STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Florence County
Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2017-001045

THE STATE,

Respondent,

vs.

VANCE ROSS,

Appellant.

INITIAL BRIEF OF RESPONDENT

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II.

The trial judge properly denied Appellant's directed verdict motion as to all seven of the charged counts of first-degree criminal sexual conduct with a minor because, when viewed in a light most favorable to the State, the evidence and testimony presented during trial established Appellant's guilt for all seven counts, including for the two distinct counts charging Appellant solely with putting his penis in the mouth of one of his daughters.

STATEMENT OF THE CASE

In July of 2015, Appellant Vance Ross was arrested following an investigation into allegations he sexually abused his two minor daughters over an extended period of time and at a variety of different locations in Florence, South Carolina. In January of 2016, the Florence County Grand Jury issued a nine-count indictment charging Appellant with eight counts of first-degree criminal sexual conduct with a minor and one count of third-degree criminal sexual conduct with a minor. On April 17, 2017, a jury trial was commenced on seven of the counts of first-degree criminal sexual conduct with a minor in the Florence County Court of General Sessions with the Honorable D. Craig Brown, circuit court judge, presiding. At the conclusion of the three-day trial, the jury convicted Appellant of six counts of first-degree criminal sexual conduct with a minor and acquitted him of the remaining count. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of life without parole for each of the convictions. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

One day in the summer of 2014, Esther Lewis ("Mother") got into an argument with Appellant Vance Ross, who was the father of her two daughters and two sons, after he accused her of not wanting to spend time or engage in "sexual activities" with him. (Tr. pp. 82-83; p. 208; pp. 212-213; pp. 215-216; pp. 225-227). Following the argument, Mother returned to her parents' home in Florence, South Carolina.[1] (Tr. p. 200; p. 207; p. 209; p. 214). Upon arriving, Mother spoke with her mother, who was the children's grandmother, in the kitchen, informed her of the nature of the argument with Appellant, and remarked Appellant was fixated on oral sex. (Tr. pp. 213-214). During that discussion, Mother's eight-year-old daughter ("Victim 1") overheard what Mother was saying, came into the kitchen, and revealed Appellant liked to perform oral sex on her, too. (Tr. p. 96; p. 214). Shocked by the revelation, Mother immediately called the police to notify them of the sexual abuse, and officers quickly responded to the home to take a report. (Tr. pp. 214-215). Thereafter, Victim 1's eight-year-old twin sister ("Victim 2") also disclosed she had been sexually abused to Mother. (Tr. p. 154; p. 215).

A few weeks later, the Florence County Sheriff's County assumed responsibility for the investigation into the sexual abuse, and Investigator Jennifer Floyd was assigned to handle the matter.[2] (Tr. pp. 82-84; pp. 197-198). Upon taking over the case, Investigator Floyd referred the victims for medical examinations and forensic interviews, and, during the interviews, both

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[1] At that time, Mother was residing at her parents' home along with her mother, her father, her children, her sister, and her sister's children. (Tr. p. 209). Prior to doing so, Mother had lived in her own house with Appellant and their children. (Tr. pp. 208-209). However, in 2013, Mother lost the house and was forced to move in with her parents. (Tr. p. 209). Meanwhile, during that time period, Appellant alternated between staying at a shelter and various hotels. (Tr. pp. 209-210).

[2] Based on the testimony presented during trial, it appears the Florence County Sheriff's Office became involved in the investigation due to potential jurisdictional issues for the Florence Police Department. (Tr. pp. 224-226).

Victim 1 and Victim 2 disclosed Appellant sexually abused them by committing acts of oral, anal, and vaginal penetration at a number of different locations throughout Florence County.[3] (Tr. pp. 198-200; pp. 231-232; p. 253; pp. 256-258; p. 259; p. 266). Ultimately, through her investigative work, Investigator Floyd was able to develop a general time frame of when the abuse occurred based on where the victims were living at different times and based on their reported ages during the incidents of abuse. (Tr. p. 201).

