front. It wasn't
3 coaching that led to that testimony. That was
4 her testimony about what happened.

5 Privates, that is what she uses. That's
6 the word she uses. To be clear, we are getting
7 Exhibit 2, and I will show that to you when the
8 clerk brings that up. State Exhibit 2 you can
9 take back into the jury room with you. That's
10 when I went over the diagram with you of the
11 little girl. I want to make sure we are all on
12 the same page. When she is talking about
13 privates, it is what we understand to mean as
14 privates. We as adults, we know words. We know
15 it is vagina, a little girl's privates. I want
16 to make sure -- we need to make sure, you need
17 to make sure that when Minor 1 says privates
18 that is what she means. She took a look at
19 State's Exhibit 2, a diagram of little girl.
20 She circled the area for you.

21 Skin to skin. That was the words that
22 Detective Neely used. That was brought out on
23 cross-examination. But that is to clarify
24 because when he interviews children, he needs to
25 make sure that they are on the same page. These

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1 are serious allegations. You don't want to
2 think apples when they are talking oranges.

3 If you interview adults, for the most part
4 we assume that we are talking about the same
5 thing. When you talk to co-workers or spouses
6 or friends, you get to know what they refer to.
7 Most of the time you know that you are on the
8 same page when you are talking about it.
9 Children are different. They have different
10 experiences. You have to know that we are on
11 the same page as a child.

12 Again, you will have State's Exhibit 2 in
13 the room with you. This is the diagram that
14 Minor1 had during her testimony. This is the
15 area that is circled in which she refers to when
16 she is saying Gene touched her privates.

17 The other element that we have to prove is
18 the accused is over the age of 14. Frankly, you
19 can look and see he is not a teenager anymore.
20 Most of us in here are not. But the direct
21 evidence from the stand that you heard is this:
22 Minor1 identifies Leonard Gene Jenkins as
23 the person that touched her privates. Leonard
24 Gene Jenkins was arrested and booked by
25 Detective Carson Neely. He gives his date of

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1 birth at booking as . He is the
2 accused because he is the defendant in this
3 case. The incident occurred the summer of 2011.
4 He is clearly over the age of 14.

5 Again, that is the second element that we
6 have to prove, child under 16, accused over 14.
7 We have to prove each of these elements beyond a
8 reasonable doubt. So when you get back into the
9 deliberation room and you start talking about
10 what the evidence is, check mark those. They
11 have conceded we have presented it, those two
12 done, proved beyond a reasonable doubt. We have
13 to get into the meat of the case.

14 The defense contends that Minor1 was
15 inconsistent, therefore, she is lying about what
16 Gene did all together. Inconsistent doesn't
17 mean lying. But that is up to you as the
18 finders of fact. You have to judge people's
19 credibility. If you have children and you
20 present something to them -- let's say you bake
21 some cookies for a bake sale and they come fresh
22 out of the oven and they are on the kitchen
23 counter and your child walks up and says, can I
24 have one of those? And you look at the child
25 and say, no, those are for your bake sale. I

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1 don't feel like making another batch. You
2 cannot have any.

3 Then you leave the room for a minute, and
4 the child takes one, and you come back out. The
5 child is out of the room but there is a cookie
6 missing. You call the child back in and you
7 say, did you take a cookie? That child can look
8 you right in the eye and shake their head, but
9 they've got cookie crumbs coming out of their
10 mouth, and they can't speak because they have
11 something in their mouth.

12 You can judge your child's credibility.
13 You can use common sense to judge Minor 1
14 credibility.

15 Believability. Do you believe what she's
16 saying? The defense contends you cannot believe
17 anything she is saying because she didn't
18 remember what shirt she was wearing. That she
19 didn't remember the exact time of the incident.
20 That she didn't say before today that she was
21 worried she was going to lose the friendship of
22 her only friend at the time. That during
23 cross-examination is what they presented to you
24 in hopes that you would ignore all of the other
25 evidence. Is that it?

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1 We want to bring you back to what was said
2 to you from the stand, and to be clear, that is
3 direct evidence. I can't give you a recipe for
4 pancakes but I can give you an example, my own
5 example, of direct and circumstantial evidence.
6 It will be defined by the judge. The best
7 example I found is that you are sitting at home
8 and you watch the mailman come and deliver your
9 mail and you see him with your own eyes. That's
10 direct evidence that the mailman came to your
11 house.

12 Circumstantial evidence would be if you
13 left your house at eight in the morning where
14 there was nothing in your mailbox and you came
15 home at five and the mail was there. That's
16 circumstantial evidence that the mailman came to
17 your house.

18 So let's be clear, when the defense
19 contends that we presented no evidence, and at
20 best, weak circumstantial evidence. That is a
21 mischaracterization. The direct evidence is
22 what you heard from this stand, from everybody
23 that got sworn in and sat there and answered
24 questions. What they see, hear, smell, taste,
25 touch, direct evidence.

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1 Minor1 tells you on several occasions on
2 direct, on cross, and even hearing some of
3 Minor1 testimony through what was brought out
4 with Detective Neely. So three opportunities
5 you heard Gene touched her inappropriately. He
6 reached over and touched me. They were in the
7 living room by the front door. Why is that
8 important? Because the defense wants to bring
9 out that the whole family was in the house.
10 That doesn't mean he didn't do it. She said the
11 whole family was in the house. Janet was in a
12 living room, not the same living room as her.
13 Gene started out in the kitchen, brought Gracie
14 into the living room. Kacie and Amber are
15 there. Amber never comes out into the play.
16 Kacie goes into somewhere, bathroom, bedroom,
17 comes back out, and timing, thankfully so.
18 Regardless of who was in the house, the people
19 in the front living room are Minor1, Gene, and
20 the beautiful little girl, Grace. It appears
21 from Minor1 testimony that Grace was used as a
22 prop. If you are a child and a toddler is
23 placed on the your lap, the last thing you
24 expect is to be violated.

25 Minor1 said Gene went into the front of her

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1 shorts, touched her privates, and it occurred in
2 the living room here in York County.

3 The defense keeps mentioning that Minor1
4 never saw the video. Minor1 is here. She may be
5 articulate, and the she is, but she is still 14
6 years old, even today. She got on that stand
7 and she swore that she would tell you. They say
8 it is poor preparation. How about the fact that
9 she didn't need to be coached about what she
10 said before. If she is telling the truth, she
11 doesn't need to see the video. She comes in
12 here and tells you what happened. She did just
13 that. They can point out inconsistencies about
14 the interview with Carson Neely, wearing a
15 different shirt, knowing that it is hot outside
16 and it happened some time in hot weather while
17 she was playing but not knowing the exact time.
18 The motive for not telling right away, those are
19 the three things that they pointed out as
20 inconsistencies. What does that mean? It means
21 she was consistent with everything else.

22 If she had given a different story in the
23 original interview, you would have heard about
24 it. She came in here and she told you what
25 happened. Not rehearsed, not based on watching

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1 the mere interview what she did 18 months ago,
2 but because it is consistent with what happened.

3 A child's world is very small. We have to
4 worry about paying bills and going work and
5 doing adult things, getting kids to practice or
6 having a date night, or whatever we have to
7 worry about as adults. A kid's world is still a
8 very small world. This is not a kid that sits
9 at home playing on the Wii or XBox or whatever
10 else. She doesn't run around on the cell phone,
11 on Facebook, or Instagram or Kickstarter or any
12 social media. This is a kid that enjoys hot
13 summer days, playing with her neighbor across
14 the street, jumping on a trampoline, and when
15 mom and dad says it is okay, walking down
16 Christmas Drive. Do we even remember what the
17 world was like when we were excited about
18 getting to walk down a street that wasn't in
19 front of your house? That is the world of Minor 1

20
21 She knew enough that telling what happened
22 would affect that world. She would lose days on
23 the trampoline. She would lose hanging out with
24 Kacie. It is amazing what the mind can do.
25 Fearing consequences more than you fear what

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1 actually happened. She told you immediately
2 that it happened in a split second, it was
3 interrupted by Kacie coming into the room. She
4 immediately put it out of her head. That can't
5 possibly have just happened. That split second.
6 This man reaching across and going into my
7 shorts and touching my privates could not have
8 possibly happened. She pushed it down. She
9 went outside to play. She continued to play,
10 continued to pretend it did not happen because
11 the consequences were great. And until she and
12 her mom are watching something about sexual
13 assault on the news and mom says, Minor1, if
14 anything happens to you, you can tell me. It
15 just came out. She blurted it out, what she had
16 been holding down came to the surface. She
17 said, Gene touched me.

18 Katrina immediately went to the police,
19 called them, they came out. She told you she
20 couldn't write the statement herself. She was
21 trying not to breakdown even more so mom wrote
22 it. She read it to you. Gene came into the
23 living room put Gracie on her lap and touched
24 her.

25 In opening statements, the defense used

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1 some very telling words. They said when
2 Detective Neely showed up at Gene Jenkins'
3 house, he got news. It was life-altering,
4 shocking, vicious news. Couldn't those words
5 also be used for Minor1 ? We have presented
6 to you the evidence to tear away that cloak of
7 innocence. We have proved beyond a reasonable
8 doubt there is no good reason a grown man
9 touches the privates of a little girl or tries
10 to before he is interrupted. There is no good
11 reason. That is obscene. It was shocking to
12 Minor1 . It was life-altering to Minor1 .

13 That was presented to you. We have proven
14 our case. Please find Gene Jenkins guilty of
15 lewd act.

16 THE JUDGE: Thank you, Ms. Desch.

17 Madam Forelady, and ladies and gentlemen
18 of the jury, the indictment charges the
19 defendant with the offense of lewd act upon a
20 child. And as I told you previously, and I will
21 remind you that the fact that the defendant was
22 arrested, charged, and indicted this case is not
23 evidence in this case and cannot be considered
24 by you as evidence of guilt this case, nor does
25 it create any presumption or inference of guilt.

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1 This document is simply the formal written
2 instrument which contains the charge made
3 against the defendant. It is the formal
4 document by which this case is brought into this
5 court.

6 The defendant has pled not guilty to this
7 indictment and that plea puts the burden on the
8 State to prove the defendant guilty. A person
9 charged with committing a criminal offense in
10 South Carolina is never required to prove
11 himself innocent.

12 I charge you that it is an important rule
13 of the law that the defendant in a criminal
14 trial, no matter what the seriousness of the
15 charge may be, will always be presumed to be
16 innocent of the crime for which the indictment
17 was issued unless guilt has been proven by
18 evidence satisfying you of that guilt beyond a
19 reasonable doubt.

20 This presumption of innocence does not end
21 when you begin your deliberations. But it
22 accompanies the defendant throughout the trial
23 until you reach a verdict of guilt based on
24 evidence satisfying you of that guilt beyond a
25 reasonable doubt. The presumption of innocence

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1 is like a robe of righteousness placed about the
2 shoulders of the defendant which remains with
3 the defendant until it has been stripped from
4 the defendant by evidence satisfying you of the
5 defendant's guilt beyond a reasonable doubt.

6 The presumption of innocence is not mere
7 legal theory. It is not just a legal phrase.
8 It is a substantial right to which every
9 defendant is entitled unless you, the jury, are
10 satisfied from the evidence of the defendant's
11 guilt beyond a reasonable doubt.

12 The State has the burden of proving the
13 defendant guilty beyond a reasonable doubt.
14 Some of you may have served as jurors in civil
15 cases where you were told that it is only
16 necessary to prove that a fact is more likely
17 true than not true such as by the greater weight
18 or the preponderance of the evidence. In
19 criminal cases, the State's burden must be more
20 powerful than that. It must be beyond a
21 reasonable doubt.

22 Proof beyond a reasonable doubt is proof
23 that leaves you firmly convinced of the
24 defendant's guilt. There are very few things in
25 this world that we know with absolute certainty.

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1 And in criminal cases, the law does not require
2 proof that overcomes every possible doubt. If,
3 based on your consideration of the evidence, you
4 are firmly convinced that the defendant is
5 guilty of the crime charged, you must find the
6 defendant guilty.

7 If on the other hand, you think there is a
8 real possibility that the defendant is not
9 guilty, you must give the defendant the benefit
10 of the doubt and find him not guilty.

11 I remind you that during this trial you
12 and I have had certain duties to perform. As
13 the trial judge, it is my responsibility to
14 preside over the trial of this case and also
15 have the duty to rule on the admissibility of
16 the evidence offered during the trial. You are
17 to consider only the competent evidence before
18 you. If there was any testimony ordered
19 stricken from the record in this case during
20 this trial, you must disregard that testimony.

21 You are to only consider the testimony
22 which has been presented from this witness stand
23 and the exhibits which have been made a part of
24 the record in this case and any stipulations of
25 counsel.

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1 I have an additional duty to charge you
2 the law applicable to this case. As the
3 presiding judge, I am the sole judge of the law
4 of this case, and it is your duty as jurors to
5 accept and apply the law as I now stated to you.

6 If you already have any idea as to what
7 the law is or what the law ought to be and it
8 does not agree with what I now tell you the law
9 is, you must abandon this idea because you are
10 sworn to accept the law and apply the law
11 exactly as I state it to you.

12 In every case tried in this court before a
13 jury, the jury becomes the sole and exclusive
14 judge of the facts in the case. A trial judge
15 cannot intimate, state, comment on, or make any
16 statement to a trial jury about the facts in a
17 case. Since you, the jury, are the sole judges
18 of the facts in this case, you are not to infer
19 from what I have said during the progress of
20 this trial in ruling upon the admissibility of
21 evidence, or otherwise, or anything that I say
22 now during the course of this instruction to
23 you, that I have any opinion about the facts in
24 this case. The law does not allow me to have an
25 opinion about the facts in this case. This is a

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1 matter solely for you, the jury, to determine.
2 As jurors, it is your duty to determine the
3 effect, value, weight, and truth of the evidence
4 presented during this trial.

5 There are two types of evidence which are
6 generally presented during a trial, direct
7 evidence and circumstantial evidence. Lawyers
8 have discussed that with you already. Direct
9 evidence is the testimony of a person who claims
10 to have actual knowledge of a fact, such as an
11 eye witness. It is evidence which immediately
12 establishes the main fact to be proved.

13 Circumstantial evidence is proof of a
14 chain of facts and circumstances indicating the
15 existence of a fact. It is evidence which
16 immediately establishes collateral facts from
17 which the main fact maybe inferred.

18 Circumstantial evidence is based on
19 inference and not on personal knowledge or
20 observation.

21 The law makes absolutely no distinction
22 between the weight or value to be given to
23 either direct or circumstantial evidence. Nor
24 is a greater degree of certainty required of
25 circumstantial evidence than of direct evidence.

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1 You should weigh all of the evidence in this
2 case. After weighing all of the evidence, if
3 you are not convinced of the guilt of the
4 defendant beyond a reasonable doubt, you must
5 find the defendant not guilty.

6 Necessarily, you must determine the
7 credibility of witnesses who have testified in
8 this case. Credibility simply means
9 believability. It becomes your duty as jurors
10 to analyze and evaluate the evidence and
11 determine which evidence convinces you of its
12 truth.

13 In determining the believability of
14 witnesses who have testified in this case, you
15 may believe one witness over several witnesses
16 or several witnesses over one witness. You may
17 believe a part of the testimony of a witness and
18 reject the remaining part of the testimony of
19 that same witness. You may believe the
20 testimony of a witness in its entirety or reject
21 the testimony of a witness in its entirety.

22 You may consider whether any witness has
23 exhibited to you any interest, bias, prejudice
24 or other motive in this case. You may also
25 consider the appearance and manner of a witness

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1 while on the witness stand.

2 There has been evidence presented that
3 witnesses have made prior statements which are
4 not consistent with witnesses' present
5 testimony. You may use this evidence to decide
6 whether to believe the witness. You may also
7 use evidence of the earlier contradictory
8 statements to determine the truth of those
9 statements. It is up to you to decide whether
10 to believe the earlier statements or the
11 testimony given at trial.

12 If a witness has shown they knowingly
13 testified or truthfully concerning any material
14 matter, you may consider this in determining
15 whether to trust witnesses' testimony as to
16 other matters. You may reject all testimony of
17 that witness or give all or part of the
18 testimony the weight you think it deserves.

19 During this trial, you have heard
20 testimony from a child. Where a witness is a
21 child, you must determine, as with any witness,
22 whether that testimony is believable. In
23 deciding believability, you may consider not
24 only matters that I have already discussed with
25 you but you may also consider the age of the

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1 child, the child's ability to observe and
2 remember facts, and the child's ability to
3 understand and answer questions. Because young
4 children may not fully understand what is
5 happening here, it is up to you to decide
6 whether the child understood the seriousness of
7 appearing as a witness at this criminal trial,
8 whether the child understood the questions,
9 whether the child has a good memory, and whether
10 the child understands the difference between
11 lying and telling the truth.

12 In addition, young children may be
13 influenced by the way that questions are asked.
14 It is up to you to decide whether the child
15 understood the questions asked.

16 I instruct you and emphasize that the fact
17 that the defendant did not testify is not a
18 factor to be considered by you in any way in
19 your deliberations and in your consideration on
20 the question of the guilt or the innocence of
21 the defendant. It must not be considered by you
22 in any manner whatsoever.

23 A defendant has the constitutional right
24 to remain silent. The assertion of this right
25 must not be considered by you in your

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1 deliberations.

2 I repeat, under your oath, you are to draw
3 no conclusion whatsoever from the fact that the
4 defendant in this case did not testify. The
5 fact that this defendant did not testify should
6 not even be discussed in the jury room.

7 The burden of proof, as I have stated to
8 you, is on the State. The defendant is not
9 required to prove his innocence. The burden of
10 proof remains on the State to prove guilt beyond
11 a reasonable doubt.

12 The defendant is charged with committing a
13 lewd act on a minor. A minor is a person under
14 the age of 18.

15 The State must first prove beyond a
16 reasonable doubt that the defendant was over the
17 age of 14.

18 Next, the State must prove that the
19 defendant willfully and lewdly committed or
20 attempted a lewd or lascivious act on, or with
21 the body or its parts of, a child under the age
22 of 16 years, with the intent to arouse, appeal
23 to, or gratify the lust passions, or sexual
24 desires of the defendant or the child.

25 Willfully means voluntarily and

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1 intentionally with the specific intent to do
2 something the law forbids.

3 Lewd means obscene, lustful, indecent, or
4 lecherous.

5 Lascivious means tending to incite lust,
6 lewd, indecent, obscene or tending to deprave
7 the morals in respect to sexual relations.

8 Now, I will mention to you, Madam
9 Forelady, and ladies and gentlemen of the jury,
10 that after your service in this trial has ended,
11 you have the right to refuse to discuss the
12 verdict you rendered or to discuss the verdict
13 as much as you want. If you chose to discuss
14 the verdict, you are free to stop any discussion
15 at any point.

16 If the person with whom you are speaking
17 tries to continue a discussion of the verdict
18 after you have stated that do you have not wish
19 to discuss it any further or continues to harass
20 you after you have refused to discuss the
21 verdict, you should report that person to the
22 Court.

23 Now, Madam Forelady, there are two
24 possible verdicts which you may find in this
25 case. We have prepared a verdict form which

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1 states: As to the charge of lewd act upon a
2 child, we the jury find the defendant not
3 guilty. We find the defendant guilty.

4 There is no significance whatsoever in the
5 order in which I have stated these possible
6 verdicts. It is simply that one must be stated
7 first.

8 Madam Forelady, and ladies and gentlemen
9 of the jury, your verdict must be unanimous.
10 Madam Forelady, when the jury agrees on a
11 verdict, you will write that verdict or check
12 the box next to the verdict, sign your name on
13 the line that says foreperson. It is already
14 dated today. You will inform the bailiff that
15 you have reached a verdict. At that time, we
16 will have you brought back into the courtroom to
17 receive your verdict.

18 What I am going to ask that you do before
19 you start your deliberations is to return to the
20 jury room, all 13 of you, and then when the
21 verdict form, the indictment, and the exhibits
22 are brought to you by the bailiff, at that time
23 you will begin your deliberations. Also, at the
24 same time, the alternate, Mr. Benson, you will
25 leave the jury room. You will be welcome to

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1 come and spend time in the courtroom, if you
2 would like, or you would be free to leave. So I
3 emphasize that do not start your deliberations.
4 Mr. Benson, don't leave the jury room until the
5 bailiff brings the exhibits, the indictment, and
6 the verdict form.

7 Thank you, very much. You can retire to
8 the jury room.

9 (Whereupon, the jury exited the courtroom
10 at 1:57 p.m.)

11 THE JUDGE: I will ask one more time, any
12 objections or exceptions by the State for to the
13 jury charge?

14 MS. DESCH: None from the State.

15 THE JUDGE: And the defense?

16 MR. HALL: None from the defense.

17 THE JUDGE: I want both the State and
18 defense to make sure what is on that round table
19 are the correct exhibits to go back to the jury.
20 Here is the verdict form and indictment.

21 Is everybody satisfied?

22 MR. HALL: I am satisfied.

23 MS. DESCH: Yes.

24 THE JUDGE: Let the record reflect both
25 the State and defense are satisfied with the

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1 correct exhibits going back to the jury room
2 along with the verdict form and the indictment.

3 (Whereupon, the jury begins to deliberate
4 at 2:00 p.m.)

5 THE JUDGE: Mr. Benson, I have been
6 advised the jury panel is done for the week. If
7 you want to stay you can, and if you want to
8 leave, you can.

9 MR. BENSON: I think I will leave. Thank
10 you very much.

11 THE JUDGE: Thank you for your service.

12 (Court in recess at 2:01 p.m.)

13 (Open court outside the presence of the
14 jury at 2:33 p.m.)

15 THE JUDGE: There is a question. I have
16 not looked at it until right now. It says, can
17 we have the written instructions about
18 reasonable doubt. Okay. I do not have a
19 problem with printing out for them a portion of
20 my charge which is about a page, maybe
21 thereabouts, on reasonable doubt. Any objection
22 from the State on that?

23 Our two options is to give them something
24 in writing in the jury room or I recharge it. I
25 don't have a problem with giving them copy of my

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1 charge on reasonable doubt. State, any
2 position?

3 MS. DESCH: Court's indulgence.

4 THE JUDGE: Sure. Take your time.

5 MS. DESCH: It is the same thing you
6 would have read?

7 THE JUDGE: The same thing that I did
8 read, yes. If you don't have an objection to it
9 and defense doesn't, we will print it out and
10 show it to both of you before it goes back to
11 them. We will do it that way.

12 MR. HALL: I have no objection. I think,
13 clearly, that is the discretion of the Court.

14 MS. DESCH: No objection, your Honor.

15 THE JUDGE: Without objection then, we
16 will print out that portion of the charge.
17 Would you like to see it?

18 MR. HALL: I would like to see it. I
19 assume you are not going to print out what was
20 struck --

21 THE JUDGE: No. It will be a clean copy.
22 I didn't know if you wanted to see the actual
23 question, the note.

24 MR. HALL: No.

25 THE JUDGE: Let the record reflect that we

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1 have printed out the charge on reasonable doubt.
2 I have shown it to both the State and defense.
3 Does the State have any objection for it to be
4 delivered to the jury room?

5 MS. DESCH: No, sir.

6 MR. HALL: No, your Honor.

7 THE JUDGE: We will have this after the
8 verdict is rendered, I want this marked as a
9 Court exhibit. Madam Court Reporter, if you
10 could remember to do that after the verdict. I
11 don't want it marked with it going into the jury
12 room. We will be at ease.

13 (Court in recess at 2:40 p.m.)

14 (Whereupon, COURT EXH. 2, Jury note, was
15 marked for identification and received into
16 evidence.)

17 (Court resumes outside the presence of the
18 jury at 2:53 p.m.)

19 THE JUDGE: We are back on the record. I
20 have a note that says we have reached our
21 decision. So I will have that marked as a court
22 exhibit.

23 (Whereupon, COURT EXH. 4, Jury note, was
24 marked for identification and received into
25 evidence.)

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1 THE JUDGE: Let me go get my robe on and
2 bring them in.

3 (Court in recess at 2:54 p.m.)

4 (Court resumes outside the presence of the
5 jury at 2:56 p.m.)

6 THE JUDGE: Anything from the State before
7 we receive the verdict from the jury?

8 MS. DESCH: Nothing from the State.

9 THE JUDGE: The defense?

10 MR. HALL: No, your Honor.

11 THE JUDGE: I would caution everyone in
12 the courtroom when the verdict is published not
13 to make any comments, show any signs of emotion
14 or anything of that nature.

15 Bring the jury in, please.

16 (Whereupon, the jury came into open court
17 at 2:57 p.m.)

18 THE JUDGE: Let the record reflect the
19 jury has returned to the courtroom. It is my
20 understanding, Madam Forelady, that you reached
21 a verdict.

22 MADAM FORELADY: Yes, sir.

23 THE JUDGE: Was that verdict reached
24 unanimously.

25 MADAM FORELADY: Yes, sir.

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1 THE JUDGE: Would you hand the verdict
2 form to the bailiff and hand that to the clerk.
3 Madam Clerk, if you would publish the jury's
4 verdict.

5 THE CLERK: Indictment Number
6 2012-GS-46-2101, the State of South Carolina
7 versus Leonard Eugene Jenkins, we, the jury,
8 find the defendant guilty of lewd act upon a
9 child. Signed by foreperson. Dated August 14,
10 2013.

11 Ladies and gentlemen of the jury, if this
12 is your verdict, please say so by raising your
13 right hand.

14 Let the record reflect all jurors have
15 published their vote.

16 THE JUDGE: Thank you, Madam Clerk. Do we
17 need to poll the jury?

18 MR. HALL: No, your Honor.

19 THE JUDGE: Madam Forelady, and ladies and
20 gentlemen of the jury, that concludes your jury
21 service for this entire week. We have no
22 further business that would require the need for
23 a jury.

24 I want to extend the Court's sincere
25 appreciation for your service on this jury. It

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1 hasn't been a long case. We have, however, kept
2 you out quite a bit, but that was just essential
3 and necessary. I do appreciate the attention
4 that you gave to this case and for your valuable
5 service. You do not need to return for the rest
6 the of the week.

7 Madam Forelady, I am is going to go ahead
8 and dismiss everybody. You will need to sign
9 the back of the indictment so if you will just
10 wait just a moment. Everybody else is excused.
11 The bailiff will direct you on where to go.
12 Thank you very much.

13 (Whereupon, the jury exited the courtroom
14 at 3:00 p.m.)

15 (Whereupon, Madam Forelady exited the
16 courtroom at 3:01 p.m.)

17 (Whereupon, COURT. EXH. 3, Reasonable
18 Doubt Instruction, was marked for identification
19 and received in evidence.)

20 THE JUDGE: Does either side need a few
21 minutes before we proceed to sentencing. I
22 would be glad to give you a few minutes.

23 MS. DESCH: I don't need any time, your
24 Honor.

25 THE JUDGE: Do you need a few minutes?

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1 MR. HALL: No, your Honor, we are ready.

2 THE JUDGE: If you will come up, please.

3 MR. HALL: Your Honor, at this time I
4 would like to put on the record I have a motion
5 for a new trial on the grounds there was not
6 substantial circumstantial evidence in which a
7 jury could render a guilty verdict. That's my
8 motion for a new trial.

9 THE JUDGE: Solicitor, do you want to
10 respond to Mr. Hall's motion for a new trial?

11 MS. DESCH: We would ask that you deny his
12 motion for a new trial.

13 THE JUDGE: Your motion is denied. I will
14 be glad to hear from the State first.

15 MS. DESCH: Thank you, your Honor. Your
16 Honor, my major concern would be the sex
17 offender registry with this lewd act. That is
18 mandatory from my understanding. But to give
19 you a little bit of background, in addition to
20 this case here today, there are two other
21 pending charges with a different victim. I
22 think you heard a bit about it at sidebar and
23 during pre-trial motions.

24 The record that he does have, there wasn't
25 anything impeachable, but for purposes of

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1 sentencing, I think it is important for the
2 Court to know that his record does date back to
3 1982 with breaking and entering, that is in
4 another state, your Honor.

5 The South Carolina record, 1984 failure to
6 stop for a blue light. 1987, a grand larceny.

7 THE JUDGE: I am going to write these down
8 so if you will go a little slower. 1984,
9 failure to stop.

10 MS. DESCH: Yes, sir.

11 THE JUDGE: Okay.

12 MS. DESCH: 1987, grand larceny and
13 criminal conspiracy. There is also a charge of
14 armed robbery. He was given six years of jail
15 for those charges.

16 THE JUDGE: When was that?

17 MS. DESCH: That was 1987.

18 THE JUDGE: Along with grand larceny and
19 conspiracy?

20 MS. DESCH: Yes, sir. In 1996 -- let me
21 skip that. There are charges during the '90's
22 that are not convictions that I can read. Then
23 we get into the 2001, that was a lewd act upon a
24 child where he plead to the reduction, assault
25 and battery high and aggravated nature. He was

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1 given probation. At that time given probation,
2 he was violated on the probation at some point
3 for not complying.

4 That's the major priors that I would ask
5 you to consider. Given his priors, and given
6 the allegations, and given the jury verdict, I
7 would ask for the sex offender registry and some
8 jail time, your Honor.

9 THE JUDGE: It is my understanding that
10 the sexual registry --

11 MR. HALL: Not only that, the sexual
12 registry is mandatory. The Court does not have
13 the discretion. GPS monitoring will be required
14 also. It is mandatory. It is not a discretion.

15 THE JUDGE: Right. Thank you, Mr. Hall.
16 I will be glad to hear from you, sir.

17 MR. HALL: Your Honor, on the issue of
18 what the solicitor said, that he had an armed
19 robbery in 1987. It appears that the NCIC
20 states that as a robbery, my client indicates to
21 me that was a strong armed robbery. He received
22 according to the NCIC a ten-year sentence, which
23 would be a sentence that is minimum of robbery.
24 He would dispute that there was an armed
25 robbery. He was charged with armed robbery, but

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1 he pled to strong armed robbery. That was back
2 in 1987.

3 We will point out to the Court, he did plead
4 no contest in 2001 for assault and battery high
5 and aggravated nature. The Court and I
6 explained to him it is considered a possibility
7 but no contest plea here, and he understands
8 that is treated as if he was convicted of that
9 as well.