At the conclusion of the investigation, Appellant was arrested and indicted for a number of different offenses through a nine-count indictment. (Tr. pp. 6-7; Indictment). Specifically, amongst the counts in the indictment, Appellant was charged with four counts of first-degree criminal sexual conduct with a minor involving Victim 1 that were alleged to have occurred in Florence County between the dates of February 1, 2013, and July 31, 2014, with two different counts alleging Appellant put his penis inside her mouth, one count alleging he put his penis inside both her vagina and mouth, and one count alleging he put his penis inside her vagina, anus, and mouth. (Indictment). Similarly, Appellant was charged with three counts of first-degree criminal sexual conduct with a minor involving Victim 2 that were alleged to have occurred in Florence County between the dates of February 1, 2013, and July 31, 2014, with one count alleging Appellant put his penis inside her mouth and two different counts alleging he put his penis inside her vagina. (Indictment).

Subsequently, Appellant proceeded to trial on the seven counts of first-degree criminal sexual conduct with a minor alleged to have been committed between February of 2013 and July

[3] Although both victims disclosed a number of different instances of sexual abuse committed by Appellant during the forensic interviews, the eight-year-old girls' statements were occasionally contradictory, inconsistent, or lacking in detail in regard to when and where the different assaults occurred, how many times the assaults took place, and what specifically took place during each of the incidents. (State's Ex. # 6 (Recording of Forensic Interviews)).

of 2014, and, at the outset of trial, defense counsel moved to quash the multi-count indictment based on the South Carolina Supreme Court's decision in State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015).[4] (Tr. pp. 6-7; p. 32). In support of that motion, defense counsel asserted the counts all involved a one-and-a-half-year time span but contained "absolutely no distinguishing language whatsoever." (Tr. pp. 38-40). Additionally, defense counsel asserted the counts were not adequate because they did not contain sufficient information for the court to ascertain what Appellant had been acquitted of in the event he was found not guilty of some them. (Tr. p. 41). Furthermore, defense counsel asserted the time span alleged in the counts was overly broad, unspecific, and unparticular since Appellant was the victims' father and, therefore, "was regularly in the life of " the victims and "probably saw them a thousand times over that period of time." (Tr. pp. 48-49; pp. 52-53). However, defense counsel acknowledged he had reviewed the victims' forensic interviews in preparation for trial and conceded the victims used "broad" and "confusing" language during the interviews that would effectively prevent anyone from being able to specifically determine how many times the abuse occurred or to clearly distinguish between the different instances of abuse. (Tr. pp. 40-41). Nonetheless, defense counsel maintained the multi-count indictment was improper because Appellant purportedly could not narrow the scope of the charges or raise any defense other than a denial based on the information contained in the different counts. (Tr. pp. 48-49).

In rebuttal, the solicitor contended each of the counts was sufficiently distinguished from the others by identifying the particular victim involved and the particular type of sexual battery involved in the individual counts. (Tr. pp. 49-50). Additionally, the solicitor asserted Appellant

[4] Although Appellant was indicted for two additional charges through the multi-count indictment, the solicitor elected not to proceed forward on those charges based on the fact they alleged significantly broader time spans for the abuse. (Tr. p. 60; Indictment).

had been on notice of the counts in the indictment for well over a year and, thus, was not surprised by the charges he was facing like the defendant in Baker had been. (Tr. pp. 50-51). Furthermore, the solicitor noted the eighteen-month time span involved in Appellant's case was shorter than either the six-year time span involved in Baker or the two-year and three-year time spans involved in other cases in which the indictments were found not to be overly broad. (Tr. pp. 51-52). For those reasons, the solicitor argued the counts in the indictment were sufficiently specific, distinguishable, and not overly broad such that the motion to quash should be denied. (Tr. p. 52).

After considering the matter and reviewing the relevant appellate decisions, the trial judge denied the motion to quash. (Tr. pp. 54-61). In denying the motion, the trial judge noted each of the counts in the indictment specifically identified the particular minor victim involved and identified the specific type of sexual battery that was alleged to have been committed while the time span identified in each of the counts covered a period of only eighteen months. (Tr. pp. 60-61). The trial judge further noted Appellant had a long period of notice in regard to the charged offenses in light of the fact he had been indicted over fifteen months earlier. (Tr. p. 61). Based on those factors, the trial judge concluded the time span alleged in the indictment was not overbroad and there was no proper basis upon which to quash the indictment. (Tr. p. 61).