10 THE JUDGE: What about the solicitor
11 indicating that he was violated on probation.
12 Do you know anything about that?

13 MR. HALL: That's what the record
14 indicated.

15 THE JUDGE: You don't know the outcome of
16 that?

17 MS. DESCH: I provided it to the defense
18 just before trial from the court records.

19 MR. HALL: I don't see that on the NCIC.

20 MS. DESCH: It was not on the NCIC. I
21 actually went down and took copies from the
22 clerk's records and provided it to the defense.
23 There is a violation.

24 THE JUDGE: Okay.

25 MR. HALL: It looks like he has been given

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1 a public service requirement and he then turned
2 himself in and agreed to 30 days weekend time in
3 lieu of 30 days. So that appears to be -- I
4 don't know if that's necessarily a violation.
5 It appears that there was a rearrangement of his
6 probation.

7 THE JUDGE: Okay.

8 MR. HALL: Your Honor, my client is 48
9 years old. His wife, Janet, is present with
10 him. They have been married for five years. He
11 is a truck driver and generally drives about
12 3,000 miles a week, which is considerable amount
13 of time, but mileage wise, gets paid by the
14 miles of which he is able to support his family,
15 his 16-year old daughter, 11-year old
16 stepdaughter, and 3-year old daughter.

17 He has always expressed the desire to have
18 a jury trial. I believe that was a good faith
19 basis based on the evidence that the State had
20 against him. With a certain respect with the
21 verdict of the jury, I ask you to fashion an
22 appropriate sentence. Certainly, because he has
23 this conviction for lewd act, he is going to
24 have to wear a GPS monitoring for the rest of
25 his life and will also have to register as a sex

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1 offender for the rest of his life. Those two
2 things are certainly a huge, huge burden,
3 life-changing, certainly, to him. We ask that
4 the Court fashion an appropriate sentence.

5 THE JUDGE: Okay. Anything further from
6 the State?

7 MS. DESCH: Your Honor, this is a
8 difficult situation. Difficult for his family
9 and everyone else, but this is now the third
10 girl that has come forward, and there is a 12
11 year old in the home so that is a great concern
12 for another sex offender registry, a piece of
13 paper that warrants, but I do think it is
14 appropriate that he not be in society for at
15 least some period of time.

16 THE JUDGE: Give me about 10 to 15 minutes
17 and I will come back and render my decision.

18 (Court in recess at 3:10 p.m.)

19 (Court resumes 3:22 p.m.)

20 THE JUDGE: Let the record reflect
21 everybody is present in the courtroom.
22 Mr. Jenkins, I have taken into consideration the
23 fact that you do have a prior record. Even
24 though I recognize that the last offense was in
25 2001, I have taken into account the other

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1 allegations having been made. I have taken into
2 account the nature of this offense, and the
3 trial of this case.

4 The sentence of the Court is that you will
5 be committed to the State Department of
6 Corrections for a term of ten years. However,
7 provided that upon service of three years, the
8 balance is suspended placing you on probation
9 for three years. So ten suspended to three, and
10 three years probation. Good luck to you, sir.

11 MR. HALL: Thank you, your Honor.

12 (Whereupon, the above-entitled matter was
13 concluded at 3:23 p.m.)

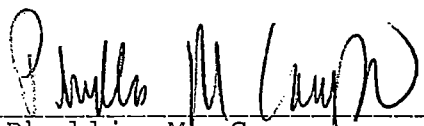
C E R T I F I C A T I O N

STATE OF SOUTH CAROLINA
COUNTY OF YORK

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I do further certify that I am neither of
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October 25, 2013



Phyllis M. Campo
Official Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LEONARD EUGENE JENKINS,

APPELLANT

APPELLATE CASE NO. 2013-001753

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing Appellant's request to use a video tape of an interview between the prosecution's key witness and a police investigator to impeach the witness regarding her inconsistent statements about an alleged lewd act in violation of Appellant's right to confront the witnesses against him and to present a complete defense pursuant to the Sixth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

On June 13, 2013, a York County Grand Jury indicted Appellant for a lewd act upon a child. The lewd act allegedly occurred “during or about the month of May 2011 through on or about the month of August 2011.” R. 228. Assistant Solicitor Jennifer Desch called the case for trial before the Honorable Donald Hocker and a jury on August 13, 2013. Daniel Hall represented Appellant. R. 1. After a two day trial and three witnesses, the jury found Appellant guilty as charged. R. 219, lines 5-10. Judge Hocker sentenced Appellant to ten years’ imprisonment suspended upon the service of three years’ imprisonment and probation for three years. R. 227, lines 4-10; R. 230.

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

Violating Appellant's right to confront the witnesses against him and to present a complete defense pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, the trial judge erred in refusing Appellant's request to use a video tape of an interview between the prosecution's key witness and a police investigator to impeach the witness regarding her inconsistent statements about an alleged lewd act.

Relevant facts

Appellant, his wife, and his three children lived across the street in a double-wide trailer from Minor 1 in 2011. R. 21, lines 6-22; R. 41, lines 14-16. Appellant's daughter and Minor 1 were friends and played together often. R. 21, line 25 – R. 22, line 1; R. 24, lines 2-8. Minor 1 claimed that on an unknown day during the summer of 2011 she was playing with Appellant's daughter when the two decided to enter Appellant's house to cool down. Although Minor was unable to give a specific day, she recalled that she went to Georgia to stay with her grandmother approximately two weeks after summer started and remained there until about a week before school started again. Later, Minor 1 testified that the alleged incident occurred before she went to Georgia for the summer. According to Minor 1, Appellant, his wife, and all three of his children were in the home when the alleged touching occurred. While Appellant's daughter used the bathroom, Minor 1 sat on the couch. Minor 1 claimed that at some point, Appellant sat down on the couch beside her. Appellant, who had been holding his toddler when he entered the room, placed the toddler on Minor 1's lap. Minor 1 claimed that while she was playing with the toddler, Appellant reached over and touched her. Specifically, Minor 1 claimed

that three of Appellant's fingers went into the front of her shorts. R. 24, line 12 – R. 29, line 10; R. 34, line 21 – R. 35, line 8; R. 35, line 23 – R. 36, line 3; R. 42, lines 16-25.

Minor 1 claimed she was wearing blue jean shorts with a blue and white striped top when this occurred. Additionally, Minor 1 claimed that Appellant put his hands "right in front where the zipper is" underneath her shorts and underwear. She elaborated that this was "right in the front, not between the legs but just like right down there in the front." Minor 1 referred to this area as "the privates." R. 29, line 11 – R. 30, line 6; R. 32, lines 19-24. All of this allegedly occurred while Minor 1 still had the toddler on her lap. When Appellant's daughter walked into the room from the bathroom, Minor 1 put the toddler on Appellant's lap and walked outside. She and Appellant's daughter played for the rest of the day. R. 30, lines 9-17. Even when Minor 1 returned from Georgia later in the summer, she and Appellant's daughter continued to play together. R. 36, lines 4-7.

Minor 1 never revealed this alleged encounter to Appellant's daughter. R. 33, lines 14-24. In fact, Minor 1 told no one because she "didn't want to lose one of [her] friends that [she] had on that road." R. 35, lines 9-19. When Minor 1 turned thirteen in February of 2012, she and her mother were watching a television program about a sexual assault. When her mother advised Minor 1 to confide in her if something like that ever happened, Minor 1 "blurted it out." Her mother called the police immediately. R. 36, line 19 – R. 37, line 13; R. 39, lines 16-18. When the police arrived, Minor 1 did not write a statement; instead, her mother wrote the official statement to police without Minor 1 even present. R. 37, lines 14-20; R. 45, lines 4-14.

On cross-examination, Minor 1 admitted she was interviewed by Detective Neely and the interview was videotaped.¹ R. 38, line 20 – R. 39, line 2. When she spoke to Neely, the alleged incident would have occurred eight or nine months earlier according to her trial testimony. However, she told Neely that it occurred “two to three months ago.” In fact, she said “it happened right before school started.” When asked about this inconsistency, she explained that “it slipped [her] head because [she] was so nervous.” R. 39, line 10 – R. 40, line 7. Later, Minor 1 testified that she realized she had “slip[ped] up” regarding the date after she was interviewed by Neely or the solicitor. She did not believe that Neely or the solicitor told her she had slipped up, but she did try “to get [her] story right.” R. 46, line 5 – R. 47, line 2. Finally, Minor thought she had told Neely that she did not tell anyone what happened because of her friendship with Appellant’s daughter, but she was unable to give a definitive answer because she had not seen the video. R. 47, lines 16-23.

Additionally, Minor 1 testified at trial that she had on a blue and white top when the incident allegedly occurred, but on the video she told Neely she was wearing the top she had on at the time of the interview. R. 40, lines 16-24. When Appellant asked if the top she had on during her interview with Neely was an olive green t-shirt, Minor 1 responded, “I mean, I can’t remember exactly what the top was. It was - - it was either blue or green. I can’t really remember.” R. 40, line 25 – R. 41, line 7. Further, on the video, Minor 1 told Neely that when Appellant touched her, she had her “knees almost up to [her] chest” and her legs were spread. This contrasted greatly with her trial testimony

¹ Defense counsel proffered the video as defendant’s exhibit #2. The exhibit is on file with this Court.

that Appellant had placed his toddler on Minor 1's lap. R. 43, line 16 – R. 44, line 4. Minor 1 did not remember telling Neely that she only thought Appellant's hand had touched her. R. 48, lines 2-9. Despite the stark contrast between her trial testimony and her video interview, Minor 1 testified that she told Neely "exactly what happened." R. 45, lines 17-19.

On re-direct examination, the prosecutor emphasized that Minor 1 had not watched the video of the interview and had not discussed the video with the prosecutor. To challenge the cross-examination, the prosecutor asked: "When you are answering Mr. Hall's questions, are you just trusting he is giving you what happened or do you have a recollection of what you talked about?" Minor 1 responded, "I was pretty confused about what he was saying is what he had gotten from the report." R. 53, line 25 – R. 54, line 11. This line of questioning continued with the prosecutor asking "When Mr. Hall is asking you questions about what is in the video, do you independently remember or do you understand or trust that he is telling you what he viewed on the video?" Minor responded, "kind of what he viewed on the video." R. 54, lines 19-23.

During a break, the solicitor argued that although the video was inadmissible due to the statute and case law because Minor 1 was thirteen-years old at the time of trial, the video was admissible as a prior consistent statement to rebut an allegation of recent fabrication. However, the solicitor determined that the admissibility was limited to time and place. R. 60, line 7 – R. 66, line 8. When the judge inquired if the solicitor wanted the "whole video to come in," the solicitor responded, "It is not that I don't or I do. If he would like to put it in, he could put it in. He could put it in as a defense exhibit." R. 66, lines 13-17. After the judge ruled that portions of the video would be admissible as a

prior consistent statement to rebut an allegation of recent fabrication as long as it was limited to time and place, Appellant moved to admit the entire video pursuant to Rule 613, SCRE. Appellant argued that the video contained prior inconsistent statements made by Minor 1 and he should be permitted to impeach her with those statements. R. 71, line 7 – R. 75, line 1.

The prosecution countered that there were no “outright denials” and argued that only an “outright denial” would “trigger[] extrinsic evidence.” However, the prosecutor admitted Minor 1 repeatedly testified that she could not remember what her statements in the video had been. R. 75, line 10 – R. 76, line 24.

When Neely testified, Appellant moved to introduce the video of the interview between Neely and Minor 1 into evidence pursuant to Rule 801(d)(1)(A). Appellant explained the video contained inconsistent statements made by Minor 1. Additionally, Appellant argued that the rule of completeness required the admission of the entire video. R. 109, line 25 – R. 111, line 15. Appellant noted Minor 1’s testimony differed from the video interview in multiple respects, including the timing of the alleged incident, how she was sitting, and how the alleged touching occurred. R. 112, lines 5-25. Although the prosecutor admitted the video contained inconsistent statements, the prosecutor opposed the introduction of the video because Appellant cross-examined Minor 1 as to those inconsistencies. R. 119, lines 3-21.

The judge ruled first that Minor 1 was advised of the time and place of the statement and to whom the statement was made satisfying part of Rule 613(b). Next, the judge ruled that Minor admitted that in the video that “she had the same top on during the video.” He further found that Minor 1 admitted that she said in the video that her knees

were to her chest and that her legs were spread at the time of the alleged incident. Additionally, Minor 1 acknowledged that she did not tell anyone about the alleged incident because she did not want it to affect her friendship. However, the judge concluded that Minor 1 “neither admits nor denies telling Detective Neely that the defendant’s hand was touching her. She said she did not remember.” Based upon those findings, the trial judge ruled the video was not admissible for impeachment. R. 137, line 1 – R. 138, line 23; R. 154, lines 8-23.

Discussion

The South Carolina Rules of Evidence permit the introduction of extrinsic evidence of prior inconsistent statements of a witness when

the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

Rule 613, SCRE (emphasis added); see also State v. Fossick, 333 S.C. 66, 69-70, 508 S.E.2d 32, 33 (1998)(finding error in failing to admit extrinsic evidence of a statement where the witness denied making the statement). A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982).

This Court observed that “[i]n determining whether a witness has admitted making a prior inconsistent statement and thereby obviated the need for extrinsic proof, the courts of our state and other jurisdictions have held that the witness must admit making the prior statement unequivocally and without qualification.” State v. Blalock, 357 S.C. 74, 591 S.E.2d 632 (Ct. App. 2003)(citing State v. Bottoms, 260 S.C. 187, 194, 195 S.E.2d 116, 118

(1973) & C.J.S. Witnesses 727 (2002)). This Court explained that “[g]enerally, where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement. Id. at 80, 591 S.E.2d at 636.

If the witness neither directly admit[s] nor den[ies] the act or declaration, as when he merely says that he does not recollect, or, or as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember.

Id. (quoting State v. Sullivan, 43 S.C. 205, 211, 21 S.E. 4, 7 (1895)).

Nothing short of an absolute unequivocal admission satisfies Rule 613(b). In Blalock, 357 S.C. at 80, 591 S.E.2d at 636, this Court held the witness’s response to questions about her prior statement did “not meet the standard of a clear and unequivocal admission that the precedent case law demands.” Acknowledging that the witness did “admit that she said the portion of the statement quoted” toward the end of the examination, this Court held such an admission was not sufficient because the witness was adamant throughout her testimony that the statement as recorded by the detective was incomplete. Id. at 81, 591 S.E.2d at 636.

Similarly, in State v. Carmack, 388 S.C. 190, 201-202, 694 S.E.2d 224, 230 (Ct. App. 2010), this Court held that a prior inconsistent statement by a witness who said his prior statement was “‘accurate,’” that “‘certain details were not in his original statement because such details were not inquired into at the time and ‘everything was chaotic’” was admissible because the witness “did not unequivocally admit making a prior inconsistent statement.” In State v. Moses, 390 S.C. 502, 523, 702 S.E.2d 395, 406 (Ct. App. 2010), this Court held the trial court properly admitted a prior inconsistent statement by a witness who

testified she “could not remember” having made the prior statement because such was “not an unequivocal admission.”

The trial judge erred in finding Minor 1’s videotaped interview with Neely was not admissible pursuant to Rule 613(b), SCRE because Minor 1 admitted all of the inconsistencies or stated she did not remember. A review of the entirety of Minor 1’s testimony reveals Minor 1 did not admit unequivocally the inconsistent statement. As an initial matter, the trial judge clearly erred in finding the video inadmissible concerning whether Minor 1 told Neely that she only thought Appellant’s hand was touching her where the trial judge concluded that Minor 1 “neither admit[ted] nor denie[d] telling Detective Neely that the defendant’s hand was touching her. She said she did not remember.” This finding required the trial judge to allow the introduction of the video as extrinsic evidence. Although the judge found that Minor 1 neither admitted nor denied telling Neely that she only thought Appellant’s hand was touching her, the transcript revealed that Minor 1 actually and unequivocally denied that statement:

Q. Do you remember telling Detective Neely on the video that - - I think your words were, I think that his hand was touching - - do you remember saying that? You don’t remember that?

A. No.

R. 48, lines 2-5. This denial required introduction of extrinsic evidence of the inconsistent statement pursuant to the plain language of the statute and controlling case law.

Additionally, the trial judge’s other findings that Minor 1 admitted the inconsistent statement in the video were incorrect when the entire testimony is reviewed. Although Minor 1 stated that she told Neely that the alleged incident took place two to

three months prior to her interview with Neely, she explained her answer by saying “I mean, I hadn’t really a good time - - I was trying to remember exactly when it happened because I tried as best as possible, but it slipped my head because I was so nervous.” R. 39, line 19 – R. 40, line 2. Concerning her response about the telling Neely she was wearing the same top on the date of the interview as she wore on the date of the alleged incident, Minor 1 responded, “I believe so, yes.” R. 40, lines 20-24. When Appellant queried Minor 1 on the color of the shirt she wore on the date of the interview, Minor 1 responded, “I mean, I can’t remember exactly what the top was. It was - - it was either blue or green. I can’t really remember.” R. 40, line 25 – R. 41, line 7. When Appellant asked if Minor 1 had told Neely that she had not told anyone about the alleged incident because of her friendship with Appellant’s daughter, Minor responded, “I thought I had.” R. 47, lines 16-22. None of the above responses were unequivocal admissions; in fact, at least, one of the responses was an obvious and unequivocal denial and the others were clear equivocations.

Although on cross-examination, Minor 1 admitted she told Neely that her knees were almost to her chest and that her legs were spread when the alleged touching took place, R. 43, line 20 – R. 44, line 4, the state’s re-direct examination of Minor 1 revealed that even these admissions could not be construed as unequivocal admissions due to Minor 1’s lack of memory of the interview with Neely. Essentially, the re-direct examination turned the unequivocal admissions into equivocations. The state’s re-direct examination of Minor 1 reinforced and highlighted the equivocation of Minor 1’s responses relative to her prior inconsistent statements. After the prosecutor made clear that Minor 1 had not seen the video, she asked, “So the video that was taken a year and a

half ago - - when you are answering Mr. Hall's questions, are you just trusting he is giving you what happened or do you have a recollection of what you talked about?" Minor 1 responded that she was "pretty confused about what he was saying is what he had gotten from the report." R. 54, lines 5-11. Unabashed, the prosecutor continued: "When Mr. Hall is asking you questions about what is in the video, do you independently remember or do you understand or trust that he is telling you what he viewed on the video?" Minor 1 responded, "Um, kind of what he viewed on the video." R. 54, lines 19-23. Turning to Minor 1's statement on the video regarding when the incident occurred, the prosecutor asked "how narrow" was Minor 1's answer to Neely on the timeframe. Minor 1 responded that she was trying to narrow it down and told Neely all that she could remember. R. 55, lines 10-21. In response to the prosecutor's questioning on re-direct examination, Minor 1 testified that she could "not remember a lot of [the video interview] because it was about maybe - - it was just a while ago" and she could "not really remember exactly." R. 58, lines 11-21.

During the argument on the admissibility of the video interview, the prosecutor argued Minor 1 had made no "outright denials." According to the prosecutor, only an "outright denial" would "trigger[] extrinsic evidence." Therefore, the prosecutor admitted Minor 1's repeated testimony that she could not remember what her statements in the video had been were not relevant to the analysis. R. 75, line 10 – R. 76, line 24. The trial judge seemed to buy the prosecutor's argument despite clear precedent to the contrary.

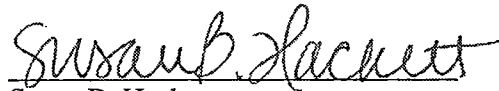
The case law is clear that unless a witness unequivocally admits to making the prior inconsistent statement, then extrinsic evidence of the prior inconsistent statement is

admissible. The trial judge clearly erred in excluding the video interview containing Minor 1's prior inconsistent statements because Minor 1 failed to unequivocally admit to making those statements. The prosecutor's re-direct examination portrayed defense counsel as dishonest in his cross-examination by suggesting that what defense counsel said was on the video was not in fact on the video. This was particularly disingenuous in light of the prosecutor's repeated objections to Appellant's attempts to introduce the video into evidence. The prosecutor misled the jury in her questioning of Minor 1 as to what was contained on the video and how the Minor 1's statements to Neely differed from her trial testimony. The deceitful questioning created a false impression for the jury regarding the veracity of Minor 1 and of defense counsel personally.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction for lewd act and remand for a new trial based upon the trial judge's erroneous ruling that the video interview of the prosecution's key witness was not admissible as extrinsic evidence of prior inconsistent statements where the witness failed to admit unequivocally that she made the prior inconsistent statements.

Respectfully submitted,

A handwritten signature in cursive script that reads "Susan B. Hackett". The signature is written in dark ink and is positioned above the printed name and title.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of December, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

December 8, 2014

A handwritten signature in black ink, reading "Susan B. Hackett", is written over a horizontal line.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

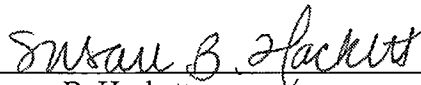
V.

LEONARD EUGENE JENKINS,

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CERTIFICATE OF SERVICE

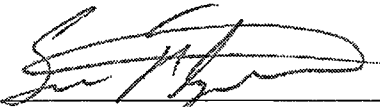
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of December, 2014.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of December, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2013-001753

THE STATE,.....RESPONDENT

v.

LEONARD EUGENE JENKINS,.....APPELLANT.

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether Appellant's claim that the trial court erred in refusing his Rule 613(b), SCRE, request to use a video recording of a police investigator's interview of the victim to impeach her credibility is not preserved for appellate review where: (1) Appellant never challenged the trial court's factual findings that the victim admitted making the allegedly prior inconsistent statements; and (2) Appellant waived his Rule 613(b) claim because he never moved to introduce the video after the State advised it would not object to any further motion by Appellant seeking admission. Furthermore, to the extent the claim is preserved, whether the trial court properly exercised its discretion not to admit the extrinsic evidence pursuant to Rule 613(b) where: (1) Appellant was given a full and fair opportunity to confront the victim; (2) the foundational requirements of the Rule were not met; (3) any minor inconsistencies did not impact the "essential meaning" of the prior statement; and (4) exclusion was proper pursuant to Rule 403.

STATEMENT OF THE CASE

Leonard Eugene Jenkins (Appellant) was indicted at the June 13, 2013 term of the grand jury for York County for one count of lewd act upon a child (2012-GS-46-2101).

He was represented by Dan Hall, Esquire, of the York County Bar. The State was represented by Assistant Solicitor Jennifer Desch of the Sixteenth Circuit Solicitor's Office. (R.p.1). On August 14, 2012, Appellant proceeded to trial by jury before the Honorable Donald Hocker, pursuant to which he was found guilty as indicted. The trial court sentenced him to ten (10) years' imprisonment suspended upon the service of three (3) years' imprisonment and three (3) years' probation. (R.p.215, line 3-p.227, line 13; p.228-230). Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent (the State) follows.

STATEMENT OF FACTS

One afternoon during the summer of 2011, Appellant committed a lewd act on the twelve-year-old victim by sticking his hand down the front of her shorts and underwear and touching her "privates." The victim first disclosed the incident to her mother in February of 2012 when she turned thirteen. (R.p.19, line 8-p.38, line 14). Appellant was subsequently arrested and indicted for lewd act upon a minor. On August 13-14, 2013, he proceeded to trial by jury pursuant to which he was found guilty as indicted.

At the call of the case, Appellant made a motion in limine raising seven evidentiary issues, the last of which concerned a video recording of a police detective's interview of the victim. Appellant's counsel said: "I state at this point, there was a video-recorded interview from the detective with the 13-year old child. We certainly don't have any objections if the state intends or wishes to introduce that. So if we get to that point and they want to introduce that video of the interview then it would be without objection from the defense." (R.p.2, lines 7-14). After the jury was selected and sworn, the trial court gave preliminary instructions and asked the parties to proceed with opening statements. (R.p.3, line 2-p.14, line 15). Appellant noted the victim would be the only witness to the alleged incident and asked the jury to focus on how her story changed over time in assessing her credibility and whether the State would be able to meet its overall burden of proof. (R.p.14, line 16-p.19, line 1).

The State then called the victim to the stand. She gave specific testimony about the lewd act committed by Appellant in the summer of 2011, when she was twelve years old. One morning the victim was playing outside with her friend, eleven-year-old Kacie

Kacie lived across the street in a house with Appellant, Appellant's wife Janet,

and two other children, Amber and Gracey.¹ Sometime in the early afternoon, Kacie went into her house to cool off. A few minutes later the victim followed her inside and sat on a couch to wait for Kacie to get out of the bathroom. While she was waiting, Appellant came into the room carrying Gracey, sat down on the couch, and placed Gracey on the victim's lap. The victim began bouncing Gracey up and down on her knee when Appellant reached over and put three of his fingers down the front of the victim's shorts and underwear. Appellant touched the victim's "privates," making skin to skin contact. The victim handed Gracey back to Appellant just as Kacie walked into the room, and the two girls went back outside to play for the rest of the day. At first, the victim did not tell anybody about the incident because she did not want to lose her only friend who lived on the same road. She continued being friends with Kacie but tended to stay outside and avoided Appellant when they played. The victim did not disclose the incident to anyone until February of 2012 when she and her mother were watching a news story about some other person being reported for similar behavior, at which point she decided to tell her mother what had happened. The victim's mother called the police and reported the incident. (R.p.19, line 8-p.38, line 14).

On cross-examination, Appellant asked the victim if she remembered being interviewed by Detective Neely after her mother reported the incident to the police. She testified she remembered being interviewed and acknowledged the interview was video recorded. Appellant proceeded to question the victim about particular statements she made during that interview in an apparent attempt to show inconsistencies between those statements and her testimony at trial. Appellant focused on five specific alleged

¹ Gracey, whose full name is Graceland _____, was a toddler at the time of the incident and is the biological daughter of Appellant and Janet. Kacie and Amber are Janet's children from a prior marriage.

"inconsistencies" involving: (1) the timing of the incident; (2) the shirt the victim was wearing; (3) the position of the victim's legs; (4) the reason the victim gave for the delay in her disclosure; and (5) whether Appellant's hand had actually touched the victim. (R.p.38, line 14-p.49, line 25).

First, Appellant asked about the victim's trial testimony that the incident happened in the summer, which he incorrectly characterized as approximately "eight or nine" months before her disclosure. He then asked if the victim had initially told Detective Neely it happened only two to three months before the disclosure. The victim unequivocally admitted making this statement to the Detective, but explained it was made because she was so nervous during the interview. Next, Appellant asked the victim if she later told Detective Neely the incident happened right before school started; however, he did not give her an opportunity to admit or deny the statement because he compounded the question by immediately asking if she had seen the video. The victim replied "no," and explained she had never seen the video recording of her interview. Later, Appellant again asked about timing at which point the victim unequivocally acknowledged making a statement to Detective Neely that the incident happened "right before school started." She then explained she thinks she meant to say it was "right before school ended," and realized the slip-up sometime after the interview when she was trying to "get her story right." (R.p.39, line 10-p.40, line 15; p.46, lines 5-25).

Second, Appellant questioned the victim about her testimony that she was wearing a blue and white top when the incident occurred. He then asked if she had told Detective Neely she was wearing the same top as the one she was wearing during the interview, which was an olive green T-shirt rather than a blue and white one. The victim

testified she believed she had made that statement. She then explained she could not remember exactly what top she was wearing, but that it was either blue or green. (R.p.40, line 16-p.41, line 9). Third, Appellant asked the victim about her trial testimony that Appellant put Gracey on her lap just before the incident. He then asked if she had told Detective Neely she had her knees up to her chest and her legs spread at the time of the incident. The victim unequivocally admitted making that statement during the interview. (R.p.43, line 16-p.44, line 4).

Fourth, Appellant questioned the victim about her testimony that she refrained from immediately disclosing the incident because she did not want to harm her friendship with Kacie. He asked the victim whether she ever said this to Detective Neely during the interview. The victim testified she thought she had, and Appellant commented: "Maybe we will get an opportunity to see that." (R.p.47, lines 16-23). Finally, Appellant addressed the victim's testimony at trial that Appellant had touched her with his hand. He asked if she remembered telling Detective Neely "I think" that his hand was touching me. The victim testified she did not remember making that particular comment, but did not deny it. (R.p.48, lines 1-9). Appellant concluded his cross-examination without making a motion or any other attempt to introduce all or part of the video recording into evidence. (R.p.49, lines 24-25).

On re-direct, the victim repeated her testimony that she had never seen the video recording of her interview with Detective Neely, and she testified she had never even talked about the video with the solicitor before trial. The victim testified that during cross-examination she was trusting Appellant's counsel's version of what happened during the interview as being accurate. She testified she couldn't remember exactly what

she said during the interview with Neely, only that it was about the general incident, what happened, and where on her body she was touched. (R.p.50, line 3-p.59, line 6). The victim never claimed she did not remember making a statement to Detective Neely. Indeed, throughout her testimony she unequivocally admitted being interviewed after Appellant's arrest. Appellant declined when the trial court asked if he wished to conduct any re-cross-examination, and he again made no motion to introduce the video recording into evidence. (R.p.59, lines 7-11).

Following a break and outside the presence of the jury, the solicitor advised the judge she had concerns about any attempt to introduce the video recording of what was essentially a "forensic interview" with Detective Neely. She explained she believed the State could not simply introduce the video into evidence because it was inadmissible hearsay, except possibly the specific portions of the video that might qualify for admission under Rule 801(d) as prior consistent statements being offered to rebut an allegation of recent fabrication, and that even then those statements would likely be limited to the time and place of the incident. Appellant responded: "I am not objecting to the whole video coming in." He contended there was "exculpatory information" on the video and repeatedly stated he wanted it to come in to evidence. The solicitor commented that Appellant could put the video recording into evidence as a defense exhibit if he wanted. Appellant however complained that the State was trying to "stand behind a rule that it is inadmissible when my client is willing to waive and give up that and determine whether it is admissible. He wants it in." (R.p.60, line 7-p.67, line 11).

The parties continued to argue about whether all or parts of the video would be admissible and on what basis. After hearing the arguments, the trial court found the State

would be allowed to introduce evidence of the victim's prior consistent statements as to time and place because Appellant's cross-examination implied recent fabrication. The court also found that at the appropriate time, if Appellant wanted to move to introduce the entire video, the court would address the issue at that time. Appellant's counsel stated: "I certainly agree with that analysis and the way to handle it." He then argued, for the first time, that pursuant to Rule 613(b), SCRE, the video recording should be admissible as extrinsic evidence of a prior inconsistent statement of a witness because the victim did not admit she made the prior inconsistent statements during his cross-examination.

(R.p.68, line 7-p.72, line 10). Counsel said:

I understand I may have the burden of trying to figure out whether or not I want to put it in or not, but however, I am at a little bit of a quandary of how to introduce this extrinsic evidence of a prior inconsistent statement. I disagree with the solicitor in that there are consistent statements in the video, that there are a number of inconsistent statements that are exculpatory. And certainly, I did try to do those without showing the video with the child to impeach her.

(R.p.72, lines 12-23). Counsel proposed that he be allowed to show pertinent parts of the video during his cross-examination of Detective Neely as proof of the alleged inconsistent statements without introducing them into evidence. The trial judge noted that typically a party would impeach a witness with evidence of prior inconsistent statements through that witness herself, but asked the State's opinion. The solicitor disputed the claim that the victim failed to admit her prior inconsistent statements, and argued that in any event Appellant had already effectively brought out the alleged inconsistencies during cross without actually showing the video. Ultimately, the trial court ruled it would proceed as previously discussed, with the State being allowed to use Detective Neely to present evidence of prior consistent statements from the victim, and

Appellant being allowed to cross-examine Neely on the interview, and possibly use the video to do so. (R.p.72, line 24-p.77, line 18).

The State then called Detective Carson Neely of the York County Sheriff's Office to the stand. He testified he had worked in law enforcement since 1998 and had been a detective since 2005. Detective Neely was assigned to the Violent Crime Unit, which investigated any crime against a person, including sexual conduct or assault against an adult or a child. He had special training in interviewing techniques, including classes in "finding words" and the RATAC method of forensic interviewing. Detective Neely testified he interviewed the victim on February 14, 2012, in a conference room at the Sheriff's Office. At that interview the victim was able to identify who had assaulted her. She initially said the incident happened two or three months prior, but later explained it happened in the summertime, between two school years. The victim told Detective Neely the incident took place in the living room at Appellant's house. (R.p.78, line 18-p.93, line 6).

On cross-examination, Appellant asked several questions about Detective Neely's interview of the victim. He acknowledged it was recorded and that his written report referenced a DVD recording of the interview. Neely testified the only time he watched the full video recording was once trial started. He admitted the video "cut off" towards the end so that the final portion of the interview was not recorded. Appellant did not move to introduce all or any part of the video into evidence. (R.p.93, line 9-p.100, line 19). After brief re-direct examination and re-cross, Appellant asked to take up a matter outside the presence of the jury. He said he was not yet finished with the witness. (R.p.100, line 23-p.103, line 25).

The jury was excused and the video recording was marked for identification as Defendant's Exhibit #2. Appellant said: "I would like to try to introduce the video through Carson Neely on his part of cross. I would like to proffer it through him. I would let the Court look at it. I believe it is admissible." He argued that portions of the video were not hearsay and admissible because they included prior inconsistent statements, and that under the rule of completeness the entire video should be admissible. Appellant asked to proffer the video through Detective Neely and for the trial court to make a ruling on its admissibility. The solicitor took the position the video was inadmissible except for any specific portions which could come in under Rule 801 and/or Rule 613. The video recording was then played outside the presence of the jury. Neely testified it was fair and accurate representation of the interview with the exception of one to five minutes at the end when the recording cut off. (R.p.104, line 3-p.109, line 24).

After the proffer, Appellant asked that the entire video recording be "presented to the jury." He argued it was not hearsay under Rule 801(d) because the victim testified at trial and was subject to cross-examination concerning the statement, and because the statement was inconsistent in certain respects to her trial testimony. Appellant further argued it was not hearsay because the State sought to admit the victim's prior consistent statements to rebut an allegation of recent fabrication, and that since both parties identified prior statements that are not hearsay, the entire video recording where those statements were made should be admissible under the "rule of completeness." (R.p.109, line 25-p.111, line 21).

The trial judge asked Appellant to point out specifically which statements from the interview he believed were inconsistent with the victim's trial testimony. Appellant

alleged there were inconsistencies involving the timing of the incident, the position of the victim's legs, and the reason the victim gave for the delay in her disclosure. The solicitor opposed introduction of the entire video recording arguing it was a "back door attempt to get it in with the rule of completeness." She reiterated her concerns with admitting portions of the video recording which could run afoul of recent appellate court decisions regarding forensic interviews and vouching, and then argued Appellant should not be allowed to now introduce the video recording as a prior inconsistent statement because it was too late. The solicitor argued Appellant has missed his opportunity because the proper time to try to impeach the victim would have been during cross-examination. She also said she was not conceding the statements were in fact inconsistent. (R.p.111, line 16-p.116, line 17).

The trial judge agreed that Rule 613 seems to contemplate addressing prior inconsistent statements of a witness by examining that particular witness and introducing extrinsic evidence of a prior inconsistent statement through that witness if the proper foundation has been laid. Appellant argued Rule 613 was not limited in this regard and that once the proper foundation was laid with the witness he should be allowed to introduce the extrinsic evidence at any point during trial. (R.p.116, line 18-p.118, line 20). The solicitor ultimately agreed there were some inconsistencies between the trial testimony and the victim's statements from the interview, but argued they had been "handled on cross-examination and for the most part admitted." She then appeared to concede Appellant could bring in portions of the video through Detective Neely if the proper foundation was laid under Rule 613(b) and the victim actually denied making the statement. (R.p.118, line 21-p.122, line 9).

Next, Appellant argued an alternative theory for admission of the video recording, contending he should be able to use it to impeach Detective Neely by showing he did not strictly follow the protocol for conducting a forensic interview as described in his trial testimony. The solicitor continued to object to Appellant's request to admit the entire video recording under the "rule of completeness" and argued the trial court would have to decide whether each statement was admitted or denied by the victim before allowing it in under Rule 613(b). The trial court took the matter under advisement overnight and recessed for the evening. (R.p.123, line 20-p.130, line 11).

The following morning, the trial judge announced he had obtained a transcript of the victim's testimony for review in light of Appellant's motion. He noted the victim acknowledged being interviewed by Detective Neely and that the interview was being videotaped. The judge then conducted a detailed examination and consideration of her testimony in regard to each of Appellant's five alleged inconsistencies before ruling: "So based upon what was listed during cross-examination, I do not believe the video would be admissible for impeachment. So based upon what she admitted to in cross-examination, I think under the rules the video would not come in for impeachment purposes." (R.p.137, line 1-p.138, line 23). The trial judge then allowed the parties to look at the transcript together and said: "If you disagree with my summary of the testimony, then I will be glad to hear from you." After reviewing the transcript, Appellant did not challenge the trial court's factual finding that the victim admitted making the prior statement as a whole, including the first four inconsistencies. He also did not offer any argument or challenge to trial court's conclusion that her testimony of not remembering the fifth inconsistency was equivalent to an admission for purposes of

the analysis. Instead Appellant simply stated: "Your Honor, I respect the Court going through the testimony and pointing out the things of what the record accurately reflects. I don't need to do that. I respect the court's ruling on that. I have registered my objection. Based on what it appears the Court is going to rule, I have no further rationale to get the video in for the purpose of impeaching [the victim] through this witness." (R.p.138, line 24-p.139, line 21). Appellant stated: "I respect the Court's opinion, but for the record, I do object to the Court's ruling," however, Appellant never articulated a particular objection to that ruling in regard to the finding that he failed to meet the foundation requirements of Rule 613(b), SCRE. (R.p.140, lines 4-14).

Next, Appellant resumed his re-cross-examination of Detective Neely. Appellant asked to use the video to refresh Detective Neely's memory of his interview with the victim, which led to a discussion outside the jury's presence about whether the State would agree to admit the video into evidence. The solicitor said: "If the defense moves it in, I will agree to have it come in" (R.p.140, line 15-p.151, line 3). Appellant then advised the trial court that when Detective Neely resumed testifying he intended to lay the foundation for the video, move it into evidence, and show the video to the jury. He repeated his desire that the entire video be admitted into evidence. Next, the trial judge re-stated his previously ruling in regard to the use of the video recording for impeachment purposes. He noted he had deemed the victim as having admitted everything she was asked in regard to what she stated on the video, and that therefore was no need to impeach her with the video itself. Appellant again failed to challenge the trial court's ruling that the victim had admitted every inconsistency from her prior statement. (R.p.151, line 6-p.154, line 24).

Appellant then continued his re-cross-examination of Detective Neely, followed by additional re-direct examination from the State, and more re-cross-examination by Appellant. Appellant did not move to introduce the video recording of the interview either time he addressed additional questions to Detective Neely. (R.p.155, line 4-p.158, line 25). When Detective Neely finally stepped down, the State rested. (R.p.159, lines 2-4). Appellant moved for a directed verdict and the motion was denied. Appellant then called the victim's mother, Katrina Babb, as a witness but elected not to testify in his own defense. (R.p.159, line 14-p.178, line 16).

After a brief charge conference, the parties agreed to the trial judge's proposed jury charges and made closing arguments. Appellant explained the judge would be charging the law of inconsistent statements and asked the jury to consider the victim's testimony in light of any inconsistencies and her admission that she had never watched the video recording of her interview before trial. The solicitor responded that even though there were inconsistencies between the victim's testimony and things she said during her interview, this did not mean she was lying and the jury had the duty to judge her credibility and believability. (R.p.179, line 14-p.202, line 25). The trial court then charged the jury on the burden of proof, the presumption of innocence, reasonable doubt, the respective and exclusive roles of the judge and jury, direct and circumstantial evidence, the credibility of witnesses, and the elements of the offense. (R.p.202, line 16-p.214, line 16). In regard to credibility the court charged:

There has been evidence presented that witnesses have made prior statements which are not consistent with witnesses' present testimony. You may use this evidence to decide whether to believe the witness. You may also use evidence of the earlier contradictory statements to determine the truth of those statements. It is up to you to decide whether to believe the earlier statements or the testimony given at trial.

(R.p.209, lines 2-11). The jury deliberated for less than an hour before finding Appellant guilty as indicted. The trial court sentenced him to ten (10) years' imprisonment suspended upon the service of three (3) years' imprisonment and three (3) years' probation. (R.p.215, line 3-p.225, line 13).

ARGUMENT

I.

Appellant's claim that the trial court erred in refusing his Rule 613(b), SCRE, request to use a video recording of a police investigator's interview of the victim to impeach her credibility is not preserved for appellate review because: (1) Appellant never challenged the trial court's factual findings that the victim admitted making the allegedly prior inconsistent statements; and (2) Appellant waived his Rule 613(b) claim because he never moved to introduce the video after the State advised it would not object to any further motion by Appellant seeking admission. Furthermore, to the extent the claim is preserved, the trial court properly exercised its discretion not to admit the extrinsic evidence pursuant to Rule 613(b) where: (1) Appellant was given a full and fair opportunity to confront the victim; (2) the foundational requirements of the Rule were not met; (3) any minor inconsistencies did not impact the "essential meaning" of the prior statement; and (4) exclusion was proper pursuant to Rule 403, SCRE.

Appellant argues the trial court erred in refusing his request to use a video recording of a police investigator's interview of the victim as extrinsic evidence of a prior inconsistent statement to impeach her credibility. He alleges certain statements the victim made during the interview were inconsistent with her testimony at trial, and contends that by ruling the video itself was inadmissible, the trial court violated his right to confront the witnesses against him and to present a complete defense pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. The State disagrees and submits Appellant's argument should be denied on and dismissed for several reasons.

Issue Not Preserved for Appeal

Initially, the State submits Appellant's argument is not preserved for appellate review because: (1) Appellant did not specifically object to or otherwise challenge the trial court's factual findings that the victim admitted making the prior statements, and

(2) Appellant waived any Rule 613(b) challenge previously argued when he failed to move to introduce the video after the solicitor stated on the record that she would not object to any further motion by appellant seeking admission.

After hearing Appellant's request to admit the video recording of the victim's interview with Detective Neely as a prior inconsistent statement under Rule 613(b), the trial court carefully reviewed a transcript of the victim's trial testimony in regard to each of Appellant's five alleged inconsistencies. The judge then ruled: "So based upon what was listed during cross-examination, I do not believe the video would be admissible for impeachment. So based upon what she admitted to in cross-examination, I think under the rules the video would not come in for impeachment purposes." (R.p.137, line 1-p.138, line 23). In other words, the trial judge acknowledged the general provisions regarding the admissibility of prior inconsistent statements pursuant to Rule 613(b), but concluded Appellant had not met the foundational requirements for admission based a factual finding that the victim admitted the prior statement. The trial judge then allowed the parties to look at the transcript together and said: "If you disagree with my summary of the testimony, then I will be glad to hear from you."

After reviewing the transcript, Appellant did not challenge the trial court's factual finding that the victim admitted making the prior statement as a whole or that she explicitly admitted the first four alleged inconsistencies. He also did not offer any argument or challenge to the trial court's conclusion that the victim's testimony of not remembering the fifth inconsistency was equivalent to an admission for purposes of the analysis. Instead, Appellant accepted the trial judge's factual findings but maintained

he had sufficiently registered his objection. (R.p.138, line 24-p.139, line 21; p.140, lines 4-14). The State disagrees and submits Appellant's objection was not sufficient in light of the court's factual finding. Appellant never articulated a particular objection to the trial court's finding that he failed to meet the foundational requirements of Rule 613(b), SCRE. This Court is bound by the trial court's factual finding because it is supported by evidence in the record. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Manning, 400 S.C. 257, 264, 734 S.E.2d 314, 317 (Ct. App. 2012). As a result, Appellant's Rule 613(b) argument is not preserved for Appellate review.

Even after the trial judge initially excluded the video, the solicitor said: "If the defense moves it in, I will agree to have it come in" (R.p.140, line 15-p.151, line 3). Appellant then advised the trial court that when Detective Neely resumed testifying he intended to lay the foundation for the video, move it into evidence, and show the video to the jury. He repeated his desire that the entire video be admitted into evidence. (R.p.151, line 25-p.153, line 1). Appellant, however, did not move to introduce the video recording of the interview during either subsequent opportunity he had to further cross-examine Detective Neely. (R.p.155, line 4-p.158, line 25). A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992); Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lvles v. BML Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282, 285 (Ct. App. 1987). The State submits Appellant waived any

Rule 613(b) challenge he may have previously raised when he voluntarily chose not to seek introduction of the video recording despite the solicitor's invitation that he do so.

To the extent this Court finds Appellant's argument is preserved for appeal, the State submits it is nevertheless without merit because the trial court's decision does not implicate the confrontation clause and because the trial court properly excluded the video recording under the South Carolina Rules of Evidence.

Confrontation Clause

As an initial matter, Appellant's contention that the trial court's evidentiary ruling denied his constitutional right to confront witnesses and present a complete defense is misplaced. As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed on appeal absent a manifest abuse of discretion. State v. Gracely, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012); State v. Quattlebaum, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000). Pursuant to the Sixth Amendment of the United States Constitution, every criminal defendant has a right to "to be confronted with the witnesses against him" during trial. U.S. Const. amend. VI. Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses. State v. Aleksey, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). "The limitation of cross-examination is reversible error if the defendant establishes he was unfairly prejudiced." State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991).

Appellant conducted extensive cross-examination of the victim. He asked her pointed questions regarding her interview with Detective Neely and was successful in

getting the victim to acknowledge inconsistencies between details she provided during that interview and her testimony at trial. The trial court did not impose any limits on Appellant's cross-examination of the victim and Appellant never sought to introduce the video recording of the interview, or any part of that video, during that cross-examination. (R.p.38, line 14-p.49, line 25; p.59, lines 7-11). Thus, Appellant's constitutional right to confront the victim and to conduct a meaningful cross-examination of her was fully protected at trial. U.S. Const. amend. VI; Gracely, supra; Aleksey, supra. The trial court did not interfere with Appellant's opportunity for effective cross-examination of the victim; therefore, Appellant's claims regarding the right to confront witnesses and present a complete defense under the Sixth and Fourteenth Amendments to the United States Constitution should be denied.

Rules of Evidence

In regard to the actual evidentiary ruling concerning Rule 613(b), SCRE, the State submits the trial court appropriately exercised its discretion to exclude the video recording as impeachment evidence because the foundational requirements of the Rule were not met. First, the victim was not adequately "advised of the substance of the statement" before she was asked to admit or deny the alleged inconsistencies; thus, the statement was inadmissible. Rule 613(b), SCRE. Second, the victim admitted making the prior statement as a whole, specifically admitted making four of the five alleged inconsistencies in the statement, and did not unequivocally deny making the fifth alleged inconsistency. Therefore, even if small portions of the victim's overall statement were inconsistent with her trial testimony, extrinsic evidence of those prior inconsistencies is inadmissible and the video recording was properly excluded. Rule

613(b), SCRE. Third, any minor inconsistencies not deemed “admitted” for purposes of Rule 613(b) did not go to the “essential meaning” of the victim’s prior statement. Thus, they were inconsequential to the jury’s assessment of the victim’s credibility and the extrinsic evidence was properly excluded. Finally, exclusion was appropriate pursuant to Rule 403, SCRE, because the probative value of the video recording was substantially outweighed by the danger of unfair prejudice, and because the video would have constituted a needless presentation of cumulative evidence.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only and is bound by the trial court’s factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The conduct of a criminal trial is left largely to the sound discretion of the presiding judge and the appellate court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way. State v. Commander, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (quoting State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982)). Thus, the admission or exclusion of evidence is left to the sound discretion of the trial court, and the court’s decision will not be reversed absent an abuse of discretion. State v. Jennings, 394 S.C. 473, 477, 716 S.E.2d 91, 93 (2011); State v. Morris, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008). A decision to admit or exclude extrinsic evidence of a prior inconsistent statement will not be reversed absent a manifest abuse of discretion that prejudiced the appellant. See State v. Carmack, 388 S.C. 190, 201, 694 S.E.2d 224, 229 (Ct. App. 2010) (finding the trial court did not abuse its discretion in admitting extrinsic evidence of a statement where

the witness did not unequivocally admit making the prior inconsistent statement); State v. Blalock, 357 S.C. 74, 78, 591 S.E.2d 632, 635 (Ct. App. 2003) (emphasis added); see also State v. Fossick, 333 S.C. 66, 69-70, 508 S.E.2d 32, 33 (1998) (concluding the trial judge erred in excluding extrinsic evidence of a prior inconsistent statement when the witness unequivocally denied making the statement).

Discussion / Analysis

Rule 613 of the South Carolina Rules of Evidence provides:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible. . . .

Rule 613(b), SCRE. Thus, “A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination.” State v. Stokes, 381 S.C. 390, 398-99, 673 S.E.2d 434, 438 (2009).

However, unlike the federal rule, the South Carolina rule requires that a proper foundation must be laid before admitting a prior inconsistent statement. State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004). Thus, “[i]t is mandatory that a witness be permitted to admit, deny, or explain a prior inconsistent statement.” Id.

When a witness specifically denies making a prior statement, it is error for the trial court to exclude extrinsic evidence of that statement as impeachment evidence, although such error may be harmless. State v. Fossick, 333 S.C. 66, 69-70, 508 S.E.2d

32, 33 (1998). Additionally, “where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement.” State v. Blalock, 357 S.C. 74, 80, 591 S.E.2d 632, 636 (Ct. App. 2003) (emphasis added); see also State v. Carmack, 388 S.C. 190, 201-02, 694 S.E.2d 224, 230 (Ct. App. 2010) (holding witness did not unequivocally admit making a prior inconsistent statement; therefore, the trial court did not abuse its discretion in allowing extrinsic evidence of the statement) (emphasis added). This wide latitude extends to a situation where a witness indicates an inability to recall or to remember a previous statement. If the witness neither directly admits nor denies the act or declaration, as when he merely says that he does not recollect, or, as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember. Blalock, 357 S.C. at 80, 591 S.E.2d at 636 (quoting State v. Sullivan, 43 S.C. 205, 211, 21 S.E. 4, 7 (1895)).

Here, the proper foundation was not laid for the admission of the victim’s allegedly prior inconsistent statements. The victim was advised by Appellant of the time and place her prior statement was made and the person to whom it was made, and she was given the opportunity to explain or deny the statement. See Rule 613(b), SCRE. However, Appellant did not adequately advise the victim of the specific substance of the particular statements. Instead Appellant paraphrased portions of the video recording and advised the victim of the general substance of her responses to Detective Neely’s interview questions without either showing her the video or quoting

her exact words. The State submits these efforts were insufficient to comply with the mandatory foundational requirements of the Rule.

In addition, the foundational requirements were not met because the victim effectively admitted each of the prior inconsistent statements. In three of the five instances raised by Appellant the victim made an unequivocal admission of the inconsistent portions of her prior statement. In regard to the timing of the incident, the victim admitted she first told Detective Neely the incident happened only two to three months before the disclosure, but explained she said this because she was so nervous during the interview. The victim also acknowledged making a statement to Detective Neely that the incident happened "right before school started." She then explained she thinks she meant to say it was "right before school ended," and realized her mistake sometime after the interview. (R.p.39, line 10-p.40, line 15; p.46, lines 5-25). In both instances the victim merely explained why she gave the admittedly inconsistent statement, but she never gave "an indirect answer not amounting to an admission."

Blalock, 357 S.C. at 80, 591 S.E.2d at 636. Indeed, this is precisely the kind of post-admission explanation our supreme court found has no impact on the determination of whether a witness admitted making a prior inconsistent statement. State v. Lynn, 277 S.C. 222, 224-25, 284 S.E.2d 786, 788 (1981). In any event, the State submits that offering an explanation for an inconsistency following an admission it was made enhances rather than detracts from the impeachment value of the inconsistency, and Appellant suffered no prejudice.

In regard to her clothing, the victim admitted she told Detective Neely she was wearing the same top as the one she was wearing during the interview, which was an

olive green T-shirt rather than the blue and white one described in her testimony. She explained she could not remember exactly what top she was wearing but that it was either blue or green; however, she did not deny, explain, or equivocate in regard to making the prior statement. (R.p.40, line 16-p.41, line 9). In regard to the position of her legs, the victim admitted she told Detective Neely she had her knees up to her chest and her legs spread at the time of the incident despite her trial testimony that Gracey was on her lap just before she was fondled by Appellant. (R.p.43, line 16-p.44, line 4). Because the victim clearly "admits making the prior statement[s]," in these first three instances, the trial court properly found they were inadmissible. Rule 613(b), SCRE.

The fourth instance raised by Appellant did not involve a prior statement at all and instead focused on something that was not said by the victim. At trial, the victim testified she refrained from immediately disclosing the incident because she did not want to harm her friendship with Kacie. On cross-examination Appellant said the video showed the victim did not tell Detective Neely this during the interview and asked the victim: "You didn't tell him that on the video did you?" The victim testified she thought she had. (R.p.47, lines 16-23). Because there is not even an allegation of a prior inconsistent statement, there can be no extrinsic evidence of a prior statement, and there was no statement for the victim to admit or deny. Thus, the trial court properly found the video was inadmissible. Rule 613(b), SCRE. In any event, the victim simply said she thought she made the comment to Detective Neely, but did not dispute the accuracy of counsel's description, so her testimony would qualify as an admission even if there was in fact a statement for her to admit.

In the fifth instance, the victim never unequivocally denied making the inconsistent statement that she thought Appellant's hand was touching her skin. She merely stated she could not remember exactly what she said. (R.p.48, lines 1-9). Just as the trial court is given wide latitude to admit extrinsic evidence of a prior inconsistent statement where there is anything less than an unequivocal admission, it should also be given wide latitude to exclude extrinsic evidence of a prior inconsistent statement where there is anything less than an unequivocal denial. Unlike in Fossick, where there was an unequivocal denial, the victim here made no denial. Certainly, pursuant to Carmack and Blalock, it would not have been error for the trial judge to admit this portion of the video due to the lack of the victim's unequivocal admission. However, it does not necessarily follow that admission of the extrinsic evidence was required by Rule 613(b). The trial court is given wide latitude to admit extrinsic evidence of a prior inconsistent statement, and here the trial court simply exercised that wide latitude by choosing not to admit the evidence. This exercise of discretion was not error. Lynn, supra.

Even if this Court finds the foundational requirements were met in regard to the fifth instance, the trial court properly exercised its discretion to exclude because the only minor inconsistency which was not unequivocally admitted was inconsequential and did not go to the "essential meaning" of the victim's prior statement. In Blalock the witness had given a statement to police that: she "saw [Jane] laying on her stomach in front of the T.V. Brentley [Blalock] was sitting beside her. I noticed he had his hand under her pants leg on her backside." At trial she insisted she only told the detective she saw the defendant's hand on the back side of the victim's leg, not on her

“backside” or her “butt per se” and that some of the details were missing from her statement. Blalock, 357 S.C. at 76-78, 591 S.E.2d at 633-35. This Court affirmed the trial court’s admission of extrinsic evidence of the prior inconsistent statement because the disparity “goes to the essential meaning” of what the detective recorded as the statement.” The Court noted: “The entire probative value of Ms. Blalocks [sic] statement and trial testimony hinges on where she saw her husbands [sic] hand on Jane’s body.” Blalock, 357 S.C. at 81, 591 S.E.2d at 636. However, Blalock was tried for criminal sexual conduct with a minor, where “sexual battery” was an element of the offense. See S.C. Code Ann. §§ 16-3-651 to -655 (Supp. 2000). By comparison, in regard to lewd act, as long as the act was “willful,” was done “upon or with” the body or its parts, and was done “with the intent of arousing, appealing to, or gratifying the lust or passion or sexual desires of the person or the child” it is irrelevant whether Appellant’s hand actually touched the victim’s vagina or merely pressed against her vagina through her clothes. See S.C. Code Ann. § 16-15-140 (Supp. 2011) (“It is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child.”). Thus, the challenged inconsistency in the fifth instance does not implicate the “essential meaning” of the statement and extrinsic evidence of that statement was appropriately excluded by the trial court.

Rule 403, SCRE

Even if this Court finds that a narrow Rule 613(b) analysis would support admission of the video recording, exclusion was nevertheless appropriate pursuant to Rule 403, SCRE, because: (1) the probative value of the video recording was substantially outweighed by the danger of unfair prejudice, and (2) the video would have constituted a needless presentation of cumulative evidence.

Throughout the trial, Appellant argued he wanted the entire video recording to be admitted into evidence despite the solicitor's concerns it consisted of an otherwise inadmissible "forensic interview" with Detective Neely. (R.p.60, line 7-p.67, line 11; p.111, line 16-p.116, line 17). The solicitor was rightfully concerned the forensic interview might be wrought with hearsay and comments constituting vouching which our appellate courts have found particularly troubling. See State v. Kromah, 401 S.C. 340, 359, 737 S.E.2d 490, 500 (2013) (holding that a forensic interviewer should not have been allowed to testify about a "compelling finding" of child abuse, as that was the equivalent of stating the child was telling the truth); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding the admission of the forensic interviewer's written report into testimony to be error because the reports stated that each child "provided a compelling disclosure of abuse by appellant."); State v. McKerley, 397 S.C. 461, 465, 725 S.E.2d 139, 142 (Ct. App. 2012) (finding the forensic interviewer's "opinion as to whether she thinks something happened [was] nothing other than her inadmissible opinion as to whether the victim was telling the truth"). As explained in detail above, the video recording had very limited probative value in light of the victim's testimony

about her prior statements. Given the danger of unfair prejudice, the trial court properly excluded it despite Appellant's suspect claim that he wanted the entire video admitted.²

The video recording also constituted cumulative evidence. Appellant was allowed to effectively impeach the victim through cross-examination regarding the prior statements, getting her to unequivocally admit the inconsistencies in all but one instance. In light of these efforts, admission of the video recording itself would have been needlessly cumulative. For all of these reasons, there was no abuse of discretion by the trial court and Appellant's conviction should be affirmed.

Harmless Error

Should this court find the issue is preserved and that the trial judge erred in refusing to admit the video recorded interview into evidence, the State submits any error was harmless beyond a reasonable doubt. In determining harmless error regarding any issue of witness credibility, the appellate court will consider the importance of the witness's testimony to the prosecution's case, whether the testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case. Fossick, 333 S.C. at 69, 508 S.E.2d at 34. (citing State v.

² Appellant argues the solicitor's re-direct examination of the victim somehow portrayed defense counsel as dishonest by suggesting that what defense counsel said was on the video was not in fact on the video. He claims the solicitor's "deceitful questioning created a false impression for the jury regarding the veracity of [the victim] and of defense counsel personally." (Brief of Appellant, p. 15). However, contrary to these claims, it appears the solicitor took extraordinary steps throughout the trial to ensure the fairness of the proceedings by attempting to limit introduction of potentially inadmissible evidence. Indeed, it was trial counsel's repeated attempts to lure the solicitor into introducing the video recording that suggest a hidden motive. As a public defender and former solicitor with many years of criminal experience, it is unclear whether trial counsel was merely trying to attack the victim's credibility with her prior inconsistent statements, or was attempting to manufacture a future post-conviction relief claim in the event of a conviction.

Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995) and Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)).

Here, the trial court allowed a meaningful cross-examination with numerous opportunities for impeachment, including specifically allowing Appellant to inquire into the victim's allegedly inconsistent statements. The additional introduction of the video recording as sought by Appellant would at best have been marginally relevant. The jury was given sufficient information to judge the credibility of the victim's testimony. Furthermore, the video itself would have been cumulative to the victim's admissions regarding the alleged inconsistencies. In regard to overall strength, the victim gave compelling testimony describing how she was inappropriately touched by Appellant. Appellant suffered no unfair prejudice as a result of the ruling regarding exclusion of the video recording. Fossick, *supra*. In light of all these factors, exclusion of the video recording as extrinsic evidence of the victim's prior inconsistent statements as impeaching evidence was harmless. Thus, Appellant's conviction should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

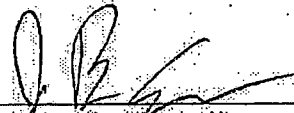
Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
December 5, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2013-001753

THE STATE,.....RESPONDENT

v.

LEONARD EUGENE JENKINS,.....APPELLANT.

CERTIFICATE OF COUNSEL

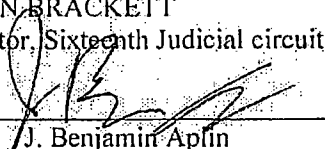
The undersigned hereby certifies that the Final Brief of Respondent complies with Rule
211(b), SCACR..

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STATE OF SOUTH CAROLINA
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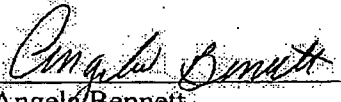
LEONARD EUGENE JENKINS, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated December 5, 2014, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Susan B. Hackett, Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served.
This 5th, day of December, 2014.


Angela Bennett
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The South Carolina Court of Appeals

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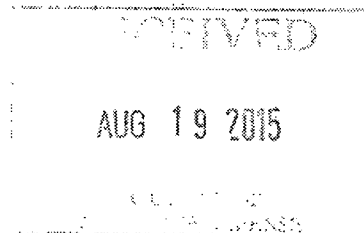
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Re: State v. Leonard E. Jenkins
Appellate Case No. 2013-001753

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.



Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: The Honorable Donald B. Hocker

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Leonard Eugene Jenkins, Appellant.

Appellate Case No. 2013-001753

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

Unpublished Opinion No. 2015-UP-429
Submitted April 1, 2015 – Filed August 19, 2015

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General John Benjamin Aplin, both of
Columbia; and Solicitor Kevin Scott Brackett, of York,
for Respondent.

PER CURIAM: Leonard Eugene Jenkins appeals his conviction for lewd act upon a child, arguing his Sixth Amendment right to confrontation and his Fourteenth Amendment right to present a complete defense were violated by the

trial court ruling a video recording of an interview of the minor victim (Minor) was inadmissible. Jenkins also asserts the trial court erred in ruling the video was inadmissible as extrinsic evidence of prior inconsistent statements under Rule 613(b), SCRE, because Minor did not unequivocally admit to making the prior statements.

1. Because Jenkins did not make any argument at trial regarding his rights under the Sixth or Fourteenth Amendments, these issues are not preserved for our review. *See State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) (stating an issue must have been raised to and ruled upon by the trial court in order to preserve the issue for appellate review).

2. Jenkins argues the video was admissible under Rule 613(b), SCRE, to impeach Minor's testimony on the following issues: (1) the time period in which the alleged incident occurred, (2) the position in which Minor had her legs at the time of the alleged incident, (3) the color of the shirt Minor was wearing at the time of the alleged incident, (4) the way Jenkins touched Minor, and (5) the reason Minor delayed disclosing the incident.

As to Minor's testimony regarding the time period in which the alleged incident occurred and the position in which Minor had her legs at the time of the alleged incident, the trial court properly ruled the video was inadmissible because Minor admitted making the prior inconsistent statements. *See* Rule 613(b), SCRE (stating extrinsic evidence of a prior inconsistent statement by a witness is inadmissible if the witness admits making the prior statement).¹

As to Minor's testimony regarding the color of the shirt she was wearing at the time of the alleged incident, the trial court properly ruled the video was inadmissible because the testimony concerned a collateral issue, not subject to impeachment by the admission of extrinsic evidence. *See State v. Beckham*, 334 S.C. 302, 321, 513 S.E.2d 606, 615 (1999) ("When a witness denies an act involving a matter

¹ Jenkins argues the State's redirect examination of Minor had the effect of converting Minor's admissions into equivocations, subject to impeachment under Rule 613(b), SCRE. Jenkins did not raise this specific argument at trial; accordingly, it is unpreserved. *See Rogers*, 361 S.C. at 183, 603 S.E.2d at 912-13 (stating an issue must have been raised to and ruled upon by the trial court in order to preserve the issue for appellate review); *id.* at 183, 603 S.E.2d at 913 (stating the issue must have been raised to the trial court with sufficient specificity).

collateral to the case in chief, the inquiring party is not permitted to introduce contradictory evidence to impeach the witness."). This rule applies equally when a witness denies making a prior inconsistent statement regarding a collateral matter. *See State v. Galloway*, 263 S.C. 585, 590-93, 211 S.E.2d 885, 887-89 (1975) (applying the collateral issue rule to a prior inconsistent statement). When determining whether a prior inconsistent statement is collateral, we look to whether the prior inconsistent statement was relevant to the case. *See id.* at 593, 211 S.E.2d at 889 (explaining "[t]he true question is one of relevance" when determining whether a prior inconsistent statement is collateral). Evidence is relevant if it has "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. The color of the shirt worn by Minor at the time of the alleged incident had no evidentiary value and was not relevant to any issue of consequence in this case. Accordingly, the trial court properly ruled the video was inadmissible for the purpose of impeaching Minor's testimony on this issue.

As to Minor's testimony regarding the way Jenkins touched her, we find Minor's statement in the video was not inconsistent with her testimony at trial. Accordingly, Rule 613(b), SCRE, does not apply, and the trial court properly found the video inadmissible to impeach Minor's testimony on this issue. *See* Rule 613(b), SCRE (providing for the admission of extrinsic evidence at trial to prove a prior inconsistent statement by a witness).

Finally, as to Minor's testimony regarding her delayed disclosure of the incident, the trial court properly found the video inadmissible because Jenkins was not seeking to prove a prior inconsistent statement but rather a prior statement was never made. At trial, Minor testified she delayed disclosing the incident because she was afraid of losing her friendship with Jenkins's stepdaughter. Jenkins sought to impeach this testimony through the admission of the video, arguing Minor did not mention in the interview that her friendship with Jenkins's daughter was the reason for her delayed disclosure. Rule 613(b), SCRE, does not allow for the video to be admitted for this purpose. *See* Rule 613(b), SCRE (allowing for the admission of prior inconsistent statements by a witness if the witness denies making the statement).

Furthermore, we find Jenkins was not prejudiced by the trial court's decision to exclude the video because he was allowed to extensively cross-examine Minor and the police officer who interviewed Minor in the video. Accordingly, we will not disturb the trial court's ruling. *See State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d

490, 494-95 (2013) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." (internal quotation marks and citation omitted)).

For the foregoing reasons, the ruling of the trial court is

AFFIRMED.²

FEW, C.J., and HUFF and WILLIAMS, JJ., concur.

² We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

LEONARD EUGENE JENKINS,

APPELLANT

APPELLATE CASE NO. 2013-001753

Appeal from York County

Donald B. Hocker, Circuit Court Judge

Opinion No. 2015-UP-429

PETITION FOR REHEARING

On August 19, 2015, this Court affirmed Appellant's conviction for lewd act upon a child in an unpublished opinion. State v. Jenkins, 2015-UP-429 (S.C. Ct. App. filed Aug. 19, 2015). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter in light of several points overlooked and/or misapprehended by the Court as discussed infra.

On appeal, Appellant raised a single issue – whether the trial judge erred in refusing his request to use a video recorded interview between the prosecution's key witness and a police investigator to impeach the witness regarding her prior inconsistent statements. In its opinion, this Court addressed portions of the witness's testimony separately to determine the video was not

admissible pursuant to Rule 613(b), SCRE. In doing so, this Court overlooked and/or misapprehended significant portions of the record.

Brief Factual Summary

Minor 1 and Appellant's daughter were friends. Minor 1 frequently visited daughter in Appellant's home. Minor 1 testified that one day during the summer, she and Appellant were sitting on the couch in Appellant's home. Minor 1 testified that Appellant touched her while the two sat on the couch together. R. 24, line 12 – R. 29, line 10; R. 34, line 21 – R. 35, line 8; R. 35, line 23 – R. 36, line 3; R. 42, lines 16-25. According to Minor, when Appellant's daughter walked into the room from the bathroom, Minor 1 walked outside without saying anything about the alleged touching. She and Appellant's daughter played for the rest of the day. R. 30, lines 9-17. Even after the alleged improper touching, Minor 1 and Appellant's daughter continued to play together. R. 36, lines 4-7.

(1) The time period in which the alleged incident occurred

This Court held the trial court properly ruled the video was inadmissible because Minor 1 admitted making prior inconsistent statements regarding the time period in which the alleged improper touching occurred. However, a close review of the record reveals Minor 1 failed to admit *unequivocally* that she made a prior inconsistent statement regarding a crucial issue in the case – when the alleged lewd act occurred.

Minor 1 claimed that on an unknown day during the summer of 2011 she was playing with Appellant's daughter when the two decided to enter Appellant's house to cool down. Although Minor 1 was unable to give a specific day, she recalled that she went to Georgia to stay with her grandmother approximately two weeks after summer started and remained there until about a week before school started again. Later, Minor 1 testified that the alleged incident

occurred *before* she went to Georgia for the summer. R. 24, line 12 – R. 29, line 10; R. 34, line 21 – R. 35, line 8; R. 35, line 23 – R. 36, line 3; R. 42, lines 16-25. Thus, the alleged incident had to have occurred during the first two weeks of summer.

However, when Minor 1 spoke to the investigating officer, Minor 1 claimed the alleged incident occurred “two to three months ago” meaning two to the three months before her interview with the officer. She told the officer “it happened right before school started.” Minor 1’s statements to the officer were in great contrast with her trial testimony because according to her testimony, the alleged incident occurred during the first two weeks of the summer, which would have been *eight or nine months* before her interview with the officer.

When asked about this inconsistency, she explained that “it slipped [her] head because [she] was so nervous.” R. 39, line 10 – R. 40, line 7. Later, Minor 1 testified that she realized she had “slip[ped] up” regarding the date *after* she was interviewed by the officer or the solicitor. She did not believe that the officer or the solicitor told her she had slipped up, but she did try “to get [her] story right.” R. 46, line 5 – R. 47, line 2. Although Minor 1 stated that she told the officer that the alleged incident took place two to three months prior to her interview with Neely, she explained her answer by saying “I mean, I hadn’t really a good time - - I was trying to remember exactly when it happened because I tried as best as possible, but it slipped my head because I was so nervous.” R. 39, line 19 – R. 40, line 2.

On re-direct examination, the prosecutor asked “how narrow” was Minor 1’s answer to the officer on the timeframe. Minor 1 responded that she was trying to narrow it down and told the officer all that she could remember. R. 55, lines 10-21. In response to the prosecutor’s questioning on re-direct examination, Minor 1 testified that she could “not remember a lot of [the

video interview] because it was about maybe - - it was just a while ago” and she could “not really remember exactly.” R. 58, lines 11-21.¹

The South Carolina Rules of Evidence permit the introduction of extrinsic evidence of prior inconsistent statements of a witness when

the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

Rule 613, SCRE (emphasis added); see also State v. Fossick, 333 S.C. 66, 69-70, 508 S.E.2d 32, 33 (1998)(finding error in failing to admit extrinsic evidence of a statement where the witness denied making the statement). A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982).

This Court observed that “[i]n determining whether a witness has admitted making a prior inconsistent statement and thereby obviated the need for extrinsic proof, the courts of our state and other jurisdictions have held that the witness must admit making the prior statement unequivocally and without qualification.” State v. Blalock, 357 S.C. 74, 591 S.E.2d 632 (Ct. App. 2003)(citing State v. Bottoms, 260 S.C. 187, 194, 195 S.E.2d 116, 118 (1973) & C.J.S. Witnesses 727 (2002)). This Court explained that “[g]enerally, where the witness has responded with anything less than an

¹ In addition to the argument that Minor 1’s testimony on direct and cross examination was not an unequivocal admission and therefore, the video was admissible, Appellant also argues that this Court should consider the re-direct examination of Minor 1 to determine that Minor 1’s responses were equivocal and the video was admissible. This Court held this argument was not presented at the trial level and is not preserved for review. In a separate part of this petition, Appellant counters this holding. Although Appellant presents this argument in a separate section, Appellant respectfully requests that the argument regarding consideration of re-direct examination be considered as to **each** of Minor 1’s inconsistent statements.

unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement. Id. at 80, 591 S.E.2d at 636.

If the witness neither directly admit[s] nor den[ies] the act or declaration, as when he merely says that he does not recollect, or, or as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember.

Id. (quoting State v. Sullivan, 43 S.C. 205, 211, 21 S.E. 4, 7 (1895)).

Nothing short of an absolute unequivocal admission satisfies Rule 613(b). In Blalock, 357 S.C. at 80, 591 S.E.2d at 636, this Court held the witness's response to questions about her prior statement did "not meet the standard of a clear and unequivocal admission that the precedent case law demands." Acknowledging that the witness did "admit that she said the portion of the statement quoted" toward the end of the examination, this Court held such an admission was not sufficient because the witness was adamant throughout her testimony that the statement as recorded by the detective was incomplete. Id. at 81, 591 S.E.2d at 636.

Similarly, in State v. Carmack, 388 S.C. 190, 201-202, 694 S.E.2d 224, 230 (Ct. App. 2010), this Court held that a prior inconsistent statement by a witness who said his prior statement was "accurate," that "certain details were not in his original statement because such details were not inquired into at the time and 'everything was chaotic'" was admissible because the witness "did not unequivocally admit making a prior inconsistent statement." In State v. Moses, 390 S.C. 502, 523, 702 S.E.2d 395, 406 (Ct. App. 2010), this Court held the trial court properly admitted a prior inconsistent statement by a witness who testified she "could not remember" having made the prior statement because such was "not an unequivocal admission."

Minor 1's testimony was not an unequivocal admission regarding a central issue of the case – when the alleged improper touching occurred. When questioned about the inconsistency,

Minor 1 did not admit that she had been inconsistent. Rather, she claimed it had slipped her mind and that she was trying to get her story straight. This Court erred in concluding Minor 1's testimony was an unequivocal admission that she had given a prior inconsistent statement on this vital matter.

(2) The position Minor 1 had her legs at the time of the alleged incident

This Court held the trial judge properly ruled the video was inadmissible because Minor 1 admitted making the prior inconsistent statements regarding the position of her legs at the time of the alleged improper touching. Again, a careful review of the record reveals Minor 1 did not unequivocally admit to making a prior inconsistent statement regarding the position of her legs.

At trial, Minor 1, claimed that Appellant, his wife, and all three of his children were in the home when the alleged touching occurred. While Appellant's daughter used the bathroom, Minor 1 sat on the couch. Minor 1 claimed that at some point, Appellant sat down on the couch beside her. Appellant, who had been holding his toddler when he entered the room, placed the toddler on Minor 1's lap. Minor 1 claimed that while she was playing with the toddler, Appellant reached over and improperly touched her. R. 24, line 12 – R. 29, line 10; R. 34, line 21 – R. 35, line 8; R. 35, line 23 – R. 36, line 3; R. 42, lines 16-25. All of this allegedly occurred while Minor 1 *still* had the toddler on her lap. When Appellant's daughter walked into the room from the bathroom, Minor 1 put the toddler on Appellant's lap and walked outside. R. 30, lines 9-17.

This contrasted greatly with her video recorded interview with the investigating officer. Minor 1 told the officer that when Appellant touched her, she had her "knees almost up to [her] chest" and her legs were spread. R. 43, line 16 – R. 44, line 4. No doubt having her knees to her chest with her legs spread was a vastly different position than having a toddler on her lap.

Although on cross-examination, Minor 1 admitted she told Neely that her knees were almost to her chest and that her legs were spread when the alleged touching took place, R. 43, line 20 – R. 44, line 4, the state’s re-direct examination of Minor 1 revealed that even these admissions could not be construed as unequivocal admissions due to Minor 1’s lack of memory of the interview with Neely.

Essentially, the re-direct examination turned the unequivocal admissions into equivocations. The state’s re-direct examination of Minor 1 reinforced and highlighted the equivocation of Minor 1’s responses relative to her prior inconsistent statements. After the prosecutor made clear that Minor 1 had not seen the video, she asked, “So the video that was taken a year and a half ago - - when you are answering Mr. Hall’s questions, are you just trusting he is giving you what happened or do you have a recollection of what you talked about?” Minor 1 responded that she was “pretty confused about what he was saying is what he had gotten from the report.” R. 54, lines 5-11. Unabashed, the prosecutor continued: “When Mr. Hall is asking you questions about what is in the video, do you independently remember or do you understand or trust that he is telling you what he viewed on the video?” Minor 1 responded, “Um, kind of what he viewed on the video.” R. 54, lines 19-23.

A party must clearly present his grounds at trial to preserve it for appeal. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). The ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial. State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (1999). In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912 – 13 (Ct. App. 2004). Appellant raised this issue with specificity

before the trial judge. There is no doubt that the judge considered the prosecutor's re-direct examination of Minor 1 in making his ruling as his ruling occurred *after* the prosecutor engaged in re-direct examination. See R. 137, line 1 – R. 138, line 23; R. 154, lines 8-23. While Appellant did not say the prosecutor's re-direct examination had transformed any "denials" into equivocations, Appellant argued that Minor 1 had testified inconsistent with her video recorded interview. This argument was made after the prosecutor engaged in re-direct examination; therefore, the argument obviously encompassed all of the testimony before the court to that point. See R. 71, line 7 – R. 75, line 1; R. 109, line 25 – R. 111, line 15; R. 112, lines 5-25; R. 119, lines 3-21. This issue was raised with sufficient specificity to alert the trial judge that consideration of the prosecutor's re-direct examination was necessary to determine whether Minor 1 had testified inconsistently with her video recorded statement.

The prosecutor's re-direct examination portrayed defense counsel as dishonest in his cross-examination by suggesting that what defense counsel said was on the video was not in fact on the video. This was particularly disingenuous in light of the prosecutor's repeated objections to Appellant's attempts to introduce the video into evidence. The prosecutor misled the jury in her questioning of Minor 1 as to what was contained on the video and how the Minor 1's statements to the officer differed from her trial testimony. The deceitful questioning created a false impression for the jury regarding the veracity of Minor 1 and of defense counsel personally.

Without question, the prosecutor's re-direct examination of Minor 1 turned each of her responses into equivocations. Further, the prosecutor's questions cast personal aspersions on Appellant's counsel by suggesting that counsel's questions were not accurate as to what was contained on the video. Consideration of the prosecutor's re-direct examination demonstrates

that Minor 1's responses were not unequivocal admissions to inconsistent statements. Therefore, Appellant should have been permitted to introduce the video to impeach Minor 1.²

(3) The clothing Minor 1 was wearing

This Court held the trial judge properly ruled the video was inadmissible because the testimony on this point concerned a collateral issue, not subject to impeachment by the admission of extrinsic evidence. The clothing Minor 1 was wearing at the time of the alleged improper touching was not a collateral issue. The clothing she was wearing when the alleged incident occurred was central to her credibility, which was the entirety of the state's case. This was a classic "he said, she said" as there were no other witnesses and no physical evidence. The only evidence that Appellant engaged in any improper conduct was Minor 1's testimony, which was contradictory and inconsistent with statements she gave to the police when the alleged event would have been fresher in her mind.

Minor 1 testified at trial that she had on a blue and white top when the incident allegedly occurred, but on the video she told the officer she was wearing the top she had on at the time of the interview. R. 40, lines 16-24.³ When Appellant asked if the top she had on during her interview with the officer was an olive green t-shirt, Minor 1 responded, "I mean, I can't remember exactly what the top was. It was - - it was either blue or green. I can't really remember." R. 40, line 25 – R. 41, line 7. Concerning her response about the telling the officer she was wearing the same top on the date of the interview as she wore on the date of the alleged incident, Minor 1 responded, "I believe so, yes." R. 40, lines 20-24. When Appellant queried Minor 1 on the color of the shirt she wore on the date of the interview, Minor 1 responded, "I

² Appellant respectfully requests his argument that consideration of re-direct examination is preserved for review and that it supports his position that Minor 1's responses were not unequivocal admissions be considered as to **each** of Minor 1's inconsistent statements.

mean, I can't remember exactly what the top was. It was - - it was either blue or green. I can't really remember." R. 40, line 25 – R. 41, line 7. Quite clearly, this was not an unequivocal admission that she gave a prior inconsistent statement.

The color of Minor 1's shirt on the date of the alleged incident was not a collateral matter. According to this Court, "[t]he color of the shirt worn by Minor [1] at the time of the alleged incident had no evidentiary value and was not relevant to any issue of consequence in this case." However, Minor 1's statements about the color of her shirt were very relevant to the case. "[T]he credibility of a witness with respect to a material issue in a case is not a collateral, immaterial or irrelevant matter." State v. Galloway, 263 S.C. 585, 593, 211 S.E.2d 885, 889 (1975)(internal citation omitted). Thus, "if a prior statement bears upon the story of a witness with such force and directness as to give it appreciable value in determining whether or not that story is true, such statement may be introduced against him." Id. Minor 1's prior inconsistent statement about the color of her shirt at the time of the alleged improper touching was central to Minor's credibility. The entire case boiled down to whether Minor 1 was telling the truth. While it is true that the actual color of her shirt had little to do with whether Appellant touched her improperly, the fact that Minor 1 gave inconsistent statements on the matter was very material to her credibility, which was the only issue in the case. This Court erred in finding Minor's prior statement regarding the color of her shirt was a collateral matter.

(4) The way Appellant allegedly touched Minor 1

This Court found Minor 1's statement in the video was not inconsistent with her testimony at trial regarding how Appellant allegedly touched Minor 1. The record reveals otherwise.

³ The top she wore during the video statement was not blue and white.

At trial, Minor 1 claimed that Appellant put his hands “right in front where the zipper is” underneath her shorts and underwear. She elaborated that this was “right in the front, not between the legs but just like right down there in the front.” Minor 1 referred to this area as “the privates.” R. 29, line 11 – R. 30, line 6; R. 32, lines 19-24. Specifically, Minor 1 claimed that three of Appellant’s fingers went into the front of her shorts. R. 24, line 12 – R. 29, line 10; R. 34, line 21 – R. 35, line 8; R. 35, line 23 – R. 36, line 3; R. 42, lines 16-25.

On the video, Minor 1 told the officer Appellant’s hand had touched her. When questioned about this inconsistency, Minor 1 claimed she *did not remember* telling the officer that she thought *only* Appellant’s hand had touched her. R. 48, lines 2-9. Minor 1 unequivocally denied telling the officer that only Appellant’s hand had touched her:

Q. Do you remember telling Detective Neely on the video that - - I think your words were, I think that his hand was touching - - do you remember saying that? You don’t remember that?

A. No.

R. 48, lines 2-5. Despite the stark contrast between her trial testimony and her video interview, Minor 1 testified that she told the officer “exactly what happened.” R. 45, lines 17-19. This *denial* required introduction of extrinsic evidence of the inconsistent statement pursuant to the plain language of the statute and controlling case law. See Rule 613, SCORE; see also Fossick, 333 S.C. at 69-70, 508 S.E.2d at 33; Copeland, 278 S.C. at 572, 300 S.E.2d at 63; Blalock, 357 S.C. at 80, 591 S.E.2d at 636; State v. Carmack, 388 S.C. at 201-202, 694 S.E.2d at 230; Moses, 390 S.C. at 523, 702 S.E.2d at 406.

(5) The reason Minor 1 delayed making allegations of the sexual assault

This Court held the trial court properly found the video inadmissible on this point because Appellant “was not seeking to prove a prior inconsistent statement but rather a prior statement was

never made.” While it is true that Appellant was trying to prove that Minor 1 had *not* told the officer that she did not want to lose her friends and that was the reason she had not revealed the alleged improper touching, Appellant was also trying to prove a prior inconsistent statement. Minor 1 claimed she had told the officer of her alleged reason for not revealing the improper touching; however, the video was incontrovertible evidence otherwise. Thus, Appellant was trying to prove an inconsistent statement. The entire case centered on whether Minor 1 was believable. Appellant should have been permitted to explore her prior inconsistent statements – even those were Minor 1 had made no statement, but claimed that she had.

The undisputed facts were that Minor 1 never revealed this alleged encounter to Appellant’s daughter, her friend. R. 33, lines 14-24. In fact, Minor 1 testified that she told no one because she “didn’t want to lose one of [her] friends that [she] had on that road.” R. 35, lines 9-19. When Minor 1 turned thirteen in February of 2012, she and her mother were watching a television program about a sexual assault. When her mother advised Minor 1 to confide in her if something like that ever happened, Minor 1 “blurted it out.” Her mother called the police immediately. R. 36, line 19 – R. 37, line 13; R. 39, lines 16-18. When the police arrived, Minor 1 did not write a statement; instead, her mother wrote the official statement to police without Minor 1 even present. R. 37, lines 14-20; R. 45, lines 4-14.

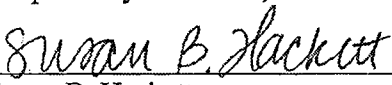
At trial, Minor testified that she *thought* she had told the officer that she did not tell anyone what happened because of her friendship with Appellant’s daughter, but she was unable to give a definitive answer because she had not seen the video. R. 47, lines 16-23. Specifically, when Appellant asked if Minor 1 had told the officer that she had not told anyone about the alleged incident because of her friendship with Appellant’s daughter, Minor responded, “I thought I had.” R. 47, lines 16-22.

Quite clearly, Minor 1's testimony on this point contradicted what she had told the officer. Thus, Appellant should have been permitted to introduce evidence of her statement to the officer in which she did not say that she did not tell anyone what happened because of her fear of losing friends. See Rule 613, SCRE; see also Fossick, 333 S.C. at 69-70, 508 S.E.2d at 33; Copeland, 278 S.C. at 572, 300 S.E.2d at 63; Blalock, 357 S.C. at 80, 591 S.E.2d at 636; State v. Carmack, 388 S.C. at 201-202, 694 S.E.2d at 230; Moses, 390 S.C. at 523, 702 S.E.2d at 406.

Finally, Appellant requests rehearing concerning this Court's prejudice determination. The testimony by Minor 1 was the only evidence in the record to support a conviction. Minor 1's credibility was central to the case. Although Appellant cross-examined Minor 1 and the police officer who interviewed her, Appellant's cross-examination was cut short by the judge's ruling that he could not present video evidence of contradictory statements by Minor 1. The video was powerful evidence because it was incontrovertible. See State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012); State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006); State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002); State v. Fossick, 333 S.C. 66, 508 S.E.2d 32 (1998); State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995); State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004).

Appellant respectfully requests rehearing in this case to review the points misapprehended and/or overlooked by this Court in issuing its opinion. The case law is clear that unless a witness unequivocally admits to making the prior inconsistent statement, then extrinsic evidence of the prior inconsistent statement is admissible.

Respectfully submitted,


 Susan B. Hackett
 Appellate Defender

This 3rd day of September, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LEONARD EUGENE JENKINS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Leonard Eugene Jenkins, at _____, Rock Hill, S.C. 29732, this 3rd day of September, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 3rd day
of September, 2015.

[Signature] (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.

The South Carolina Court of Appeals

The State, Respondent,

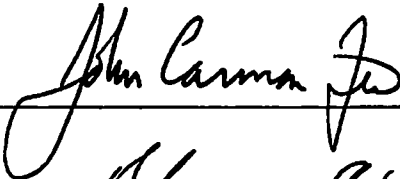
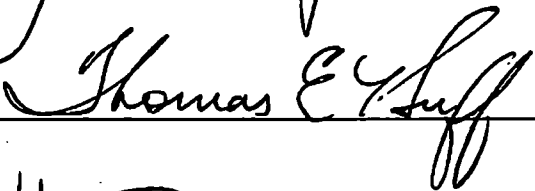
v.

Leonard Eugene Jenkins, Appellant.

Appellate Case No. 2013-001753

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

	C.J.
	J.
	J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
Susan Barber Hackett, Esquire
John Benjamin Aplin, Esquire
Kevin Scott Brackett, Esquire
The Honorable Donald B. Hocker

FILED

October 23, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Donald B. Hocker, Circuit Court Judge

Opinion No. 2015-UP-429 (S.C. Ct. App. filed 8/19/2015)

12-GS-46-2101

THE STATE,

RESPONDENT,

V.

LEONARD EUGENE JENKINS,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR PETITIONER.

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Violating Petitioner's right to confront the witnesses against him and to present a complete defense pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, the trial judge erred in refusing Petitioner's request to use a video tape of an interview between the prosecution's key witness and a police investigator to impeach the witness regarding her inconsistent statements about an alleged lewd act.	5
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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on October 23, 2015. App. 19.

QUESTION PRESENTED

Did the trial judge's refusal to allow Petitioner to use a video tape of an interview between the prosecution's key witness and a police investigator to impeach the witness regarding her inconsistent statements about an alleged lewd act violate Petitioner's right to confront the witnesses against him and to present a complete defense pursuant to the Sixth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

On June 13, 2013, a York County grand jury indicted Petitioner for a lewd act upon a child. The lewd act allegedly occurred “during or about the month of May 2011 through on or about the month of August 2011.” R. 228. Assistant Solicitor Jennifer Desch called the case for trial before the Honorable Donald Hocker and a jury on August 13, 2013. Daniel Hall represented Petitioner. R. 1. After a two day trial and three witnesses, the jury found Petitioner guilty as charged. R. 219, lines 5-10. Judge Hocker sentenced Petitioner to ten years’ imprisonment suspended upon the service of three years’ imprisonment and probation for three years. R. 227, lines 4-10; R. 230.

Petitioner filed a timely notice of appeal, which was perfected. On August 19, 2015, the Court of Appeals affirmed Petitioner’s conviction and sentence in an unpublished opinion. State v. Jenkins, 2015-UP-429 (S.C. Ct. App. filed Aug. 19, 2015); App. 1-4. On September 3, 2015, Petitioner filed a petition for rehearing. App. 5-18. On October 23, 2015, the Court of Appeals denied the petition. App. 19.

Petitioner now files this petition for writ of certiorari.

ARGUMENT

Violating Petitioner's right to confront the witnesses against him and to present a complete defense pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, the trial judge erred in refusing Petitioner's request to use a video tape of an interview between the prosecution's key witness and a police investigator to impeach the witness regarding her inconsistent statements about an alleged lewd act.

Reasons to grant certiorari

This Court should grant certiorari to review the Court of Appeals' decision in this case because of the substantial constitutional issues involved. The Sixth Amendment to the United States Constitution guarantees an accused the right to confront the witnesses against him and the right to present a defense. The entirety of the state's case against Petitioner centered on the key witness's credibility as there was no other evidence against Petitioner. Thus, the ability of Petitioner to cross-examine the witness on prior inconsistent statements and to show those inconsistent statements through extrinsic evidence was essential to his right to cross-examine the state's witness and present a defense. The constitutional questions involved in Petitioner's case require review by this Court.

Relevant facts

Direct examination of Minor 1

Petitioner, his wife, and his three children lived across the street from Minor 1 in a double-wide trailer in 2011. R. 21, lines 6-22; R. 41, lines 14-16. Petitioner's daughter and Minor 1 were friends and played together often. R. 21, line 25 – R. 22, line 1; R. 24, lines 2-8. Minor 1 claimed that on an unknown day during the summer of 2011 she was playing with Petitioner's daughter when the two decided to enter Petitioner's house to cool down. Although

Minor 1 was unable to give a specific day, she recalled that she went to Georgia to stay with her grandmother approximately two weeks *after* summer started and remained there until about a week before school started again. Later, Minor 1 testified that the alleged incident occurred *before* she went to Georgia for the summer.

According to Minor 1, Petitioner, his wife, and all three of his children were in the home when the alleged touching occurred. While Petitioner's daughter used the bathroom, Minor 1 sat on the couch. Minor 1 claimed that at some point, Petitioner sat down on the couch beside her. Petitioner, who had been holding his toddler when he entered the room, placed the toddler on Minor 1's lap. Minor 1 claimed that while she was playing with the toddler, Petitioner reached over and touched her. Specifically, Minor 1 claimed that three of Petitioner's fingers went into the front of her shorts. R. 24, line 12 – R. 29, line 10; R. 34, line 21 – R. 35, line 8; R. 35, line 23 – R. 36, line 3; R. 42, lines 16-25.

Minor 1 claimed she was wearing blue jean shorts with a blue and white striped top when this occurred. Additionally, Minor 1 claimed that Petitioner put his hands "right in front where the zipper is" underneath her shorts and underwear. She elaborated that this was "right in the front, not between the legs but just like right down there in the front." Minor 1 referred to this area as "the privates." R. 29, line 11 – R. 30, line 6; R. 32, lines 19-24. All of this allegedly occurred while Minor 1 still had the toddler on her lap. When Petitioner's daughter walked into the room from the bathroom, Minor 1 put the toddler on Petitioner's lap and walked outside. She and Petitioner's daughter played for the rest of the day. R. 30, lines 9-17. Even when Minor 1 returned from Georgia later in the summer, she and Petitioner's daughter continued to play together. R. 36, lines 4-7.

Minor 1 never revealed this alleged encounter to Petitioner's daughter. R. 33, lines 14-24. In fact, Minor 1 told no one because she "didn't want to lose one of [her] friends that [she] had on that road." R. 35, lines 9-19. When Minor 1 turned thirteen in February of 2012, she and her mother were watching a television program about a sexual assault. When her mother advised Minor 1 to confide in her if something like that ever happened, Minor 1 "blurted it out." Her mother called the police immediately. R. 36, line 19 – R. 37, line 13; R. 39, lines 16-18. When the police arrived, Minor 1 did not write a statement; instead, her mother wrote the official statement to police without Minor 1 even present. R. 37, lines 14-20; R. 45, lines 4-14.

Cross-examination of Minor 1

On cross-examination, Minor 1 admitted she was interviewed by Detective Neely and the interview was videotaped.¹ R. 38, line 20 – R. 39, line 2. When she spoke to Neely, the alleged incident would have occurred eight or nine months earlier, according to her trial testimony. However, she told Neely that it occurred "two to three months ago." In fact, she said "it happened right before school started." When asked about this inconsistency, she explained that "it slipped [her] head because [she] was so nervous." R. 39, line 10 – R. 40, line 7. Later, Minor 1 testified that she realized she had "slip[ped] up" regarding the date after she was interviewed by Neely or the solicitor. She did not believe that Neely or the solicitor told her she had slipped up, but she did try "to get [her] story right." R. 46, line 5 – R. 47, line 2. Finally, Minor thought she had told Neely that she did not tell anyone what happened because of her friendship with Petitioner's daughter, but she was unable to give a definitive answer because she had not seen the video. R. 47, lines 16-23.

¹ Defense counsel proffered the video as Defendant's Exhibit #2. The exhibit is on file with this Court.

Petitioner questioned Minor 1 regarding the inconsistency in her direct testimony that she had on a blue and white top when the incident allegedly occurred and her statement on video that the top she had on during the video statement, which was olive green. R. 40, lines 16-24. Minor 1 responded, "I mean, I can't remember exactly what the top was. It was - - it was either blue or green. I can't really remember." R. 40, line 25 – R. 41, line 7. Further, on the video, Minor 1 told Neely that when Petitioner touched her, she had her "knees almost up to [her] chest" and her legs were spread. This contrasted greatly with her trial testimony that Petitioner had placed his toddler on Minor 1's lap. R. 43, line 16 – R. 44, line 4. Minor 1 did not remember telling Neely that she thought only Petitioner's hand had touched her. R. 48, lines 2-9. Despite the stark contrast between her trial testimony and her video interview, Minor 1 testified that she told Neely "exactly what happened." R. 45, lines 17-19.

Re-direct examination of Minor 1

On re-direct examination, the prosecutor emphasized that Minor 1 had not watched the video of the interview and had not discussed the video with the prosecutor. To challenge the cross-examination, the prosecutor asked: "When you are answering Mr. Hall's questions, are you just trusting he is giving you what happened or do you have a recollection of what you talked about?" Minor 1 responded, "I was pretty confused about what he was saying is what he had gotten from the report." R. 53, line 25 – R. 54, line 11. This line of questioning continued with the prosecutor asking "When Mr. Hall is asking you questions about what is in the video, do you independently remember or do you understand or trust that he is telling you what he viewed on the video?" Minor responded, "kind of what he viewed on the video." R. 54, lines 19-23.

Argument on the motion

During a break, the solicitor argued that although the video was inadmissible due to the statute and case law because Minor 1 was thirteen-years old at the time of trial, the video was admissible as a prior consistent statement to rebut an allegation of recent fabrication. However, the solicitor argued that the admissibility was limited to time and place. R. 60, line 7 – R. 66, line 8. When the judge inquired if the solicitor wanted the “whole video to come in,” the solicitor responded, “It is not that I don’t or I do. If he would like to put it in, he could put it in. He could put it in as a defense exhibit.” R. 66, lines 13-17. After the judge ruled that portions of the video would be admissible as a prior consistent statement to rebut an allegation of recent fabrication as long as it was limited to time and place, Petitioner moved to admit the entire video pursuant to Rule 613, SCRE. Petitioner argued that the video contained prior *inconsistent* statements made by Minor 1 and he should be permitted to impeach her with those statements. R. 71, line 7 – R. 75, line 1.

The prosecution countered that there were no “outright denials” and argued that only an “outright denial” would “trigger[] extrinsic evidence.” However, the prosecutor admitted Minor 1 repeatedly testified that she could not remember what her statements in the video had been. R. 75, line 10 – R. 76, line 24.

When Neely testified, Petitioner moved to introduce the video of the interview between Neely and Minor 1 into evidence pursuant to Rule 801(d)(1)(A). Petitioner explained the video contained inconsistent statements made by Minor 1. Additionally, Petitioner argued that the rule of completeness required the admission of the entire video. R. 109, line 25 – R. 111, line 15. Petitioner noted Minor 1’s testimony differed from the video interview in multiple respects, including the timing of the alleged incident, how she was sitting, and how the alleged touching

occurred. R. 112, lines 5-25. Although the prosecutor admitted the video contained inconsistent statements, the prosecutor opposed the introduction of the video because Petitioner cross-examined Minor 1 as to those inconsistencies. R. 119, lines 3-21.

Ruling by the judge

The judge ruled first that Minor 1 was advised of the time and place of the statement and to whom the statement was made satisfying part of Rule 613(b). Next, the judge ruled that Minor admitted that in the video that “she had the same top on during the video.” He further found that Minor 1 admitted that she said in the video that her knees were to her chest and that her legs were spread at the time of the alleged incident. Additionally, Minor 1 acknowledged that she did not tell anyone about the alleged incident because she did not want it to affect her friendship. However, the judge concluded that Minor 1 “neither admits nor denies telling Detective Neely that the defendant’s hand was touching her. She said she did not remember.” Based upon those findings, the trial judge ruled the video was not admissible for impeachment. R. 137, line 1 – R. 138, line 23; R. 154, lines 8-23.

Discussion

The South Carolina Rules of Evidence permit the introduction of extrinsic evidence of prior inconsistent statements of a witness when:

the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness *does not admit* that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

Rule 613, SCRE (emphasis added); see also State v. Fossick, 333 S.C. 66, 69-70, 508 S.E.2d 32, 33 (1998)(finding error in failing to admit extrinsic evidence of a statement where the witness denied

making the statement). A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982).

The Court of Appeals observed that “[i]n determining whether a witness has admitted making a prior inconsistent statement and thereby obviated the need for extrinsic proof, the courts of our state and other jurisdictions have held that the witness must admit making the prior statement unequivocally and without qualification.” State v. Blalock, 357 S.C. 74, 591 S.E.2d 632 (Ct. App. 2003)(citing State v. Bottoms, 260 S.C. 187, 194, 195 S.E.2d 116, 118 (1973) & C.J.S. Witnesses 727 (2002)). The Court explained that “[g]enerally, where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement. Id. at 80, 591 S.E.2d at 636.

If the witness neither directly admit[s] nor den[ies] the act or declaration, as when he merely says that he does not recollect, or, or as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember.

Id. (quoting State v. Sullivan, 43 S.C. 205, 211, 21 S.E. 4, 7 (1895)).

Nothing short of an absolute unequivocal admission satisfies Rule 613(b). In Blalock, 357 S.C. at 80, 591 S.E.2d at 636, the Court of Appeals held the witness’s response to questions about her prior statement did “not meet the standard of a clear and unequivocal admission that the precedent case law demands.” Acknowledging that the witness did “admit that she said the portion of the statement quoted” toward the end of the examination, the Court of Appeals held such an admission was not sufficient because the witness was adamant throughout her testimony that the statement as recorded by the detective was incomplete. Id. at 81, 591 S.E.2d at 636.

Similarly, in State v. Carmack, 388 S.C. 190, 201-202, 694 S.E.2d 224, 230 (Ct. App. 2010), the Court of Appeals held that a prior inconsistent statement by a witness who said his prior statement was “accurate,” that “certain details were not in his original statement because such details were not inquired into at the time and ‘everything was chaotic’” was admissible because the witness “did not unequivocally admit making a prior inconsistent statement.” In State v. Moses, 390 S.C. 502, 523, 702 S.E.2d 395, 406 (Ct. App. 2010), the Court of Appeals held the trial court properly admitted a prior inconsistent statement by a witness who testified she “could not remember” having made the prior statement because such was “not an unequivocal admission.”

The way Petitioner allegedly touched Minor 1

At trial, Minor 1 said Petitioner put his hands “right in front where the zipper is” underneath her shorts and underwear. R. 29, line 11 – R. 30, line 6; R. 32, lines 19-24. She also claimed that three of Petitioner’s fingers went into the front of her shorts. R. 24, line 12 – R. 29, line 10; R. 34, line 21 – R. 35, line 8; R. 35, line 23 – R. 36, line 3; R. 42, lines 16-25. However, on the video, Minor 1 told the officer only Petitioner’s hand had touched her.

When questioned about this inconsistency, Minor 1 claimed she *did not remember* telling the officer that she thought *only* Petitioner’s hand had touched her. R. 48, lines 2-9. Minor 1 unequivocally denied telling the officer that only Petitioner’s hand had touched her:

Q. Do you remember telling Detective Neely on the video that - - I think your words were, I think that his hand was touching - - do you remember saying that? You don’t remember that?

A. No.

R. 48, lines 2-5. This *denial* required introduction of extrinsic evidence of the inconsistent statement pursuant to the plain language of the statute and controlling case law. See Rule 613, SCRE; see also Fossick, 333 S.C. at 69-70, 508 S.E.2d at 33; Copeland, 278 S.C. at 572, 300 S.E.2d

at 63; Blalock, 357 S.C. at 80, 591 S.E.2d at 636; State v. Carmack, 388 S.C. at 201-202, 694 S.E.2d at 230; Moses, 390 S.C. at 523, 702 S.E.2d at 406. The Court of Appeals held Minor 1's statement in the video was not inconsistent with her trial testimony concerning the way Petitioner allegedly touched her. However, a comparison of the testimony and her videotaped statement revealed an inconsistency in this regard. Further, on cross-examination, Minor 1 testified that she did not remember telling Neely that only Petitioner's hand had touched her. This failure to unequivocally admit the prior inconsistent statement entitled Petitioner to present the extrinsic evidence.

The time period in which the alleged incident occurred

Minor 1 testified the alleged incident occurred during the first two weeks of summer in 2011. R. 24, line 12 – R. 29, line 10; R. 34, line 21 – R. 35, line 8; R. 35, line 23 – R. 36, line 3; R. 42, lines 16-25. However, when Minor 1 spoke to the investigating officer, Minor 1 claimed the alleged incident occurred “two to three months ago” meaning two to the three months before her interview with the officer. She told the officer “it happened right before school started.” R. 39, line 10 – R. 40, line 7. Minor 1's statements to the officer were in great contrast with her trial testimony because according to her testimony, the alleged incident occurred during the first two weeks of the summer, which would have been *eight or nine months* before her interview with the officer.

On cross-examination, Minor 1 said that she told Neely that the alleged incident took place two to three months prior to her interview. However, Minor 1 explained her answer by saying “I mean, I hadn't really a good time - - I was trying to remember exactly when it happened because I tried as best as possible, but it slipped my head because I was so nervous.” R. 39, line 10 – R. 40, line 7; R. 46, line 5 – R. 47, line 2. R. 39, line 19 – R. 40, line 2.

On re-direct examination, the prosecutor asked “how narrow” was Minor 1’s answer to the officer on the timeframe. Minor 1 responded that she was trying to narrow it down and told the officer everything she could remember. R. 55, lines 10-21. In response to the prosecutor’s questioning on re-direct examination, Minor 1 testified that she could “not remember a lot of [the video interview] because it was about maybe - - it was just a while ago” and she could “not really remember exactly.” R. 58, lines 11-21.

Minor 1’s testimony was *not* an unequivocal admission regarding a central issue of the case – when the alleged improper touching occurred. When questioned about the inconsistency, Minor 1 did *not* admit that she had been inconsistent. Rather, she claimed it had slipped her mind and that she was trying to get her story straight. Minor 1’s testimony was *not* an unequivocal admission that she had given a prior inconsistent statement on this vital matter. The Court of Appeals held Minor 1 admitted making a prior inconsistent statement; however, the record revealed Minor 1’s testimony was not an unequivocal denial. See App. 2. Further, the Court of Appeals refused to consider the impact of the solicitor’s re-direct examination because Petitioner “did not raise this specific argument at trial.” App. 2, n.1. This was error. The trial judge clearly considered the impact of the re-direct examination when ruling on the motion because the ruling was delivered after the re-direct examination. See R. 137, line 1 – R. 138, line 23; R. 154, lines 8-23. Therefore, Petitioner should have been permitted to use the videotaped interview to impeach Minor 1’s credibility.

The clothing Minor 1 was wearing

Minor 1’s testimony was that she wore a blue and white top when the incident allegedly occurred, but on the video she told the officer she was wearing the top she had on at the time of the interview – an olive green shirt – when the alleged incident occurred. R. 40, lines 16-24.

When Petitioner asked if the top she had on during her interview with the officer was an olive green t-shirt, Minor 1 responded, “I mean, I can’t remember exactly what the top was. It was - - it was either blue or green. I can’t really remember.” R. 40, line 25 – R. 41, line 7. Quite clearly, this was *not* an unequivocal admission that she gave a prior inconsistent statement.

The color of Minor 1’s shirt on the date of the alleged incident was not a collateral matter as the Court of Appeals held. See App. 2-3. Minor 1’s statements about the color of her shirt were very relevant to the case. “[T]he credibility of a witness with respect to a material issue in a case is not a collateral, immaterial or irrelevant matter.” State v. Galloway, 263 S.C. 585, 593, 211 S.E.2d 885, 889 (1975)(internal citation omitted). Thus, “if a prior statement bears upon the story of a witness with such force and directness as to give it appreciable value in determining whether or not that story is true, such statement may be introduced against him.” Id. Minor 1’s prior inconsistent statement about the color of her shirt at the time of the alleged improper touching was central to Minor’s credibility. The entire case boiled down to whether Minor 1 was telling the truth. The fact that Minor 1 gave inconsistent statements on the matter was very material to her credibility, which was the only issue in the case. This was a classic “he said, she said” as there were no other witnesses and no physical evidence. The only evidence that Petitioner engaged in any improper conduct was Minor 1’s testimony, which was contradictory and inconsistent with statements she gave to the police when the alleged event would have been fresher in her mind.

The reason Minor 1 delayed making allegations of the sexual assault

At trial, Minor testified that she *thought* she had told the officer that she did not tell anyone what happened because of her friendship with Petitioner’s daughter, but she was unable to give a definitive answer because she had not seen the video. R. 47, lines 16-23. Specifically,

when Petitioner asked if Minor 1 had told the officer that she had not told anyone about the alleged incident because of her friendship with Petitioner's daughter, Minor responded, "I thought I had." R. 47, lines 16-22. However, the video was incontrovertible evidence otherwise – Minor 1 had not told the officer why she did not reveal the alleged incident.

Petitioner should have been permitted to explore her prior inconsistent statements – even those where Minor 1 had made no statement, but claimed that she had. See Rule 613, SCRE; see also Fossick, 333 S.C. at 69-70, 508 S.E.2d at 33; Copeland, 278 S.C. at 572, 300 S.E.2d at 63; Blalock, 357 S.C. at 80, 591 S.E.2d at 636; State v. Carmack, 388 S.C. at 201-202, 694 S.E.2d at 230; Moses, 390 S.C. at 523, 702 S.E.2d at 406. The Court of Appeals held Petitioner was not allowed to impeach Minor 1 with the videotaped statement in which she never advised Neely of the reason she delayed disclosing the alleged abuse because Petitioner "was not seeking to prove a prior inconsistent statement but rather a prior statement was never made." App. 3. Certainly, Petitioner was trying to prove that a prior statement was never made. This proof would have been inconsistent with Minor 1's testimony that a prior statement had been made. Thus, the testimony of Minor 1 at trial was inconsistent with her videotaped statement to Neely. As such, it fit within the purview of Rule 613(b), SCRE, and the constitutional right to cross-examination.

The position Minor 1 had her legs at the time of the alleged incident

Minor 1 testified that while she sat on the couch, Petitioner placed his toddler daughter on Minor 1's lap. While Minor 1 was playing with the toddler on her lap, Petitioner reached over and improperly touched her. R. 24, line 12 – R. 29, line 10; R. 34, line 21 – R. 35, line 8; R. 35, line 23 – R. 36, line 3; R. 42, lines 16-25. However, during her video recorded interview with the investigating officer, Minor 1 told the officer that when Petitioner touched her, she had her "knees almost up to [her] chest" and her legs were spread. R. 43, line 16 – R. 44, line 4.

Although on cross-examination, Minor 1 admitted she told Neely that her knees were almost to her chest and that her legs were spread when the alleged touching took place, R. 43, line 20 – R. 44, line 4, the state’s re-direct examination of Minor 1 revealed that even these admissions could not be construed as unequivocal admissions due to Minor 1’s lack of memory of the interview with Neely as explained more fully below. R. 54, lines 5-11; R. 54, lines 19-23.

Effect of the solicitor’s re-direct examination

The state’s re-direct examination of Minor 1 reinforced and highlighted the equivocation of Minor 1’s responses relative to her prior inconsistent statements and turned the unequivocal admissions into equivocations. After the prosecutor made clear that Minor 1 had not seen the video, she asked, “So the video that was taken a year and a half ago - - when you are answering Mr. Hall’s questions, are you just trusting he is giving you what happened or do you have a recollection of what you talked about?” Minor 1 responded that she was “pretty confused about what he was saying is what he had gotten from the report.” R. 54, lines 5-11. Unabashed, the prosecutor continued: “When Mr. Hall is asking you questions about what is in the video, do you independently remember or do you understand or trust that he is telling you what he viewed on the video?” Minor 1 responded, “Um, kind of what he viewed on the video.” R. 54, lines 19-23.

The prosecutor’s re-direct examination portrayed defense counsel as dishonest in his cross-examination by suggesting that what defense counsel said was on the video was not in fact on the video. This was particularly disingenuous in light of the prosecutor’s repeated objections to Petitioner’s attempts to introduce the video into evidence. The prosecutor misled the jury in her questioning of Minor 1 as to what was contained on the video and how the Minor 1’s statements to the officer differed from her trial testimony. The deceitful questioning created a false impression for the jury regarding the veracity of Minor 1 and of defense counsel personally.

Without question, the prosecutor's re-direct examination of Minor 1 turned *each* of her responses into equivocations. Further, the prosecutor's questions cast personal aspersions on Petitioner's counsel by suggesting that counsel's questions were not accurate as to what was contained on the video. Consideration of the prosecutor's re-direct examination demonstrates that Minor 1's responses were not unequivocal admissions to inconsistent statements. Therefore, Petitioner should have been permitted to introduce the video to impeach Minor 1. The Court of Appeals refused to consider Petitioner's argument that the solicitor's re-direct examination of Minor 1 converted Minor 1's admissions into equivocations because Petitioner "did not raise this specific argument at trial." App. 2, n.1. However, the Court of Appeals failed to note that the ruling on the motion occurred after the solicitor conducted re-direct examination, and would have been a factor considered by the judge. Further, the motion to admit the video was formally made only after Minor 1 testified and during the testimony of the officer because the appropriate foundation had to be laid. Thus, the trial court considered the direct examination, cross examination, and re-direct examination in making its ruling on the motion to admit the video as extrinsic evidence of Minor 1's prior inconsistent statements.

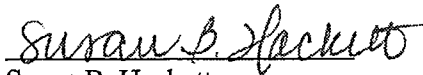
The case law is clear that unless a witness unequivocally admits to making the prior inconsistent statement, then extrinsic evidence of the prior inconsistent statement is admissible. The trial judge clearly erred in excluding the video interview containing Minor 1's prior inconsistent statements because Minor 1 failed to unequivocally admit to making those statements. The testimony by Minor 1 was the only evidence in the record to support a conviction. Minor 1's credibility was central to the case. Although Petitioner cross-examined Minor 1 and the police officer who interviewed her, Petitioner's cross-examination was cut short by the judge's ruling that he could not present video evidence of contradictory statements by Minor 1. The video

was powerful evidence because it was incontrovertible. The judge's ruling denied Petitioner the right to confront his accusers and present a complete defense. See State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012); State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006); State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002); State v. Fossick, 333 S.C. 66, 508 S.E.2d 32 (1998); State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995); State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004).

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 18th day of November, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

 Certiorari to York County

 Donald B. Hocker, Circuit Court Judge

 Opinion No. 2015-UP-429 (S.C. Ct. App. filed 8/19/2015)
 12-GS-46-2101

THE STATE,

RESPONDENT,

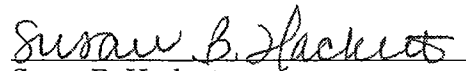
V.

LEONARD EUGENE JENKINS,

PETITIONER

 CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Leonard Eugene Jenkins #138712, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, and the S.C. Court of Appeals this 18th day of November, 2015.



 Susan B. Hackett
 Appellate Defender

ATTORNEY FOR PETITIONER

 SWORN TO BEFORE ME this 18th day
 of November, 2015.

 (L.S.)
 Notary Public for South Carolina
 My Commission Expires: October 30, 2022

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of General Sessions
Donald B. Hocker, Circuit Court Judge

Opinion No. 2015-UP-429 (S.C. Ct. App. filed August 19, 2015)

Appellate Case No: 2015-002359

The State, ...Respondent,

v.

Leonard Eugene Jenkins, ...Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether Petitioner's failure to challenge the Court of Appeals ruling that his appellate argument regarding his rights under the Sixth or Fourteenth Amendments to the United States Constitution were not preserved for appellate review means that issue preservation ruling is now the law of the case and requires dismissal of his Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Leonard Eugene Jenkins (Petitioner) was indicted at the June 13, 2013, term of the grand jury for York County for one count of lewd act upon a child (2012-GS-46-2101). He was represented by Dan Hall, Esquire, of the York County Bar. The State was represented by Assistant Solicitor Jennifer Desch of the Sixteenth Circuit Solicitor's Office. (R.p.1). On August 14, 2012, Petitioner proceeded to trial by jury before the Honorable Donald Hocker, pursuant to which he was found guilty as indicted. The trial court sentenced him to ten (10) years' imprisonment suspended upon the service of three (3) years' imprisonment and three (3) years' probation. (R.p.215, line 3-p.227, line 13; p.228-230). Petitioner timely filed a notice of intent to appeal his conviction and sentence as well as a brief in support of his appeal and the Respondent (the State) filed a brief in response. Petitioner's conviction and sentence were subsequently affirmed in an unpublished opinion from the Court of Appeals. State v. Jenkins, Op. No. 2015-UP-429 (S.C. Ct. App. filed August 19, 2015). (App.p.1-p.4). Petitioner submitted a timely Petition for Rehearing and by Order filed October 23, 2015, the Petition was denied. (App.p.5-p.19). On November 18, 2015, Petitioner submitted a Petition for a Writ of Certiorari to this Court and now this Return on behalf of the State follows.

STATEMENT OF FACTS

On afternoon during the summer of 2011, Petitioner committed a lewd act on the twelve-year-old victim by sticking his hand down the front of her shorts and underwear and touching her “privates.” The victim first disclosed the incident to her mother in February of 2012 when she turned thirteen. (R.p.19, line 8-p.38, line 14). Petitioner was subsequently arrested and indicted for lewd act upon a minor. On August 13-14, 2013, he proceeded to trial by jury pursuant to which he was found guilty as indicted.

At the call of the case, Petitioner made a motion in limine raising seven evidentiary issues, the last of which concerned a video recording of a police detective’s interview of the victim. Petitioner’s counsel said: “I state at this point, there was a video-recorded interview from the detective with the 13-year old child. We certainly don’t have any objections if the state intends or wishes to introduce that. So if we get to that point and they want to introduce that video of the interview then it would be without objection from the defense.” (R.p.2, lines 7-14). After the jury was selected and sworn, the trial court gave preliminary instructions and asked the parties to proceed with opening statements. (R.p.3, line 2-p.14, line 15). Petitioner noted the victim would be the only witness to the alleged incident and asked the jury to focus on how her story changed over time in assessing her credibility and whether the State would be able to meet its overall burden of proof. (R.p.14, line 16-p.19, line 1).

The State then called the victim to the stand. She gave specific testimony about the lewd act committed by Petitioner in the summer of 2011, when she was twelve years old. One morning the victim was playing outside with her friend, eleven-year-old Kacie

1. Kacie lived across the street in a house with Petitioner, Petitioner’s wife Janet,

and two other children, Amber and Gracey.¹ Sometime in the early afternoon, Kacie went into her house to cool off. A few minutes later the victim followed her inside and sat on a couch to wait for Kacie to get out of the bathroom. While she was waiting, Petitioner came into the room carrying Gracey, sat down on the couch, and placed Gracey on the victim's lap. The victim began bouncing Gracey up and down on her knee when Petitioner reached over and put three of his fingers down the front of the victim's shorts and underwear. Petitioner touched the victim's "privates," making skin to skin contact. The victim handed Gracey back to Petitioner just as Kacie walked into the room, and the two girls went back outside to play for the rest of the day. At first, the victim did not tell anybody about the incident because she did not want to lose her only friend who lived on the same road. She continued being friends with Kacie but tended to stay outside and avoided Petitioner when they played. The victim did not disclose the incident to anyone until February of 2012 when she and her mother were watching a news story about some other person being reported for similar behavior, at which point she decided to tell her mother what had happened. The victim's mother called the police and reported the incident. (R.p.19, line 8-p.38, line 14).

On cross-examination, Petitioner asked the victim if she remembered being interviewed by Detective Neely after her mother reported the incident to the police. She testified she remembered being interviewed and acknowledged the interview was video recorded. Petitioner proceeded to question the victim about particular statements she made during that interview in an apparent attempt to show inconsistencies between those statements and her testimony at trial. Petitioner focused on five specific alleged

¹ Gracey, whose full name is Graceland , was a toddler at the time of the incident and is the biological daughter of Petitioner and Janet. Kacie and Amber are Janet's children from a prior marriage.

“inconsistencies” involving: (1) the timing of the incident; (2) the shirt the victim was wearing; (3) the position of the victim’s legs; (4) the reason the victim gave for the delay in her disclosure; and (5) whether Petitioner’s hand had actually touched the victim. (R.p.38, line 14-p.49, line 25).

First, Petitioner asked about the victim’s trial testimony that the incident happened in the summer, which he incorrectly characterized as approximately “eight or nine” months before her disclosure. He then asked if the victim had initially told Detective Neely it happened only two to three months before the disclosure. The victim unequivocally admitted making this statement to the Detective, but explained it was made because she was so nervous during the interview. Next, Petitioner asked the victim if she later told Detective Neely the incident happened right before school started; however, he did not give her an opportunity to admit or deny the statement because he compounded the question by immediately asking if she had seen the video. The victim replied “no,” and explained she had never seen the video recording of her interview. Later, Petitioner again asked about timing at which point the victim unequivocally acknowledged making a statement to Detective Neely that the incident happened “right before school started.” She then explained she thinks she meant to say it was “right before school ended,” and realized the slip-up sometime after the interview when she was trying to “get her story right.” (R.p.39, line 10-p.40, line 15; p.46, lines 5-25).

Second, Petitioner questioned the victim about her testimony that she was wearing a blue and white top when the incident occurred. He then asked if she had told Detective Neely she was wearing the same top as the one she was wearing during the interview, which was an olive green T-shirt rather than a blue and white one. The victim testified

she believed she had made that statement. She then explained she could not remember exactly what top she was wearing, but that it was either blue or green. (R.p.40, line 16-p.41, line 9). Third, Petitioner asked the victim about her trial testimony that Petitioner put Gracey on her lap just before the incident. He then asked if she had told Detective Neely she had her knees up to her chest and her legs spread at the time of the incident. The victim unequivocally admitted making that statement during the interview. (R.p.43, line 16-p.44, line 4).

Fourth, Petitioner questioned the victim about her testimony that she refrained from immediately disclosing the incident because she did not want to harm her friendship with Kacie. He asked the victim whether she ever said this to Detective Neely during the interview. The victim testified she thought she had, and Petitioner commented: "Maybe we will get an opportunity to see that." (R.p.47, lines 16-23). Finally, Petitioner addressed the victim's testimony at trial that Petitioner had touched her with his hand. He asked if she remembered telling Detective Neely "I think" that his hand was touching me. The victim testified she did not remember making that particular comment, but did not deny it. (R.p.48, lines 1-9). Petitioner concluded his cross-examination without making a motion or any other attempt to introduce all or part of the video recording into evidence. (R.p.49, lines 24-25).

On re-direct, the victim repeated her testimony that she had never seen the video recording of her interview with Detective Neely, and she testified she had never even talked about the video with the solicitor before trial. The victim testified that during cross-examination she was trusting Petitioner's counsel's version of what happened during the interview as being accurate. She testified she couldn't remember exactly what

she said during the interview with Neely, only that it was about the general incident, what happened, and where on her body she was touched. (R.p.50, line 3-p.59, line 6). The victim never claimed she did not remember making a statement to Detective Neely. Indeed, throughout her testimony she unequivocally admitted being interviewed after Petitioner's arrest. Petitioner declined when the trial court asked if he wished to conduct any re-cross-examination, and he again made no motion to introduce the video recording into evidence. (R.p.59, lines 7-11).

Following a break and outside the presence of the jury, the solicitor advised the judge she had concerns about any attempt to introduce the video recording of what was essentially a "forensic interview" with Detective Neely. She explained she believed the State could not simply introduce the video into evidence because it was inadmissible hearsay, except possibly the specific portions of the video that might qualify for admission under Rule 801(d) as prior consistent statements being offered to rebut an allegation of recent fabrication, and that even then those statements would likely be limited to the time and place of the incident. Petitioner responded: "I am not objecting to the whole video coming in." He contended there was "exculpatory information" on the video and repeatedly stated he wanted it to come in to evidence. The solicitor commented that Petitioner could put the video recording into evidence as a defense exhibit if he wanted. Petitioner however complained that the State was trying to "stand behind a rule that it is inadmissible when my client is willing to waive and give up that and determine whether it is admissible. He wants it in." (R.p.60, line 7-p.67, line 11).

The parties continued to argue about whether all or parts of the video would be admissible and on what basis. After hearing the arguments, the trial court found the State

would be allowed to introduce evidence of the victim's prior consistent statements as to time and place because Petitioner's cross-examination implied recent fabrication. The court also found that at the appropriate time, if Petitioner wanted to move to introduce the entire video, the court would address the issue at that time. Petitioner's counsel stated: "I certainly agree with that analysis and the way to handle it." He then argued, for the first time, that pursuant to Rule 613(b), SCRE, the video recording should be admissible as extrinsic evidence of a prior inconsistent statement of a witness because the victim did not admit she made the prior inconsistent statements during his cross-examination.

(R.p.68, line 7-p.72, line 10). Counsel said:

I understand I may have the burden of trying to figure out whether or not I want to put it in or not, but however, I am at a little bit of a quandary of how to introduce this extrinsic evidence of a prior inconsistent statement. I disagree with the solicitor in that there are consistent statements in the video, that there are a number of inconsistent statements that are exculpatory. And certainly, I did try to do those without showing the video with the child to impeach her.

(R.p.72, lines 12-23). Counsel proposed that he be allowed to show pertinent parts of the video during his cross-examination of Detective Neely as proof of the alleged inconsistent statements without introducing them into evidence. The trial judge noted that typically a party would impeach a witness with evidence of prior inconsistent statements through that witness herself, but asked the State's opinion. The solicitor disputed the claim that the victim failed to admit her prior inconsistent statements, and argued that in any event Petitioner had already effectively brought out the alleged inconsistencies during cross without actually showing the video. Ultimately, the trial court ruled it would proceed as previously discussed, with the State being allowed to use Detective Neely to present evidence of prior consistent statements from the victim, and

Petitioner being allowed to cross-examine Neely on the interview, and possibly use the video to do so. (R.p.72, line 24-p.77, line 18).

The State then called Detective Carson Neely of the York County Sheriff's Office to the stand. He testified he had worked in law enforcement since 1998 and had been a detective since 2005. Detective Neely was assigned to the Violent Crime Unit, which investigated any crime against a person, including sexual conduct or assault against an adult or a child. He had special training in interviewing techniques, including classes in "finding words" and the RATAC method of forensic interviewing. Detective Neely testified he interviewed the victim on February 14, 2012, in a conference room at the Sheriff's Office. At that interview the victim was able to identify who had assaulted her. She initially said the incident happened two or three months prior, but later explained it happened in the summertime, between two school years. The victim told Detective Neely the incident took place in the living room at Petitioner's house. (R.p.78, line 18-p.93, line 6).

On cross-examination, Petitioner asked several questions about Detective Neely's interview of the victim. He acknowledged it was recorded and that his written report referenced a DVD recording of the interview. Neely testified the only time he watched the full video recording was once trial started. He admitted the video "cut off" towards the end so that the final portion of the interview was not recorded. Petitioner did not move to introduce all or any part of the video into evidence. (R.p.93, line 9-p.100, line 19). After brief re-direct examination and re-cross, Petitioner asked to take up a matter outside the presence of the jury. He said he was not yet finished with the witness. (R.p.100, line 23-p.103, line 25).

The jury was excused and the video recording was marked for identification as Defendant's Exhibit #2. Petitioner said: "I would like to try to introduce the video through Carson Neely on his part of cross. I would like to proffer it through him. I would let the Court look at it. I believe it is admissible." He argued that portions of the video were not hearsay and admissible because they included prior inconsistent statements, and that under the rule of completeness the entire video should be admissible. Petitioner asked to proffer the video through Detective Neely and for the trial court to make a ruling on its admissibility. The solicitor took the position the video was inadmissible except for any specific portions which could come in under Rule 801 and/or Rule 613. The video recording was then played outside the presence of the jury. Neely testified it was fair and accurate representation of the interview with the exception of one to five minutes at the end when the recording cut off. (R.p.104, line 3-p.109, line 24).

After the proffer, Petitioner asked that the entire video recording be "presented to the jury." He argued it was not hearsay under Rule 801(d) because the victim testified at trial and was subject to cross-examination concerning the statement, and because the statement was inconsistent in certain respects to her trial testimony. Petitioner further argued it was not hearsay because the State sought to admit the victim's prior consistent statements to rebut an allegation of recent fabrication, and that since both parties identified prior statements that are not hearsay, the entire video recording where those statements were made should be admissible under the "rule of completeness." (R.p.109, line 25-p.111, line 21).

The trial judge asked Petitioner to point out specifically which statements from the interview he believed were inconsistent with the victim's trial testimony. Petitioner

alleged there were inconsistencies involving the timing of the incident, the position of the victim's legs, and the reason the victim gave for the delay in her disclosure. The solicitor opposed introduction of the entire video recording arguing it was a "back door attempt to get it in with the rule of completeness." She reiterated her concerns with admitting portions of the video recording which could run afoul of recent appellate court decisions regarding forensic interviews and vouching, and then argued Petitioner should not be allowed to now introduce the video recording as a prior inconsistent statement because it was too late. The solicitor argued Petitioner has missed his opportunity because the proper time to try to impeach the victim would have been during cross-examination. She also said she was not conceding the statements were in fact inconsistent. (R.p.111, line 16-p.116, line 17).

The trial judge agreed that Rule 613 seems to contemplate addressing prior inconsistent statements of a witness by examining that particular witness and introducing extrinsic evidence of a prior inconsistent statement through that witness if the proper foundation has been laid. Petitioner argued Rule 613 was not limited in this regard and that once the proper foundation was laid with the witness he should be allowed to introduce the extrinsic evidence at any point during trial. (R.p.116, line 18-p.118, line 20). The solicitor ultimately agreed there were some inconsistencies between the trial testimony and the victim's statements from the interview, but argued they had been "handled on cross-examination and for the most part admitted." She then appeared to concede Petitioner could bring in portions of the video through Detective Neely if the proper foundation was laid under Rule 613(b) and the victim actually denied making the statement. (R.p.118, line 21-p.122, line 9).

Next, Petitioner argued an alternative theory for admission of the video recording, contending he should be able to use it to impeach Detective Neely by showing he did not strictly follow the protocol for conducting a forensic interview as described in his trial testimony. The solicitor continued to object to Petitioner's request to admit the entire video recording under the "rule of completeness" and argued the trial court would have to decide whether each statement was admitted or denied by the victim before allowing it in under Rule 613(b). The trial court took the matter under advisement overnight and recessed for the evening. (R.p.123, line 20-p.130, line 11).

The following morning, the trial judge announced he had obtained a transcript of the victim's testimony for review in light of Petitioner's motion. He noted the victim acknowledged being interviewed by Detective Neely and that the interview was being videotaped. The judge then conducted a detailed examination and consideration of her testimony in regard to each of Petitioner's five alleged inconsistencies before ruling: "So based upon what was listed during cross-examination, I do not believe the video would be admissible for impeachment. So based upon what she admitted to in cross-examination, I think under the rules the video would not come in for impeachment purposes." (R.p.137, line 1-p.138, line 23). The trial judge then allowed the parties to look at the transcript together and said: "If you disagree with my summary of the testimony, then I will be glad to hear from you." After reviewing the transcript, Petitioner did not challenge the trial court's factual finding that the victim admitted making the prior statement as a whole, including the first four inconsistencies. He also did not offer any argument or challenge to trial court's conclusion that her testimony of not remembering the fifth inconsistency was equivalent to an admission for purposes of

the analysis. Instead Petitioner simply stated: “Your Honor, I respect the Court going through the testimony and pointing out the things of what the record accurately reflects. I don’t need to do that. I respect the court’s ruling on that. I have registered my objection. Based on what it appears the Court is going to rule, I have no further rationale to get the video in for the purpose of impeaching [the victim] through this witness.” (R.p.138, line 24-p.139, line 21). Petitioner stated: “I respect the Court’s opinion, but for the record, I do object to the Court’s ruling;” however, Petitioner never articulated a particular objection to that ruling in regard to the finding that he failed to meet the foundation requirements of Rule 613(b), SCRE. (R.p.140, lines 4-14).

Next, Petitioner resumed his re-cross-examination of Detective Neely. Petitioner asked to use the video to refresh Detective Neely’s memory of his interview with the victim, which led to a discussion outside the jury’s presence about whether the State would agree to admit the video into evidence. The solicitor said: “If the defense moves it in, I will agree to have it come in” (R.p.140, line 15-p.151, line 3). Petitioner then advised the trial court that when Detective Neely resumed testifying he intended to lay the foundation for the video, move it into evidence, and show the video to the jury. He repeated his desire that the entire video be admitted into evidence. Next, the trial judge re-stated his previously ruling in regard to the use of the video recording for impeachment purposes. He noted he had deemed the victim as having admitted everything she was asked in regard to what she stated on the video, and that therefore was no need to impeach her with the video itself. Petitioner again failed to challenge the trial court’s ruling that the victim had admitted every inconsistency from her prior statement. (R.p.151, line 6-p.154, line 24).

Petitioner then continued his re-cross-examination of Detective Neely, followed by additional re-direct examination from the State, and more re-cross-examination by Petitioner. Petitioner did not move to introduce the video recording of the interview either time he addressed additional questions to Detective Neely. (R.p.155, line 4-p.158, line 25). When Detective Neely finally stepped down, the State rested. (R.p.159, lines 2-4). Petitioner moved for a directed verdict and the motion was denied. Petitioner then called the victim's mother, Katrina Babb, as a witness but elected not to testify in his own defense. (R.p.159, line 14-p.178, line 16).

After a brief charge conference, the parties agreed to the trial judge's proposed jury charges and made closing arguments. Petitioner explained the judge would be charging the law of inconsistent statements and asked the jury to consider the victim's testimony in light of any inconsistencies and her admission that she had never watched the video recording of her interview before trial. The solicitor responded that even though there were inconsistencies between the victim's testimony and things she said during her interview, this did not mean she was lying and the jury had the duty to judge her credibility and believability. (R.p.179, line 14-p.202, line 25). The trial court then charged the jury on the burden of proof, the presumption of innocence, reasonable doubt, the respective and exclusive roles of the judge and jury, direct and circumstantial evidence, the credibility of witnesses, and the elements of the offense. (R.p.202, line 16-p.214, line 16). In regard to credibility the court charged:

There has been evidence presented that witnesses have made prior statements which are not consistent with witnesses' present testimony. You may use this evidence to decide whether to believe the witness. You may also use evidence of the earlier contradictory statements to determine the truth of those statements. It is up to you to decide whether to believe the earlier statements or the testimony given at trial.

(R.p.209, lines 2-11). The jury deliberated for less than an hour before finding Petitioner guilty as indicted. The trial court sentenced him to ten (10) years' imprisonment suspended upon the service of three (3) years' imprisonment and three (3) years' probation. (R.p.215, line 3-p.225, line 13).

CERTIORARI

Petitioner argues this Court should grant certiorari to review the Court of Appeals' decision in this case because of the substantial constitutional issues involved. He contends the trial court's refusal of his request to use a video recording of a police investigator's interview of the victim to attempt to impeach her credibility violated his Sixth Amendment constitutional right to confront the witnesses against him and the right to present a defense. Petitioner argues the constitutional questions involved in his case require review by this Court.

The State disagrees and submits the Court of Appeals properly affirmed the trial court's ruling for all of the reason set forth in its opinion and for all of the reasons argued in the Final Brief of Respondent, which is hereby incorporated by reference. More critically, however, the State submits Petitioner's failure to challenge the Court of Appeals ruling that his appellate argument regarding his constitutional rights was not preserved for appellate review, requires dismissal of his Petition for a Writ of Certiorari. Pursuant to Rule 242(b), SCACR, there are no "special and important reasons" for this Court to exercise its discretion to grant review of the decision of the Court of Appeals in this matter. Even if Petitioner's argument is not deemed waived, the Court of Appeals' decision was nevertheless a straightforward exercise of applying existing precedent,

logic, and practical consideration of the particular facts and circumstances of Petitioner's case and does not merit further review. Thus, the State respectfully requests that Petitioner's petition for a writ of certiorari be denied and dismissed.

ARGUMENT

Petitioner's failure to challenge the Court of Appeals ruling that his appellate argument regarding his rights under the Sixth or Fourteenth Amendments to the United States Constitution were not preserved for appellate review means that issue preservation ruling is now the law of the case and requires dismissal of his Petition for a Writ of Certiorari.

On appeal to the Court of Appeals, Petitioner argued the trial court erred in refusing his request to use a video recording of a police investigator's interview of the victim as extrinsic evidence of a prior inconsistent statement to impeach her credibility. He alleged certain statements the victim made during the interview were inconsistent with her testimony at trial, and contended that by ruling the video itself was inadmissible, the trial court violated his right to confront the witnesses against him and to present a complete defense pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. He continues to advance this argument in his petition for a writ of certiorari. The State submits Petitioner's argument should be denied and dismissed for several reasons and that the Court of Appeals properly affirmed the denial of his request to use the video recording.

Law of the Case

First and foremost, the State submits Petitioner's failure to challenge the Court of Appeals ruling that his appellate argument regarding his constitutional rights was not preserved for appellate review, requires dismissal of his Petition for a Writ of Certiorari.

In its unpublished opinion, the Court of Appeals specifically held: “Because [Petitioner] did not make any argument at trial regarding his rights under the Sixth or Fourteenth Amendments, these issues are not preserved for our review.” (App.p.2). Petitioner does not challenge this holding anywhere in his petition for a writ of certiorari; therefore, whether right or wrong, it is the law of the case. See Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (“An unappealed ruling, right or wrong, is the law of the case.”); State v. Looper, 412 S.C. 363, 365, 772 S.E.2d 516, 517 (Ct. App. 2015). Because Petitioner’s constitutional arguments are not preserved for appellate review, this Court should decline to address them and should deny certiorari.

Analysis / Discussion of Merits

To the extent this Court disagrees in regard to issue preservation, the State submits the Court of Appeals nevertheless properly affirmed the trial court’s denial of Petitioner’s Rule 613(b), SCRE, request to use a video recording of a police investigator’s interview of the victim to impeach her credibility. First, Petitioner’s claim was not preserved for appellate review because: (1) Petitioner did not specifically object to or otherwise challenge the trial court’s factual findings that the victim admitted making the prior statements, and (2) Petitioner waived any Rule 613(b) challenge previously argued when he failed to move to introduce the video after the solicitor stated on the record that she would not object to any further motion by Petitioner seeking admission. Second, it was a proper exercise of the trial court’s discretion not to admit the extrinsic evidence pursuant to Rule 613(b) where: (1) Petitioner was given a full and fair opportunity to confront the victim; (2) the

foundational requirements of the Rule were not met; (3) any minor inconsistencies did not impact the “essential meaning” of the prior statement; and (4) exclusion was proper pursuant to Rule 403, SCRE. Two of these substantive issues are explored in more detail below.

Confrontation Clause

Petitioner’s argument is grounded in a claim that the trial court’s evidentiary ruling violated his right to confront the witnesses against him. As an initial matter, Petitioner’s argument is misplaced. As a general rule, a trial court’s ruling on the proper scope of cross-examination will not be disturbed on appeal absent a manifest abuse of discretion. State v. Gracely, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012); State v. Quattlebaum, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000). Pursuant to the Sixth Amendment of the United States Constitution, every criminal defendant has a right to “to be confronted with the witnesses against him” during trial. U.S. Const. amend. VI. Specifically included in a defendant’s Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses. State v. Aleksey, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). “The limitation of cross-examination is reversible error if the defendant establishes he was unfairly prejudiced.” State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991).

Petitioner conducted extensive cross-examination of the victim. He asked her pointed questions regarding her interview with Detective Neely and was successful in getting the victim to acknowledge inconsistencies between details she provided during that interview and her testimony at trial. The trial court did not impose any limits on

Petitioner's cross-examination of the victim and Petitioner never sought to introduce the video recording of the interview, or any part of that video, during that cross-examination. (R.p.38, line 14-p.49, line 25; p.59, lines 7-11). Thus, Petitioner's constitutional right to confront the victim and to conduct a meaningful cross-examination of her was fully protected at trial. U.S. Const. amend. VI; Gracely, *supra*; Aleksey, *supra*. The trial court did not interfere with Petitioner's opportunity for effective cross-examination of the victim; therefore, Petitioner's claims regarding the right to confront witnesses and present a complete defense under the Sixth and Fourteenth Amendments to the United States Constitution was properly denied.

Rule 403, SCRE

Even if this Courts finds that a narrow Rule 613(b) analysis would support admission of the video recording, exclusion was nevertheless appropriate pursuant to Rule 403, SCRE, because: (1) the probative valued of the video recording was substantially outweighed by the danger of unfair prejudice, and (2) the video would have constituted a needless presentation of cumulative evidence.

Throughout the trial, Petitioner argued he wanted the entire video recording to be admitted into evidence despite the solicitor's concerns it consisted of an otherwise inadmissible "forensic interview" with Detective Neely. (R.p.60, line 7-p.67, line 11; p.111, line 16-p.116, line 17). The solicitor was rightfully concerned the forensic interview might be wrought with hearsay and comments constituting vouching which our appellate courts have found particularly troubling. See State v. Kromah, 401 S.C. 340, 359, 737 S.E.2d 490, 500 (2013) (holding that a forensic interviewer should not have been allowed to testify about a "compelling finding" of child abuse, as that was the

equivalent of stating the child was telling the truth); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding the admission of the forensic interviewer's written report into testimony to be error because the reports stated that each child "provided a compelling disclosure of abuse by Petitioner."); State v. McKerley, 397 S.C. 461, 465, 725 S.E.2d 139, 142 (Ct. App. 2012) (finding the forensic interviewer's "opinion as to whether she thinks something happened [was] nothing other than her inadmissible opinion as to whether the victim was telling the truth"). As explained in detail in the Final Brief of Respondent, the video recording had very limited probative value in light of the victim's testimony about her prior statements. Given the danger of unfair prejudice, the trial court properly excluded it despite Petitioner's suspect claim that he wanted the entire video admitted.²

The video recording also constituted cumulative evidence. Petitioner was allowed to effectively impeach the victim through cross-examination regarding the prior statements, getting her to unequivocally admit the inconsistencies in all but one instance. In light of these efforts, admission of the video recording itself would have been needlessly cumulative. For all of these reasons, there was no abuse of discretion

² Petitioner argues the solicitor's re-direct examination of the victim somehow portrayed defense counsel as dishonest by suggesting that what defense counsel said was on the video was not, in fact, on the video. He claims the solicitor's suggestions were "particularly disingenuous" and that her "deceitful questioning created a false impression for the jury regarding the veracity of [the victim] and of defense counsel personally." (Petition, p.17). However, contrary to these claims, it appears the solicitor took extraordinary steps throughout the trial to ensure the fairness of the proceedings by attempting to limit introduction of potentially inadmissible evidence. Indeed, it was defense counsel's repeated attempts to lure the solicitor into introducing the video recording that suggest a hidden motive. As a public defender and former solicitor with many years of criminal experience, it is unclear whether trial counsel was merely trying to attack the victim's credibility with her prior inconsistent statements, or was attempting to manufacture a future post-conviction relief claim in the event of a conviction. Either way, the State takes issue with appellate counsel's characterization of the solicitor's advocacy as "disingenuous" and "deceitful." See Donald E. Campell, Raise Your Right Hand and Swear to be Civil: Defining Civility as an Obligation of Professional Responsibility, 47 Gonz. L. Rev. 99 (2011) (examining the obligations of civility in the practice of law).

by the trial court and the Court of Appeals' decision affirming Petitioner's conviction should likewise be affirmed.

Harmless Error

Should this court find the issue is preserved and that the Court of Appeals should have concluded the trial judge erred in refusing to admit the video recorded interview into evidence, the State submits any error was harmless beyond a reasonable doubt. In determining harmless error regarding any issue of witness credibility, the appellate court will consider the importance of the witness's testimony to the prosecution's case, whether the testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case. Fossick, 333 S.C. at 69, 508 S.E.2d at 34. (citing State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995) and Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)).

Here, the trial court allowed a meaningful cross-examination with numerous opportunities for impeachment, including specifically allowing Petitioner to inquire into the victim's allegedly inconsistent statements. The additional introduction of the video recording as sought by Petitioner would at best have been marginally relevant. The jury was given sufficient information to judge the credibility of the victim's testimony. Furthermore, the video itself would have been cumulative to the victim's admissions regarding the alleged inconsistencies. In regard to overall strength, the victim gave compelling testimony describing how she was inappropriately touched by Petitioner. Petitioner suffered no unfair prejudice as a result of the ruling regarding exclusion of the video recording. Fossick, supra. In light of all these factors, exclusion

of the video recording as extrinsic evidence of the victim's prior inconsistent statements as impeaching evidence was harmless. Thus, the Court of Appeals decision affirming Petitioner's conviction should likewise be affirmed.

CONCLUSION

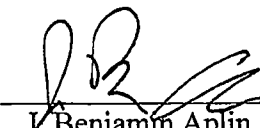
Based on the foregoing reasons, Respondent submits this Court should deny the petition for a writ of certiorari and let stand the decision of the Court of Appeals affirming the trial court. If the Court grants the petition for a writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Interim Senior Assistant
Deputy Attorney General

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

BY: 

J. Benjamin Aplin
S.C. Bar No. 8729

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(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
December 18, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of General Sessions
Donald B. Hocker, Circuit Court Judge

Opinion No. 2015-UP-429 (S.C. Ct. App. filed August 19, 2015)

Appellate Case No: 2015-002359

The State, ...Respondent,

v.

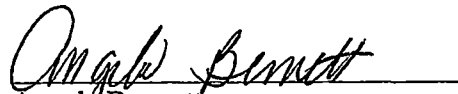
Leonard Eugene Jenkins, ...Petitioner.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Return to Petition for a Writ of Certiorari*, dated December 18, 2015, on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Susan B. Hackett, Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served.
This 18th day of December, 2015.


Angela Bennett
Administrative Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

The Supreme Court of South Carolina

The State, Respondent,

v.

Leonard Eugene Jenkins, Petitioner.

Appellate Case No. 2015-002359

Trial Court Case No. 2012-GS-46-02101

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY



CLERK

Few, J., not participating

Columbia, South Carolina

June 16, 2016

cc:

Susan Barber Hackett, Esquire

Alan McCrory Wilson, Esquire

John Benjamin Aplin, Esquire

Kevin Scott Brackett, Esquire

The Honorable Jenny Abbot Kitchings

The Honorable David Hamilton



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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June 21, 2016

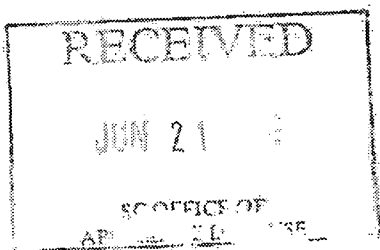
The Honorable David Hamilton
PO Box 649
York SC 29745-0649

REMITTITUR

Re: State v. Leonard E. Jenkins
Lower Court Case No. 2012GS4202101
Appellate Case No. 2013-001753

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.



Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
Susan Barber Hackett, Esquire
John Benjamin Aplin, Esquire
Kevin Scott Brackett, Esquire

2017 CP4600242

STATE OF SOUTH CAROLINA
 County of York
Leonard Eugene Jenkins 138712
 Full name and prison number (if any) of Applicant

CERTIFIED TRUE COPY

2017 FEB -2 AM 8:14

IN THE COURT OF COMMON PLEAS

DAVID HAMILTON
 CLERK OF COURT
 YORK COUNTY, SC

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION REVIEW

DAVID HAMILTON
 C.C.C. & GS
 YORK COUNTY, SC

2017 FEB -1 PM 2:09

FILED-RECEIVED

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention South Carolina Dept of Mental Health
2. Name and location of Court which imposed sentence Moss Justice Center
1675-3A York Hwy York, SC. 29745-7431
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 (a) 2012-GS-46-02102
 (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence: August 13, 2013
- (a) Committed to the State Department of Corrections for a term
- (b) of ten years, Suspended to Three Years and
- (c) Probation for three years
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. State of South Carolina in The Court of Appeals
- ii. State of South Carolina in The Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. denied
- ii. denied
- iii. _____
- (c) the date of each such result:
- i. Court of Appeals October 23, 2015
- ii. Supreme Court June 16, 2016
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) 6th and 14th Amendment
- (b) Ineffective Assistance of Counsel
- (c) The detective never questioned all the witness in the case that was → over
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Unable to Present a Complete defence and/or Confront the Witnesses about there → over
- (b) Did not Preserve my ISSUES for review on Appeal → over
- (c) Amber Seitz was present sitting in a chair across from the → over
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Court of Appeals (appeal)
- ii. Supreme Court (appeal)
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Court of Appeals York County
- ii. Supreme Court of York County
- iii. _____
- iv. _____

10(b) My ^{Attorney} did not object when the solicitors Paralegal Dawn Carter recognized and worked with one of the jurors for years in a nursing home in York County.

10(c) Present at the time of the alleged lewd act, and I did not raise this claim earlier because my attorney was ineffective.

11(a) Inconsistent Statements

11(b) Did not move to introduce the video after state advised they would not object anymore.

11(c) alleged victim and the detective never questioned her as to what she saw or the other people that was in the home at the time of the alleged lewd act.

(c) the disposition thereof:

- i. denied
- ii. denied
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. October 23, 2015
- ii. June 16, 2016
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. denied Opinion NO. 2015-UP-429 (S.C. Ct. App. filed 8/19/2015)
- ii. denied
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

Yes

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. 6th and 14th Amendment
- ii. Ineffective Assistance of Counsel
- iii. _____

(b) the proceedings in which each ground was raised:

- i. The South Carolina Court of Appeals
- ii. The Supreme Court of South Carolina
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) I was unaware of the grounds at that time
 (b) I did not raise the claim earlier because my attorney was ineffective and
 (c) I did not raise the claim earlier because my attorney was ineffective →

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? Yes
 (b) your trial, if any? Yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
Yes

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 i. Daniel Hall, Public Defenders Office York County
1675-A York Highway York South Carolina 29745
 ii. Susan B Hackett, Appellate Defender, Division of Appellate
Defense Post office Box 11589, Columbia, S.C. 29211-1589
 iii. _____

 (b) the proceedings at which each such attorney represented you:
 i. Trial, Sentencing, arraignment

 ii. Appeal, Writ of Certiorari

 iii. _____

16. B. The prosecution had a working relationship with
one of the Jurors (Transcript of record 2012-GS-46-0210) p. 104
line 5-9) I was unaware of the grounds at that time.

16C. my lawyer was ineffective for not properly
arguing my claims, I was unaware of the grounds
at that time.

19. State clearly the relief you seek in filing this application:

By Presentation of my evidence, I will show the true facts of the
case, at which time I Pray on the court for my release, and Compensation
for the time I served in Prison, and not be Placed on registry.

20. Are you now under sentence from any other court that you have not challenged?

No, Only for this offence which I hope will be vacated and
expunged from my records.

STATE OF SOUTH CAROLINA)

County of York)

VERIFICATION

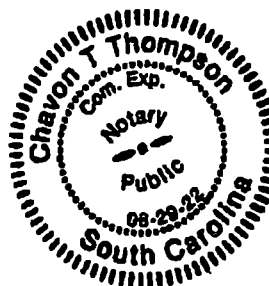
I, Leonard Eugene Jenkins, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Leonard Eugene Jenkins

SWORN to and subscribed before me this 23rd
 day of November, 2016.

[Signature] (L.S.)
 Notary Public

My Commission Expires: 6-29-22



2017 FEB -1 PM 2:09
 DAVID HAMILTON
 C.C.C.P. & GS
 YORK COUNTY, SC

FILED-RECEIVED

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Leonard Eugene Jenkins, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

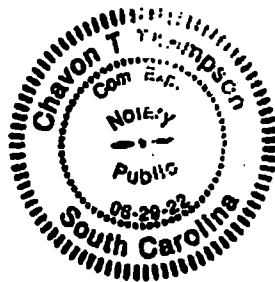
Leonard Eugene Jenkins
Applicant

SWORN or affirmed to and subscribed before me this

23rd day of November, 2011.

[Signature]
Notary Public

My Commission Expires: 6-29-22



FILED-RECEIVED
2017 FEB -1 PM 2:09
DAVID HAMILTON
C.C.C.P. & GS
FORK COUNTY, SC

Office of Attorney General

Feb 12 2017

In reference to 2017 CP4600242

I respectfully request to change the indictment number
on the Post Conviction Relief Application without Prejudice.

The correct indictment number is 2012-GS-46-02101.

I thank you in advance,

Leonard Eugene Jenkins

Leonard Eugene Jenkins 138712

Correct Care

1700 St Andrews terrace Building A

Columbia S.C. 29210

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
	)	
Leonard Eugene Jenkins, #138712,	)	Case No.: 2017-CP-46-0242
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR") filed on February 1, 2017, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. In June 2013, the York County Grand Jury indicted Applicant for lewd act on a child (2017-GS-46-2101). Daniel Hall, Esquire represented Applicant. Assistant Solicitor Jennifer Desch, Esquire prosecuted the case. On August 13, 2013, Applicant proceeded to trial before the Honorable Donald Hocker. The jury found Applicant guilty as indicted. Judge Hocker sentenced Applicant to imprisonment for ten years, provided upon service of three years the balance would be suspended with probation for three years.

Applicant filed a timely notice of appeal. Susan B. Hackett, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on August 19, 2015. State v. Jenkins, Op. No. 2015-UP-429 (S.C. Ct. App. filed August 19, 2015). Applicant filed a petition for rehearing on September 3, 2015. The Court of Appeals denied the petition on October 23, 2015. Applicant filed a petition for writ of certiorari to the South

Carolina Supreme Court on November 18, 2015. The Supreme Court denied the petition on June 16, 2016. The remittitur was returned to the circuit court on June 21, 2016.

Attached to this Return and incorporated by reference are the records of the York County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "6th and 14th Amendment"
 - a. "Unable to present a complete defense and/or confront the witnesses about [their] inconsistent statements."
2. Ineffective Assistance of Counsel
 - a. "Did not [preserve] my issues for review on appeal and did not move to introduce the video after [the] State advised that they would not object anymore."
 - b. "My attorney did not object when the solicitor's paralegal Dawn Carter recognized and worked with one of the jurors for years in a nursing home in York County."
3. "The detective never questioned all the witnesses in the case that was the alleged victim and the detective never questioned her as to what she saw."
 - a. "Amber S. was present sitting in a chair across from the alleged victim and the detective never questioned her as to what she saw or the other people that was in the home at the time of the alleged lewd act."

III.

Respondent submits Applicant's allegations of ineffective assistance of counsel specifically in regards to his attorney failing to preserve issues for review are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a

ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

V.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

[signature on following page]

VI.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of trial counsel.

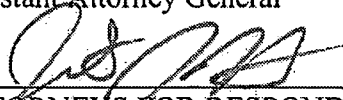
Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JUSTIN HUNTER
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

June 8, 2017

STATE OF SOUTH CAROLINA

COUNTY OF YORK

LEONARD E. JENKINS, # 138712

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent,

IN THE COURT OF COMMON PLEAS

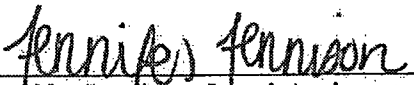
2017-CP-46-0242

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Leah B. Moody, Esquire
 Law Office of Leah B. Moody, LLC
 235 E. Main St., Ste 115
 PO Box 1015
 Rock Hill, SC 29730

DATED this the 8th day of June, 2017.


 Jennifer Jennison, Legal Assistant
 For Respondent

1 STATE OF SOUTH CAROLINA

2 -----x

3 LEONARD JENKINS,

4 Appellant,

5 Case No.

6 -against-

2017-CP-46-00242

7 STATE,

8 Respondent.

9 -----x

10 August 2, 2017

11 York, S.C.

12

13 B E F O R E:

14 HONORABLE R. LAWTON MCINTOSH

15

16 A P P E A R A N C E S:

17 LEAH MOODY, Esquire

18 Attorney for the Appellant

19

20 JUSTIN HUNTER, Esquire

21 Attorney for the Respondent

22

23 Aileen Butler

24 Official Court Reporter

25

1		<u>I N D E X</u>			
2	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
3	Leonard Jenkins				
4	Ms. Moody	5			
5	Mr. Hunter		19		
6	Daniel Hall				
7	Mr. Hunter	22			
8	Ms. Moody		29		
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1	<u>E X H I B I T S</u>			
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3	<u>NO.</u>	Description	<u>I.D.</u>	<u>EVD.</u>
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5		NO EXHIBITS MARKED		
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E X H I B I T S

NO.	Description	I.D.	EVD.
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1 MR. HUNTER: May it please the Court, Your Honor.

2 THE COURT: Yes, sir.

3 MR. HUNTER: The next case is in regards Leonard
4 Jenkins versus State of South Carolina. It is
5 2017-CP-46-242. Your Honor he was indicted June 2013
6 in York County for lewd act on a child under 16 years
7 old. He was represented by Mr. Dan Hall.

8 On August 13th through 14th, 2013 he underwent a
9 jury trial before Judge Hocker. He was found guilty
10 and sentenced to ten years suspended to three years
11 with three years probation to follow. He did file a
12 Notice of Appeal and appeal was perfected through
13 Appellant Defense. The Court of Appeals affirmed his
14 conviction on August 19, 2015. He he did file a
15 petition for rehearing which was subsequently denied.
16 He then filed a petition to the Supreme Court which
17 was denied on June 16, 2016.

18 The remittitur was sent June 21, 2016. He filed
19 this current action on February 1, 2017. He is
20 present today represented by Miss Leah Moody.

21 THE COURT: Miss Moody.

22 MS. MOODY: Thank you. May it please the Court.
23 This is Mr. Jenkins and we are ready to proceed.

24 THE COURT: Okay. Call your first witness.

25 MS. MOODY: I would like to call Mr. Leonard

1 Jenkins to the stand.

2 LEONARD JENKINS, called as a witness, having
3 been duly sworn by The Clerk, was examined and
4 testified as follows:

5 DIRECT EXAMINATION

6 BY MS. MOODY:

7 Q Good morning Mr. Jenkins. Could you please state your
8 full name for the record?

9 A Leonard Eugene Jenkins.

10 Q And where are you currently incarcerated?

11 A Mental Health at Kershaw correctional Institution.

12 Q So you are in the mental health section of the Kershaw
13 Corrections Institution. Are you in Kershaw Correctional?

14 A No, ma'am.

15 Q Okay, where are you? Where are you housed?

16 A On the the old death row unit at Kershaw Institution.

17 Q And are you in a program or a section for your status
18 as a defendant?

19 A Huh?

20 Q What is your status? Why are you there?

21 A I'm there for the SPV treatment.

22 Q And you have to go through treatment but you finished
23 your service?

24 A Yes, ma'am.

25 Q Okay. And how long have you been at that unit?

1 A Seventeen months.

2 Q And you're there because of your charges that you were
3 convicted of?

4 A Yes, ma'am.

5 Q And what were those charges?

6 A A lewd act on a minor.

7 Q You went to trial before Judge Hocker. And who was
8 your attorney when you went to trial?

9 A Dan Hall.

10 Q And was Mr. Hall your only attorney?

11 A No, ma'am. I had Miss Hackett to do the appeal.

12 Q Okay. But from the beginning of your arrest Mr. Hall
13 was your lawyer?

14 A Yes, ma'am.

15 Q And you filed your post conviction relief act
16 against -- excuse me. Post conviction application against Mr.
17 Hall?

18 A Yes. Yes, ma'am.

19 Q And Miss Hackett?

20 A Yes, ma'am.

21 Q All right. And when you filed this application you
22 stated the grounds within your application, correct?

23 A Yes, ma'am.

24 Q One of your first grounds that you indicated in your
25 application you state that it's a violation of your 6th and 14th

7
1 amendment. You were unable to present a complete defense and/or
2 confront the witnesses about their inconsistent statements?

3 A Yes, sir.

4 Q Okay. Can you explain to the Court what you mean by
5 that?

6 A I have other witnesses that was at the house at the
7 time of the lewd act. That was AmberS. (phonetics) was in
8 the room. She was never questioned, as to what she saw or what
9 she heard. The detective just never questioned anybody in the
10 house at all.

11 Q Now who is AmberS. ?

12 A She is my stepdaughter.

13 Q And did you discuss Amber's testimony with your
14 attorney?

15 A I do not remember. I think I did but I'm not sure.
16 It's been a while. What was said was she was too young to
17 testify at the time. She was -- I think she was 17 years old
18 then.

19 Q So when you met with your attorney you presented him
20 with possible witnesses?

21 A Yes..

22 Q And she was a possible witness?

23 A Yes, ma'am.

24 Q And are you saying to the Court that he explained to
25 you why he wouldn't call her?

1 A Yes, he said the prosecution said she was too young to
2 be a witness.

3 Q And was she the only witness?

4 A There was other people in the house at the time. My
5 wife was in there, Janet Jenkins, Kacie S. was in there and I
6 think another person, Jordan Pilot was there also I believe.

7 Q And what, if anything, did you tell your attorney about
8 those other individuals?

9 A That they had testimony that could possibly change the
10 story. But there again I was told that they were too young to
11 testify.

12 Q So Amber and Casey were with too young?

13 A That is what was told, yes, ma'am.

14 Q How old was Casey?

15 A Casey was 13 or 14 I think at the time and Amber was
16 17.

17 Q And then what happened with your wife?

18 A She was never called.

19 Q All right, and so when you talked to your attorney in
20 the beginning of your case you disclosed this information to
21 him?

22 A To the best of my knowledge, yes, ma'am.

23 Q And then going into the trial did you ask him again or
24 what happened going into the trial?

25 A We were told that it probably wouldn't go that far. We

1 didn't think it was going to go as far as it has.

2 Q What do you mean, that you wouldn't go to trial?

3 A No. Well, we didn't think that any of this would come
4 about.

5 Q That you would be charged?

6 A No. I was already charged. I didn't think that -- I
7 don't know how to say it. There was people that was there that
8 saw it. I just -- we never thought it would go as far as it has
9 gone. You know, I am still hear. We just didn't think --

10 Q I guess what I'm trying to understand, you're saying
11 you didn't think that it was going to get to the level where you
12 had a trial?

13 A I didn't it was going get to the level where it's at
14 right now.

15 Q Well, where is it at right now? What do you mean by
16 where it is right now?

17 A I'm at SVP.

18 Q Okay. All right. So you didn't think you would have
19 to go through any kind of treatment program?

20 A Never knew anything about that. No, ma'am.

21 Q Okay. And so if you had those witnesses you feel that
22 they would have made a difference?

23 A Yes. I feel that those witnesses their testimony would
24 have been extremely important to this because the court could
25 have seen the true facts of what all was said and done and

1 wasn't done. It would have made a big difference, yes, ma'am.

2 Q Okay. Also in its application you allege you felt your
3 lawyer was ineffective assistance of counsel because he did not
4 preserve your issues for review on appeal and did not move to
5 introduce the video after the State advised that it would not
6 object to the video?

7 A Yes, ma'am.

8 Q So let's talk about the preservation of the issues for
9 appeal. What do you feel should have been preserved for appeal?

10 A The video should have been preserved. It was a
11 17-minute video. There was a statement put on there that she
12 would not lose her friend -- friendship with Casey.

13 Q When you say "she" who are you talking about?

14 A Minor 1

15 Q Okay.

16 A She said that she didn't want to lose her friendship
17 with Casey. That was not on the video but on one of the reports
18 that I have here. The detective said that he had no notes. All
19 the notes magically appeared since I ever been down here. When
20 I was in court they said that they didn't have the notes and now
21 that the notes have showed up it's on one of the notes. It says
22 that she didn't want to lose her friendship with Casey and
23 that's on that statement, but it was not the video. And it was
24 said that it wasn't on there.

25 Q It wasn't on the video?

1 A It was not on the video and on the report it says it is
2 on the video. There was about five or ten minutes of the
3 interview on the video that was not showed.

4 Q Okay. And so did you discuss this with your attorney?

5 A I haven't seen him after the trial. That's the only
6 time I seen it.

7 Q I'm saying like in terms of -- I think you just
8 testified that you didn't have a copy of your Discovery, or did
9 you?

10 A At the time, no, ma'am. I didn't get this until this
11 year.

12 Q Okay. When I sent it to you?

13 A Yes, ma'am.

14 Q Okay. So you didn't have a copy of your Discovery and
15 your attorney had this copy is what you are saying?

16 A This came from Miss Hackett, the original transcript
17 and then -- I don't understand your question.

18 Q Okay. Let me rephrase it. The documents that I sent
19 to you --

20 A Yes, ma'am.

21 Q You found a note in there that says Minor I was worried
22 about losing friends?

23 A Yes.

24 Q And this is the information that came as the documents,
25 or the evidence, the State had against you?

1 A Yes, ma'am.

2 Q And you reviewed -- did you review any of those
3 documents with your attorney prior to going to trial?

4 A No, ma'am. I did not have them.

5 Q I know you didn't have them. But did you all talk
6 about the evidence that the State had against you?

7 A Yes.

8 Q Okay. So those documents that's the evidence that the
9 State had against you and you're saying your attorney did not
10 take note of the fact that Minor1 statement was not on the
11 video?

12 A I think that's what I'm saying. It's been four years.
13 I'm not real sure what you're asking.

14 Q You're saying -- you're saying your attorney didn't
15 preserved the record for you --

16 A Yes.

17 Q -- but you're saying he also had this information and
18 he failed to bring it up in the trial?

19 A Yes, I think that's correct.

20 Q Okay. Is there any other information your attorney
21 didn't preserved for you?

22 A Yes, ma'am. Let me see if I can find it. What you were
23 just talking about that was on page 69, line 13. Let me make
24 sure.

25 Yeah, the detective never questioned all the witnesses and

1 he was -- I didn't raise those claims earlier because I didn't
2 know the grounds.

3 Q Okay. Let's be clear on this. You're saying you
4 didn't raise those issues with your attorney at the time you
5 were getting prepared for your trial?

6 A Yeah, because I didn't know about that.

7 Q Okay. So you didn't have a copy of the documents that
8 showed the evidence the State had against you, but your attorney
9 did?

10 A I don't know if he did or not.

11 Q Okay. But now that you have a copy of it and you have
12 an appeal you feel that he should have preserved these issues
13 for your appeal or brought it up in the trial?

14 A I think Mr. Hall tried to bring up a good bit of this
15 stuff and he wasn't allowed to.

16 Q Okay. I understand that, but based off your
17 application what you wrote in your application was that your
18 attorney didn't preserve issues in your trial for you to appeal
19 them later and so I'm trying to get you to relate to the Court
20 and be clear on what those issues were. What was it that your
21 lawyer didn't say in Court that he should have said that you
22 could have appealed?

23 A I think one thing would have been the -- Dawn Carter
24 had worked with the prosecution and he didn't -- we didn't
25 object to that. At the time it was about midways in the trial

1 when the prosecution had said that they had a working
2 relationship with the prosecution at nursing home.

3 Q One of the jurors did?

4 A Yes, ma'am. And we weren't aware of that until way
5 into the trial and it was just -- it was a lot of talk about the
6 video. And he tried really hard to get that in and they just
7 wouldn't -- they didn't -- I don't think that the prosecution
8 did a very good job of factual finding. I think it should have
9 been more factual finding and talk to the witnesses.

10 Mr. Hall had come out to the house and he talked to us once
11 and tried to put a good case together and I think that we
12 weren't allowed to present all of our witnesses. I don't think
13 that we were able to have a fair trial.

14 Q Okay. All right, in one of your claims you alleged that
15 your attorney didn't move the introduction of the video into
16 evidence?

17 A Yes, ma'am. He didn't. After the State said that they
18 wouldn't object any more to the video coming in. He didn't move
19 to introduce the video into evidence after the State said that
20 they wouldn't object any more. I think that it should have come
21 in.

22 Q Why do you think it should have come in?

23 A Because it had important stuff on there that disputed
24 what the witness -- what Minor1 was saying on the stand versus
25 what was actually said on the statement. That was like a

1 written statement. He should of -- we should have been allowed
2 to introduce that and let the jury see everything that was on
3 there instead of just portions of it because it goes the jury
4 confused as to what was going on and we tried -- he tried
5 everything he could to get it to come in and then the State said
6 that they wouldn't object any more to it coming go in.

7 I don't know if -- I don't think it was strategy. I think
8 it was just overlooked because there was so much going on about
9 it.

10 Q Okay. All right. You've already mentioned that Dawn
11 Carter had a working relationship with another person that was
12 on the jury for years at the nursing home. Is there anything
13 else you want to say about her being --that your attorney not
14 objecting to her being a juror on the jury?

15 A I think it was -- there was a potential that it could
16 have been a bias jury because the lady did no one of the
17 prosecutions that worked with them, Miss Carter.

18 Q Miss Carter was a paralegal?

19 A Yes, ma'am.

20 Q And the juror knew that paralegal?

21 A Yes, ma'am. And I think that could have presented an
22 issue because she could have talked to herself, well, this might
23 be her first case. Maybe I'll go one way or another. I mean,
24 it's either guilt or punishment. It's just either way, I think
25 I should get a new trial on on that basis.

1 Q Okay. At the time during the trial did you talk to
2 your attorney when that was brought to the Court's attention
3 about the working relationship?

4 A No, we didn't have a chance. We was in the middle of
5 the trial.

6 Q Right. But I'm saying when the the solicitor put the
7 Court on notice of it. Miss Desch, I believe put the Court on
8 notice of it. As they were talking about that did you talk to
9 your attorney and tell them that you didn't want that person on
10 the jury?

11 A I wasn't aware I could do that at the time. I wasn't
12 aware of that.

13 Q Okay. All right, the next issue you presented in your
14 application was that the detective never questioned all the
15 witnesses in the case that were --

16 A Allowed.

17 Q Hold on. That were in the case that was alleged -- the
18 alleged victim, and the detective never questioned her as to
19 what she saw. You indicated there was another person who that
20 was alleged to be a victim. They said they was a victim in the
21 case?

22 A Yes, ma'am, that was Amber S. . They had alleged
23 that she was a victim. She was actually a witness. They had
24 went up there. She had come up here to the Moss Justice Center
25 because the guy who brought these charges up said that he

1 thought that she might be a victim but she was actually a
2 witness as to what had happened. With her testimony alone I
3 don't think that a reasonable jury would have convicted me as to
4 what she saw. She was sitting in the room at the time.

5 Q Okay.

6 A I didn't know that until later.

7 Q You didn't know that they didn't question her or talk
8 to her?

9 A No, I didn't know that she was even in the room because
10 I had went in there to get my child off of the girl's lap and
11 she got angry at me because Grace had open heart surgery. She
12 had the wires in her chest and she was bouncing her and you're
13 not suppose to bounce the baby because of the wires. And they
14 kept hollering she wouldn't stop bouncing my daughter. So I
15 went in there and took her from her. Put my hands under her and
16 she then kicked at me and when she kicked it at me it was like
17 this right here and grabbed her like that and pushed her out the
18 house and 18 months later they come up with a warrant saying I
19 committed a lewd act.

20 Q Okay. And so AmberS. , your stepdaughter --

21 A Yes, ma'am.

22 Q She was in the room and she observed all that?

23 A Yes, ma'am.

24 Q Okay. And so the detective when they erroneously
25 called her a victim still didn't -- once they learned about her

1 not being a victim you're saying they did not talk to her about
2 what she saw?

3 A No, ma'am. They never questioned her as to what she
4 saw.

5 Q Okay. And so did you explain that to your attorney?

6 A I don't know if I ever told Mr. Hall any of that or
7 not. I was an over the road truck driver and I was gone a lot
8 of the times. I didn't never give any statement as to what
9 happened.

10 Q Right. I get you didn't give a statement but you met
11 with your attorney, correct?

12 A Yes, ma'am.

13 Q Okay. So when you were meeting with him and talking
14 your case what if anything did you tell your attorney about this
15 witness?

16 A I don't remember what all we talked about. I don't
17 know if I never told him that or not. I didn't find out about
18 this until later. I didn't know Amber was in the room until I
19 was locked up and locked away. I never knew she was in the
20 room.

21 Q So how did you find out about it?

22 A She told me later she told me that she was in the room
23 after I was in prison.

24 Q Okay. So are there any other grounds that you have
25 that you would like the Court to know about your ineffective

1 assistance of counsel?

2 A No, ma'am I believe you covered it.

3 Q Okay. Now you filed this application. You alleged
4 your grounds. What relief are you seeking from the Court?

5 A I would like to try to get a new trial.

6 Q You want a new trial on these charges?

7 A Yes, ma'am.

8 Q Is there anything else you like for the Court to know?

9 A No, ma'am.

10 MS. MOODY: No further questions for this witness.

11 MR. HUNTER: May it please the Court.

12 THE COURT: Yes, sir.

13 CROSS EXAMINATION

14 BY MR. HUNTER:

15 Q So just to be clear, when you met with Mr. Hall for
16 your trial did you all discuss any possible defenses you had?

17 A I can't remember what all we discussed. It's been four
18 years, four and a half years now.

19 Q So do you remember if you gave him a list of witnesses
20 who could testify on your behalf?

21 A I think we talked about the people that was in the
22 house. I think we talked about Amber and my wife and Janet, but
23 I really don't remember what all we had discussed.

24 Q I believe you testified earlier take essentially you
25 were told that you couldn't call these witnesses because they

1 were too young, is that correct?

2 A Yes. Yes, sir.

3 Q Okay. And that's what Mr. Hall told you?

4 A Yes, sir. Mr. Hall I think he said that the
5 prosecution had told them that they was too young. So yes we
6 did discuss that.

7 Q Okay. I believe you testified that you did review all
8 the evidence before hand, before the trial, or at least what the
9 State gave Mr. Hall?

10 A Yes.

11 Q You all reviewed that. But you since found some other
12 notes, is that correct?

13 A Yes, sir. They had said that the notes was destroyed
14 and that there was no notes. I do have notes that have been
15 showed up from York County that was sent to me by my lawyers
16 stating that what was said. Wasn't said. I got one here.
17 Let's see.

18 Q You didn't have any of that before is that what you are
19 saying?

20 A No, sir.

21 Q As far as the video is concerned do you remember Mr.
22 Hall trying to get that video in?

23 A Yes, sir. He tried to get the video in and they argued
24 that it was inadmissible and it was admissible and it went back
25 and forth about the video. And there was -- there was evidence

1 on the video that contradicted what the witness said.

2 Q Okay.

3 A The witness being Minor1.

4 Q So essentially he argued for it and the judge kept it
5 out. Is that what you are saying?

6 A To the the best of my recollection, yes, the judge kept
7 it out for a while and then the State said they wouldn't object
8 any more to it coming in and then it was never brought back.
9 Sent back.

10 MR.HUNTER: I don't have anything else for this
11 witness.

12 THE COURT: Any redirect?

13 MS. MOODY: No, sir, Your Honor. I would say as
14 far the video is concerned and all of that discussion
15 is in the transcript.

16 THE COURT: Ma'am.

17 MS. MOODY: As to the video, I don't have any
18 other questions for him because it'S in the
19 transcript.

20 THE COURT: Will you reference the pages?

21 MS. MOODY: Yes, sir. I am looking for them right
22 now. I beg the Court's indulgence.

23 THE COURT: Yes, ma'am.

24 Mr. Jenkins, you may step down. You can call your
25 next witness.

1 MS. MOODY: No further witnesses.

2 THE COURT: Call your first witness.

3 MR. HUNTER: The State would call Dan Hall.

4 THE COURT: Mr. Hall, will you come around please.

5 DANIEL HALL, called as a witness, having been duly
6 sworn by the clerk, was examined and testified as
7 follows:

8 DIRECT EXAMINATION

9 BY MR. HUNTER:

10 Q Good morning. Please state your name for the record.

11 A Daniel Hall.

12 Q Can you describe how you became involved in this case?

13 A I was representing Mr. Jenkins on his charge. I was his
14 attorney.

15 Q Were you the only attorney?

16 A Yes.

17 Q Okay. And can you just explain prior to the trial how
18 many times did you met with him?

19 A I don't have my file. That is something I was unable
20 to locate it from the public defender's office. I don't work
21 there any longer. I was not able to locate it.

22 I do remember meeting numerous times in my office with he
23 and his wife and some of the witnesses. I went to the house and
24 to the scene. I would venture to say probably eight to ten
25 times.

1 Q And during those visits was he cooperative?

2 A Yes.

3 Q And did you share all Discovery with him?

4 A Everything I received from the prosecutor I gave him
5 copies.

6 Q Now is there anything missing that you felt should have
7 been in there?

8 A Well, if it's missing I wouldn't have known about it.

9 Q Well, was anything brought up later that surprised you?

10 A No, not at trial. No. I have not heard anything about
11 any notes that he alleges were there.

12 Q But were you ready for trial?

13 A Yes.

14 Q And can you just explain did he give you any alibi
15 witnesses, anything of that sort?

16 A I think we had a complete list of people who were
17 potential witnesses. As well as I remember, this occurrence
18 took place in his home and there was allegations of another
19 occurrence that took place across the street with another
20 neighbor and I believe this was a neighbor's child that was the
21 basis of this particular charge that went to trial on. I
22 believe I had knowledge of all the witnesses that could have
23 been called.

24 Q Okay, and can we just go over I guess certain witnesses
25 that he says were too young. Can you explain that situation?

1 A I don't -- that's the first I heard of that. I believe
2 he indicated one was 17 or 16. Certainly those would be --
3 could be credible witnesses. This were other reasons why
4 witnesses were not called. I don't remember age being a factor
5 on why they were not called.

6 Q Okay. So -- and I believe you said Casey and Amber did
7 you investigate their story if they had one?

8 A I did talk to the -- I talked to the -- his
9 stepchildren and I talked to the neighbor across the street
10 their children. I don't remember their names but I did
11 interview all those folks.

12 Q And after those interviews you choose not to call them
13 as witnesses?

14 A All of the witnesses in typical case like that would
15 have had some information that may have been helpful. On the
16 other hand there was also information that I deemed would not
17 have been helpful and when you weigh in any time of trial
18 strategy you are trying to determine in any particular witnesses
19 whether what they may have that could very well be helpful is it
20 outweighed by information or testimony that they might also give
21 particularly on cross examination that would be more prejudicial
22 then helpful to him. And so those decisions as far as I can
23 remember the decisions I made about a particular witnesses was
24 in that balance of whether at the end would they be helpful or
25 would their other testimony be more harmful.

1 Q So just in your analysis were any witnesses in
2 particular so helpful that it would have outweighed their
3 prejudice?

4 A No. No.

5 Q Okay. And did you discuss this with him?

6 A Yes.

7 Q And just to be clear again, did you discuss the video
8 with him and that whole issue before trial?

9 A Yes, we discussed the video and as well as I can
10 remember just the -- at the point of determining whether to --
11 the video was like a lot of the other potential testimony.
12 There was information on the video that certainly may have been
13 helpful to him. On the other hand there was information on the
14 video that a jury would have been aware of and seen that I
15 believe would have been hurtful to his case and made the
16 decision not to go forward with with introducing the video. I
17 think the -- and his particular issue with the one witness being
18 able to be impeached again it's a question of weighing whether
19 and I don't know about any subsequent notes if I had those maybe
20 had taken those into consideration. But as well as I can
21 remember the same analysis is finally weighing the video during
22 the trial whether it is going to be helpful or hurtful I believe
23 I determined that the bulk of the video would have been more
24 damaging to him then trying to get particular parts of the video
25 out.

1 Q So, that's the allegation that the State wasn't going
2 to object to it anymore, what was your thought process on the
3 video from that point?

4 A I don't remember. I'm not sure what's in the
5 transcript. As well as I can remember that after weighing where
6 we were at trial, what had taken place up to trial, at that
7 point made the decision that we would not go forward with that
8 video.

9 Q Okay. Just going over a few -- a few minor things. As
10 far as I believe you said that in the detective's notes it had
11 something about her saying that she did not want to lose her
12 friend hence the delay disclosure. Do you recall asking that on
13 on cross examination of the victim about her losing her friend
14 or potentially losing her friend and that's why she didn't want
15 to say anything?

16 A I believe I did. I did see that in the transcript.

17 Q Okay. And as far as your cross examination of the
18 victim, do you think that there was anything I guess that you
19 were prevented from lawfully asking without the video?

20 A No.

21 Q So would you say your cross examination was effective
22 looking back?

23 A Yes.

24 Q Okay. And as far as the -- let's just jump to the
25 juror issue. Do you recall that issue coming up?

1 A Vaguely, but I don't not specifically, no.

2 Q And just in your experience if you felt that it was an
3 issue to remove a juror would you have objected?

4 A Yes. Obviously it would have been up to the discretion
5 of the judge. I assume that -- and I'm not sure what the
6 transcript says about that, but the ultimate issue would she be
7 able to be fair and impartial. But, I don't recall that being a
8 significant issue.

9 Q Okay. And again, just about his allegation about
10 witnesses not being investigated by the detective, were you ever
11 aware of any reports from the detectives on the -- concerning
12 the witnesses that you didn't have in these reports?

13 A No, I'm not aware of that. I try to do a very -- as a
14 defense attorney, as a public defender you don't necessarily
15 rely on reports from detectives. We do, particularly this
16 office here is trained and I was trained by really good lawyers
17 that we needed to do a thorough investigation ourselves and I
18 believe I did that with all the available witnesses.

19 Q And just to be clear did you have any involvement in
20 the appeal?

21 A None.

22 MR. HUNTER: Beg the Court's indulgence for one
23 second.

24 Q And just to reiterate again, as far as your theory on
25 entering that video into evidence can you explain your thought

1 process?

2 A Again, on all the evidence, testimony of witnesses, as
3 well as I can remember it would have been a decision weighing
4 about the entirety of the video, the contents of the video that
5 would have been helpful to my client as opposed to the contents
6 of the video that what I deemed would have been detrimental to
7 his case and in weighing that, like I do any other evidence at
8 trial, I made the decision that I believe it would have been
9 more detrimental to him then helpful.

10 In any case, particularly lewd act type cases, there is
11 always testimony on both sides that can be helpful, but there is
12 also testimony and evidence that can be very hurtful as well.
13 And so that's a trial decision about what to let in and what not
14 to get in and often that changes during the course of the trial.
15 It changes during the witness's testimony.

16 Q Okay, and just to be clear as far as the video, it's
17 fair to say you are unable to just show favorable parts of that
18 video?

19 A No, we would have had to shown the video in its
20 entirety.

21 Q Okay.

22 MR. HUNTER: Beg the Court's indulgence one more
23 second. That's all I have. I appreciate your time.

24 THE COURT: Miss Moody.

25 MS. MOODY: Thank you, Your Honor. If it please

1 the Court.

2 CROSS EXAMINATION

3 BY MS. MOODY:

4 Q Mr. Hall, you indicated that you questioned or
5 discussed Minor1 statement and I guess her concern about losing
6 friends?

7 A Tell me -- I can't quite remember who Minor1 was. Was
8 she the stepdaughter or the girl across the street.

9 Q She is the victim. The stepdaughter.

10 MR. HUNTER: No, she's the victim.

11 A She's the the girl across the street. The neighbor.

12 Q Yes. Okay. So Minor1 indicated --

13 MS. MOODY: Well, may I approach the witness?

14 THE COURT: Yes, ma'am.

15 Q I will hand you this document. We need to mark it as
16 an exhibit.

17 THE COURT: Any objection?

18 MR. HUNTER: No, sir.

19 (Applicant's Exhibit 1, report, marked in evidence
20 of this date.)

21 Q Can you take a minute and look at that and see if that
22 helps you recall the evidence in the case.

23 A That's helpful.

24 Q What is that document?

25 A This is an interview report from Detective Carson Neely

1 of the York County Sheriff's Department where he interviewed E.B.
2 about an incident that took place some time before the
3 interview.

4 THE COURT: Was she a minor.

5 THE WITNESS: She was 13.

6 THE COURT: Miss court reporter put E.B., her
7 initials and not spell it out.

8 Q Do you recall questioning her or discussing her being
9 concerned about losing friends?

10 A During trial?

11 Q Yes.

12 A I think that was in the transcript, but I need to look
13 at the transcript to be sure whether I did or not. It certainly
14 would tell me whether I did or not.

15 Q So this document I just handed to you did you have this
16 in your Discovery? Do you recall having it?

17 A Yes.

18 Q Now did you -- I think you testified earlier that you
19 went over the case with Mr. Jenkins?

20 A Yes.

21 Q And so, in talking -- when you go over the case what
22 exactly -- would you have discussed this; this information that
23 you received?

24 A That particular, yes. That incident report I think my
25 discussion with Mr. Jenkins would have been, you know, if she

1 takes the stand the the jury is going have to decide whether she
2 believable or not. She's saying that this happened, but then
3 she does give indication that on there that she didn't want to
4 lose her friendship and that's why she didn't tell anybody.
5 That doesn't necessarily say that it didn't happen. But we
6 would have had a discussion about that. Certainly this case was
7 her word against his word, and so her credibility and what she
8 said then or later I would have had the incident report and we
9 would have gone over it.

10 Q And so, in terms of when you talked about this, when
11 you talked about the case, did Mr. Jenkins appear to understand
12 -- or I mean, what was his understanding of how you all were
13 going to proceed in the trial?

14 A As well as I remember, Mr. Jenkins there were some plea
15 offers. I don't remember what those were. However he always
16 insisted upon his innocence and that's his right to ultimately
17 make that decision about going to trial. He was not happy about
18 going to trial which most of our clients were not, but at the
19 end of the day that was his decision to go to trial and he
20 believed that witness was not telling the truth and was not
21 truthful in what she told law enforcement.

22 Q And as far as talking about the video --

23 MS. MOODY: Your Honor, may I approach. Its on
24 page nine, starting on line seven.

25 THE COURT: Page nine starting at seven?

1 MS. MOODY: Yes, sir.

2 Q And this is regarding the video, Mr. Hall?

3 A All right.

4 Q So does that refresh your memory as to what was said
5 about the video, that you might have said about the video?

6 A Well, this is what I said about the video. It doesn't
7 refresh my memory because I don't remember, but yes, it states
8 at this point we had a discussion about the video and at that
9 point I had indicated that I would not -- that if the State
10 sought to introduce it that it would be without objection from
11 the defense.

12 Q Okay. So you didn't know whether the State was going
13 to use it but if it came in you wanted the whole video in?

14 A At that point.

15 Q At that point. Later on in the trial and I believe you
16 previously testified you decided not to introduce the video?

17 A Yes.

18 Q Okay. And I believe you testified that was strategy or
19 --

20 A That was a trial decision, right.

21 Q Okay. And then in terms of --

22 A I mean part of the strategy is you have to weigh a
23 witness takes a stand do you want to show the video so the jury
24 can hear everything they said all over again the second time
25 and that can often be not very helpful to your clients.

1 Q So later on in the trial did you discuss that with Mr.
2 Jenkins?

3 A I don't remember that. I don't remember if I did.

4 Q Okay. And earlier you testified regarding the juror's
5 knowledge or knowing Dawn Carter from the solicitor's office. I
6 will hand you the transcript so you can see this.

7 THE COURT: What page is that?

8 MS. MOODY: 104, the entire page.

9 Q So, as far as Miss Desch presenting -- well, asking the
10 judge -- well, telling the judge she had an issue about the
11 jury. Do you recall how that came about and your comment in
12 terms of whether you objected, why you said no objection?

13 A From what I seen there in the transcript it would have
14 been the solicitor indicating that her paralegal or a paralegal
15 knew someone on the jury. There would have been no -- obviously
16 the jury is asked the question in voir dire did they have a
17 relationship, a very close personnel, business or social
18 relationship with anyone that works in the solicitor's office
19 and if a juror had answered that I would have had that
20 information during jury selection. But at that point it was
21 simply someone from the solicitor's office saying that they had
22 worked with a juror in the past.

23 Q Okay. And did they ever indicate that they had a close
24 personnel relationship with that --

25 A No. I did not find that to be a basis for me to object

1 to a particular juror being on the jury when they've gone
2 through the voir dire earlier.

3 Q And what would have happened if you objected, do you
4 know?

5 A Well, I would assume we would have en camera hearing
6 and the juror would have been brought in the courtroom and the
7 judge would question the juror as far as their relationship to
8 somebody that works in the solicitor's office and if they said I
9 don't know. I don't remember. I don't know anything about it.
10 Then that would be end of it. Or if they said, yeah, I remember
11 working with somebody then the next question would have been
12 would they have been able to be fair and impartial.

13 Q And so was there any indication that the juror didn't
14 remember Dawn Carter?

15 A No. What the transcript says is that the solicitor's
16 office someone said they knew a juror.

17 Q Okay. But they disclosed it to the Court?

18 A Yes.

19 Q Okay. Now earlier you mentioned plea offers and Mr.
20 Jenkins stating or maintaining his innocence. How many plea
21 offers were offered or made in this case?

22 A I don't know. I don't have the file.

23 Q But you are certain there were offers made?

24 A Yes.

25 Q And did you have opportunity to discuss those offers

1 with Mr. Jenkins?

2 A Yes, many times.

3 Q And he insisted on going forward?

4 A Mr. Jenkins always believed that the witnesses, the
5 victims, had reasons to be lying and were not telling the truth
6 and he was not going to plead to something he was not guilty of.

7 Q So in going forward, going forward with a trial, did
8 you have an opportunity to discuss what the consequences of
9 going forward with a trial what it meant if he was convicted?

10 A Yes.

11 Q As to Mr. Jenkins being in the SVP unit, after he
12 served his prison sentence, did you all have an opportunity to
13 discuss that?

14 A I don't -- I don't recall that. I may have. I don't
15 remember.

16 Q Did you have an opportunity to speak with him about
17 what happens in terms of like sexual registry?

18 A Yes. I'm sure I discussed with him about sexual
19 registry.

20 Q And did he seem to understand that?

21 A Yes.

22 Q Was there anything else that you would have discussed
23 with him in terms of the consequences of being found guilty?

24 A No, he was aware that the consequences were very
25 significant, the amount of time was significant, the sexual

1 registry for the rest of his life was significant. He was aware
2 of all those.

3 Q Okay.

4 MS. MOODY: Beg the Court's indulgence. No further
5 questions for this witness Your Honor.

6 THE COURT: Redirect.

7 MR. HUNTER: Nothing else Your Honor.

8 THE COURT: May this witness be excused.

9 MR. HUNTER: Yes.

10 THE WITNESS: Thank you.

11 MR. HUNTER: Nothing else from the State.

12 THE COURT: Any reply witnesses Miss Moody?

13 MS. MOODY: No, sir, Your Honor.

14 THE COURT: Thank you. I will read through the
15 materials and will I issue a decision.

16 MS. MOODY: Thank you.

17 (END OF TRANSCRIPT)

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C E R T I F I C A T E

I, the undersigned Aileen Butler, Official Court Reporter for the 16TH Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings in the captioned case, in the Circuit Court for York County, South Carolina, on the 2nd day of August, 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

December 30, 2017

Aileen Butler

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
Leonard Eugene Jenkins,)
S.C.D.C. No. 138712,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
OF THE SIXTEENTH JUDICIAL CIRCUIT

2017-CP-46-0242

ORDER OF DISMISSAL

FILED-RECEIVED
2017 SEP 15 PM 2:43
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed February 1, 2017. Respondent made its Return on or about June 8, 2017. An evidentiary hearing into the matter was convened on August 2, 2017, at the Moss Justice Center in York, South Carolina. Applicant was present at the hearing and represented by Leah Moody, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Daniel Hall, Esquire, also testified. This Court had before it a copy of Applicant's records from the York County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's PCR Application, and Respondent's Return.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. In June 2013, the York County Grand Jury indicted Applicant for lewd act on a child (2017-GS-46-2101). Daniel Hall, Esquire (hereinafter "Counsel") represented Applicant. Assistant Solicitor Jennifer Desch, Esquire prosecuted the case. On August 13, 2013, Applicant proceeded to trial before the Honorable

Donald Hocker. The jury found Applicant guilty as indicted. Judge Hocker sentenced Applicant to imprisonment for ten years, provided upon service of three years the balance would be suspended with probation for three years.

Applicant filed a timely notice of appeal. Susan B. Hackett, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on August 19, 2015. State v. Jenkins, Op. No. 2015-UP-429 (S.C. Ct. App. filed August 19, 2015). Applicant filed a petition for rehearing on September 3, 2015. The Court of Appeals denied the petition on October 23, 2015. Applicant filed a petition for writ of certiorari to the South Carolina Supreme Court on November 18, 2015. The Supreme Court denied the petition on June 16, 2016. The remittitur was returned to the circuit court on June 21, 2016.

PCR Application

In his application for post-conviction relief, Applicant alleges he is being held unlawfully for the following reasons:

1. "6th and 14th Amendment"
 - a. "Unable to present a complete defense and/or confront the witnesses about [their] inconsistent statements."
2. Ineffective Assistance of Counsel
 - a. "Did not [preserve] my issues for review on appeal and did not move to introduce the video after [the] State advised that they would not object anymore."
 - b. "My attorney did not object when the solicitor's paralegal Dawn Carter recognized and worked with one of the jurors for years in a nursing home in York County."
3. "The detective never questioned all the witnesses in the case that was the alleged victim and the detective never questioned her as to what she saw."
 - a. "Amber S. was present sitting in a chair across from the alleged victim and the detective never questioned her as to what she saw or the other people that was in the home at the time of the alleged lewd act."

II. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject

convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Counsel's testimony to be credible and persuasive on all matters. This Court finds that Applicant's testimony was not credible. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Ineffective Assistance of Counsel

Failure to call witnesses

Applicant alleged that Counsel was ineffective for failing to call witnesses at his trial. He testified that there were other witnesses present at the house who were not questioned by detectives. He testified that Amber S. should have been called and Counsel told him that the State said Amber was too young to be a witness. Applicant testified that Kacie S. was thirteen or fourteen years old at the time and should have been called as a witness. Applicant further testified that his wife should have been called to the stand, but testified that he never thought his case would go as far as needing her to testify. He testified that these witnesses would have been important to establish the truth at trial. Applicant further testified that these witnesses were not investigated by the State's detectives on what they saw and he did not know that Amber S. was in the room at the time of the incident until he was in jail.

Counsel testified that he received a list of potential witnesses prior to the trial. He testified that he did not know about the witnesses being too young to testify. He testified that he talked to Applicant's stepchildren and neighbors. He testified that these witnesses provided some helpful information but also unhelpful or harmful information. He testified that he strategically

chose not to call witnesses that would not be helpful to Applicant's defense. Counsel testified that no witness he interviewed would have been more helpful than they would be hurtful to Applicant's case if they testified at trial.

This Court finds that Applicant has failed to show that Counsel was ineffective for failing to call witnesses. This Court finds Counsel provided credible testimony that he investigated and interviewed Applicant's stepchildren and neighbors and ultimately made the strategic decision to refrain from calling these witnesses because all witnesses he interviewed would have been more harmful to Applicant's case than helpful. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The trial strategy articulated by Counsel in this case was held to be reasonable in Stokes v. State¹. In Stokes, trial counsel stated that he chose not to use certain witnesses at trial because, "in his judgment at the time, their testimony would not have been of value to the petitioner's case". Stokes, 308 S.C. at 548, 419 S.E.2d at 779. Counsel's decision not to call unhelpful witnesses constitutes a valid trial strategy and his performance was not deficient.

Further, this Court finds that Applicant has failed to show that he was prejudiced by Counsel's actions as Applicant did not provide any witnesses to testify at the PCR hearing. In order to support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise

¹ 308 S.C. 546, 419 S.E.2d 778 (1992).

introduce the witnesses' testimony in a manner consistent with the rules of evidence. Applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). As Applicant has failed to meet his burden of proving Counsel was ineffective, this allegation must be dismissed.

Video Evidence

Applicant testified that Counsel was ineffective for failing to enter the video from the victim's forensic interview into evidence after the State said they would not object. He testified that the video was a seventeen-minute statement from the victim where the victim stated that she did not initially disclose Applicant touching her because she was nervous, whereas the notes indicated she did not disclose the act because she was afraid to lose her friendship with Kacie. Applicant testified that Counsel tried to get the video statement into evidence but the trial court would not allow it in evidence.

Counsel testified that the forensic interview video contained information that could help Applicant's case but also information that would hurt the defense. He testified that he wanted to get the video in to impeach the victim's testimony and was unable to only show parts of the video. Counsel testified that he had the notes from the forensic interview and testified that the fact that the victim said she did not disclose the act because she was afraid to lose her friendship with Kacie was not exculpatory information. Counsel testified that he went over the incident report with Applicant and Applicant always insisted that he was innocent and wanted a trial.

This Court finds that Applicant has failed to show that Counsel was ineffective for failing to move the forensic interview video in evidence. The record reflects that Counsel argued extensively at trial to introduce the video to show inconsistent statements, but the trial court ruled

that it would be inadmissible for impeachment because the victim did not deny making the prior inconsistent statements. See Trial Transcript 158-191. Counsel attempted to show a portion of the videotape; however the trial court denied his request. This Court finds that Counsel's actions were not deficient because he did attempt to move the video into evidence but was denied by the trial court. This Court further finds that Applicant has failed to show that he was prejudiced by Counsel's actions. Applicant failed to present the videotape at the PCR hearing and this Court will not speculate as to its contents and whether it would change the outcome of Applicant's trial. Accordingly, this allegation must be dismissed.

Failure to preserve issue for appeal

Applicant testified that Counsel did not preserve issues concerning the video for appeal. Applicant filed a notice of appeal, arguing that the judge erred in refusing to play the forensic interview videotape because it violated his confrontation rights and right to complete his defense pursuant to the Sixth and Fourteenth Amendments. The Court of Appeals affirmed Applicant's convictions but found that "[b]ecause [Applicant] did not make any argument at trial regarding his rights under the Sixth or Fourteenth Amendments, these issues are not preserved for [appellate] review." State v. Jenkins, Op. No. 2015-CP-429 (Ct. App. 2015). The Court of Appeals found the video was properly ruled to be inadmissible because (1) the victim admitted making the prior inconsistent statements, (2) the testimony of the victim's shirt was collateral and not subject to impeachment by extrinsic evidence, (3) the victim's testimony regarding the way Applicant touched her was not inconsistent with her testimony at trial, and (4) Applicant could not use the video to show that a prior statement regarding the victim's testimony regarding her delayed disclosure of the incident was not made. Id.

This Court finds that Counsel was not deficient for failing to make an argument that the video should come in pursuant to Applicant's Sixth and Fourteenth Amendment rights at trial to preserve the issue for appeal. Counsel argued extensively at trial to allow the videotape into evidence, asking that it be played in court to impeach the victim, to show prior inconsistent statements, and to refresh the detective's recollection regarding the victim's statements. This Court finds that Applicant has failed to show that an argument that trial court violated Applicant's Sixth and Fourteenth Amendment rights would have been a more successful argument than the other arguments Counsel made at the trial. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. This Court finds that Counsel did not act unreasonably in failing to argue a Sixth and Fourteenth Amendment violation as he chose to argue that the video should be allowed based on the other arguments concerning the Rules of Evidence.

This Court finds that Applicant cannot show that he was prejudiced by Counsel's failure to preserve the issue for appeal because he has failed to prove the issue would have been successful on appeal. Our courts have previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475-76, 746 S.E.2d at 47 ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an

examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim.") (citing Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded." (emphasis in McHam)). Therefore, before a post-conviction relief court can find an applicant has prevailed on a claim of ineffective assistance of trial counsel for failing to preserve a ground for appellate review, the court must determine the underlying claim was meritorious and a reasonable probability that it would have resulted in reversal and a new trial.

This Court finds that Applicant's Sixth and Fourteenth Amendment violation argument would not have been meritorious on appeal. Pursuant to the Sixth Amendment of the United States Constitution, every criminal defendant has a right to "to be confronted with the witnesses against him" during trial. U.S. Const. Amend. VI. Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses. State v. Aleksey, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). "The limitation of cross-examination is reversible error if the defendant establishes he was unfairly prejudiced:" State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). Counsel conducted extensive cross-examination of the victim. He asked her pointed questions regarding her interview with Detective Neely and was successful in getting the victim to acknowledge inconsistencies between details she provided during that interview and her testimony at trial. The trial court did not impose any limits on Counsel's cross-examination of the victim and Counsel never sought to introduce the video recording of the interview, or any part of that video, during that cross-examination. Trial Transcript p. 82, l. 16 –

93, 1. 25. Thus, Applicant's constitutional right to confront the victim and to conduct a meaningful cross-examination of her was fully protected at trial and there is not a reasonable probability that this argument would have been successful on appeal. Further evidencing its lack of success on appeal is the fact that the Court of Appeals, despite finding that the issue was not preserved, found "[Applicant] was not prejudiced by the trial court's decision to exclude the video because he was allowed to extensively cross-examine [the victim] and the police officer who interviewed [the victim] in the video." State v. Jenkins, Op. No. 2015-CP-429. Accordingly, this Court finds that Applicant has failed to show that Counsel was deficient for failing to argue at trial and preserve for appeal that the court violated his Sixth and Fourteenth Amendment rights by excluding the video of the victim's forensic interview. As he has also failed to prove resulting prejudice, this allegation must be dismissed.

Failure to object to the State's paralegal knowing a juror

Applicant testified that Counsel was ineffective for failing to object when the State disclosed during the trial that its paralegal indicated she recognized Juror #168 from working with her at a nursing home years ago. Counsel testified that if the juror disclosed any prior relationship during voir dire then he would object, but at that point in the trial it was simply the State's paralegal who indicated she had worked with the juror at some point in the past and did not indicate a close personal relationship. The record reflects that during trial, the assistant solicitor notified the trial court:

Your Honor, I wanted to point out after we broke and left the room, my paralegal, Dawn Carter, indicated she recognized one of the jurors from working with her years ago at a nursing home here in town. It was years ago. Dawn's name was never mentioned on the record so I don't know [Juror 168] would remember who she was, but I wanted to let the Court know and the defendant know that someone from my office did recognize a juror but has no familiar relationship.

Trial Transcript p. 104, ll. 5-15. Counsel stated he had no objection.

This Court finds that Applicant has failed to show that Counsel's actions were deficient. Counsel was not unreasonable in failing to object to Juror #168's presence on the jury and find Counsel provided credible testimony that he would have objected had the juror disclosed a prior relationship during voir dire. This Court finds that Applicant has failed to show that he was prejudiced by Counsel's actions because he has failed to show that the outcome of the trial would have been different. This Court finds that Juror #168 gave no indication that she had a prior personal or working relationship with any party and gave no indication that she could not be indifferent. Applicant has failed to show that Juror #168 was not impartial and that Counsel should have objected to her presence. Applicant has failed to show that he was prejudiced by Counsel's actions and this allegation must be dismissed.

Law Enforcement Investigation

Applicant alleged that the detective never questioned all the witnesses in the case and never questioned the victim as to what she saw. This Court finds that this claim is without merit. A claim concerning law enforcement's alleged shortcomings in their investigation is not a PCR matter but is a factual question for the trial jury. This Court finds that Counsel's actions were not deficient in this regard as he pointed out the lack of evidence during his cross-examination of the State's witnesses and his closing argument. This Court further finds that Applicant was not prejudiced by Counsel's actions as he has failed to show that the outcome of the trial would have been different. Accordingly, this allegation must be dismissed.

IV. CONCLUSION

Based on the foregoing facts, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Applicant failed to demonstrate that Counsel's

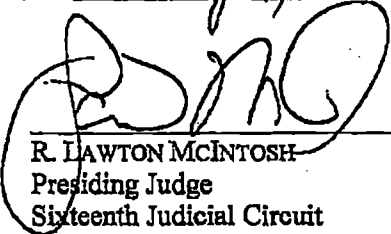
performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 8th day of Sept, 2017, 2016.


 R. DAWTON MCINTOSH
 Presiding Judge
 Sixteenth Judicial Circuit

Andersa, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2017CP4600242

Leonard Eugene Jenkins

South Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: The Court

Attorney for: ☐ Plaintiff ☐ Defendant☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☒ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court

ORDER OF DISMISSAL

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/R. Lawton McIntosh

2155

9/8/2017

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on September 15, 2017, and a copy mailed first class or placed in the appropriate attorney's box on September 15, 2017, to attorneys of record or to parties (when appearing pro se) as follows:

Leonard Eugene Jenkins 1700 St Andrews Terrace Building
A Columbia, SC 29210
Lenh B. Moody 235 E. Main St., Ste 115 PO Box 1015 Rock
Hill, SC 29730

Justin James Hunter PO Box 11549 Columbia, SC
29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

EXHIBITSCOURT OF GSDATE 8-2-17COUNTY YorkJUDGE McIntosh~~Applicant~~
PLAINTIFF Leonard Jenkins~~State~~
DEFENDANT RespondentATTORNEY Leah MoodyATTORNEY Justin HunterCASE NUMBER 2017CP 46-242PLAINTIFFDEFENDANTJOINT

1. _____

1 Incident Report

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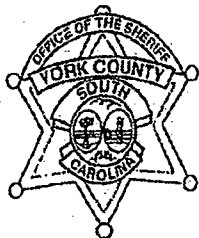
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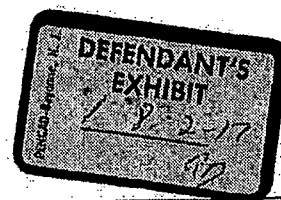
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RECEIVED OF _____, COURT REPORTER ALL OF THE ABOVE
EXHIBITS.DATE 8-2-17CLERK Wanna Foster



INCIDENT INTERVIEW REPORT



YCSO CASE NUMBER: 201200001789 LEAD NUMBER: _____

PERSON INTERVIEWED: Minor I

DATE OF BIRTH: _____ SOCIAL SECURITY NUMBER: _____

ADDRESS: (HOME) _____

TELEPHONE: _____

(WORK) Student

TELEPHONE: _____

DATE OF INTERVIEW: 02-14-12 TIME: 08:30 AM

LOCATION OF INTERVIEW: MJC CID Conference RoomPURPOSE/TOPIC OF INTERVIEW: Sexual assault offense

DETAILS OF INTERVIEW:

On February 14, 2012, I conducted a forensic interview with Minor I in the CID conference room at MJC. The interview was video recorded. A DVD is available for full details of the interview. The interview was conducted while utilizing the accepted method of forensic interviewing known as RATAAC. This is a semi structured protocol for interviewing children. During the interview a rapport was established and maintained throughout. Minor I was notified of the recording and the importance of only discussing the truth and talking about things that are real. Minor I understood the rules and demonstrated that she knew the difference in telling the truth and a lie. Minor I appeared to be age appropriate and had no problems with providing details and information without being guided.

Minor I provided information concerning her age (13), her school (____ School), and members of her family that she lives with. Minor I provided names for body parts on the male and female anatomic drawings. Minor I provided names of family members that give her hugs, kisses, and tickles. When asked about an incident that may have not been good or a touching that was not ok with her, Minor I stated that "Gene" touched her inappropriately while she was sitting on the couch holding Gracey (Gene's toddler child). Minor I provided details of the incident that included Gene touching her vagina with his hand. Minor I described how Gene put Gracey on her lap and how he put his hand down her shorts and touched her "private." Only those three were in the room when this occurred. Minor I drew a diagram of Gene's house and said that others were in the home at the time but not in the living room where and when this happened. Minor I said that she never told anyone because she was scared that she would not be able to be friend's with Kacie (Gene's daughter). Minor I said that this incident happened the summer prior to going to returning to school this school year.

While entering the closing portion of the interview, the camera shut down. Minor I did not make anymore statements as to this incident or any other incident. We discussed the importance of reporting this type of incident to her mother or others that may be able to help.

OFFICER / AGENT: Detective Carson NeelyPAGE 1 OF 1

WITNESSES

YCSOWeely

dc

ARREST WARRANT NUMBER

J-158128

ACTION OF GRAND JURY

/s/ Paul Vehaun

TRUE BILL

6-14-12-True Billed

Sammy Eakers
Foreperson of Grand Jury
Date: *6-13-13*

VERDICT

Guilty

Arnell R. Lee
Foreperson of Petit Jury
Date: *8-14-2013*

AMENDED DOCKET NO. 2012-GS-46-02101

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

June 13, Term 2013

THE STATE

vs.

LEONARD EUGENE JENKINS

Indictment for

LEWD ACT UPON A CHILD

SC Code: 16-15-140
CDR Code: 2468

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)

CERTIFIED TRUE INDICTMENT

COUNTY OF YORK)

2013 AUG 15 AM 11:09

DAVID HAMILTON
CLERK OF COURT

At a Court of General Sessions, convened on June 13, 2013, the Grand Jurors of York County present upon their oath:

LEWD ACT UPON A CHILD

That the Defendant, Leonard Eugene Jenkins, a person over the age of fourteen (14) years, did in York County, South Carolina, during or about the month of May 2011 through on or about the month of August, 2011, willfully and lewdly commit or attempt to commit a lewd or lascivious act upon the body, or any part or member thereof, of a child under the age of sixteen (16) years, to wit: by touching the vagina of minor female child, Minor 1, dob /99, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of himself or of said child, all in violation of Section 16-15-140, S.C. Code of Laws 1976, as amended.

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


ASSISTANT SOLICITOR

COUNTY OF York
STATE 484 VS.
Leonard Eugene Jenkins
AKA:
Race: WHITE Sex: M Age: 49
DOB: 1964 SS#:
Address:
City, State, Zip:
DL#: SID#:
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

INDICTMENT/CASE#: 2012GS4602101
A/W#: J158128
Date of Offense: 8/1/2011
S.C. Code §: 16-15-0140
CDR Code #: 2468

ORIGINAL

In disposition of the said indictment comes now the Defendant who was SC
TO: COMMITTING LEWD ACT UPON A CHILD UNDER 16 (0- 15 YRS)

in violation of § 16-15-0140 of the S.C. Code of Laws, bearing CDR Code # 2468
☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: Jenny E. Dwyer 72806
Dech. Penny E. SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed 3 years
and/or to pay a fine of \$ 3; provided that upon the service of 3 days/months/years and/or payment
of \$ 3; plus costs and assessments as applicable*; the balance is suspended with probation for 3

3 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:
☐ The Defendant is to be given credit for time served pursuant to S.C. Code 24-13-10 to be calculated and applied
by the State Department of Corrections.

☒ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP
Total: \$ plus 20% fee: \$
Payment Terms:
☐ Set by SCDPPPS

Recipient:

*Fine:	\$
§ 14-1-206 (Assessments 107.5%)	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100
§ 56-5-2995 (DUI Assessment)	\$12
§ 56-1-286 (DUI Breath Test)	\$25
Proviso 47.9 (Public Def/Prob)	\$500
§ 14-1-212 (Law Enforce. Funding)	\$25
§ 14-1-213 (Drug Court Surcharge)	\$150
§ 50-21-114 (BUI Breath Test Fee)	\$50
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea
Proviso 90.5 (SCCJA Surcharge)	\$5
3% to County (if paid in installments)	\$
TOTAL	\$ 130.00

 days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning

\$ paid to Public Defender Fund
Other: MANDATORY Sexual
registry and GPS monitoring
to apply.

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk David Hamel
Court Reporter: Phyllis Campos
SCCA/217 (03-2011)

Presiding Judge
Judge Code: 2167 Hoch
Sentence Date: 8/14/13