Following the trial judge's ruling, the trial proceeded forward, and Victim 1, who was eleven years old at the time of trial, testified Appellant sexually abused her and her sister multiple times at a variety of different locations when she was around seven or eight years old. (Tr. pp. 95-151). More specifically, Victim 1 indicated Appellant touched her and her sister's buttocks and vagina on one occasion while inside a parked vehicle at their grandmother's house, put his penis in her vagina on at least one occasion while inside a parked vehicle at the same

location, put his penis in her vagina at the Thunderbird Inn hotel, touched her "[i]n [her] mouth" on yet another occasion near a bus stop, and put his penis in her vagina at a park once. (Tr. pp. 103-108; p. 120; pp. 134-135; pp. 139-144). Additionally, Victim 1 revealed Appellant put his penis in her mouth at the Thunderbird Inn hotel on one occasion, but she then quickly offered inconsistent testimony and asserted Appellant did not actually get "it" into her mouth during that incident. (Tr. p. 119). Likewise, Victim 1 alternately claimed Appellant did and did not put his penis in her anus on multiple occasions, and she asserted he did put his penis inside her mouth and vagina between five and ten times in total.[5] (Tr. pp. 124-125; pp. 129-130). Furthermore, Victim 1 stated she saw Appellant put his penis inside Victim 2's mouth on one occasion. (Tr. pp. 122-123).

Similarly, Victim 2, who was also eleven years old at the time of trial, testified the numerous instances of sexual abuse involving her and her sister that occurred around the time she was seven or eight years old. (Tr. pp. 154-195). Specifically, during her testimony, Victim 2 recounted Appellant put his penis in her mouth at the Thunderbird Inn hotel on one occasion, put his penis in her vagina between one and five times at that location, put his penis in her anus one time at that location, put his penis in her anus one time at a different hotel, and put his penis in her mouth and vagina on multiple occasions while inside a vehicle parked at her grandmother's house.[6] (Tr. pp. 158-162; pp. 164-165; pp. 168-170). Likewise, Victim 2 indicated she observed Appellant put his penis in her sister's anus at one of the hotels and saw Appellant put his penis in

[5] Regarding a potential cause of or contributing factor to the inconsistencies in Victim 1's testimony, Victim 1 revealed she was "frightened" and "intimidated" about testifying and was "shy." (Tr. p. 127; p. 130; p. 151). Furthermore, according to Mother, Victim 1 was assigned to "resource" classes in school while her sister was assigned to "regular" classes. (Tr. p. 212).

[6] In recounting the sexual abuse, Victim 2 indicated Appellant's penis had a scar on it. (Tr. p. 192). Notably, Mother later testified Appellant's penis was, in fact, scarred as the result of a surgical procedure. (Tr. p. 212).

her sister's mouth once and vagina on multiple occasions while they were inside a vehicle parked outside their grandmother's house. (Tr. pp. 164-165; pp. 168-170). Moreover, Victim 2 stated she saw Appellant unsuccessfully attempt to put his penis in Victim 1 vagina and mouth at the Thunderbird Inn motel, but she acknowledged she had previously indicated during the forensic interview she observed Appellant put his penis in Victim 1's mouth while the two were showering together at that location. (Tr. p. 162; p. 182).

Furthermore, in addition to the victims' testimony, Mother offered testimony confirming Appellant regularly was with the victims for long periods of time at hotels, at the park, and in a vehicle parked outside of her parents' house while she was working during the time period of the abuse. (Tr. pp. 209-211; p. 222). Moreover, she discussed Victim 1's initial disclosure of the abuse, and she noted the victims began exhibiting behavioral changes, such as bed-wetting and issues in school, that began to manifest during the period of time in which the abuse was alleged to have occurred.[7] (Tr. pp. 212-218).

Beyond that testimony, the officers involved in the investigation into the allegations discussed the steps in the investigation that culminated in Appellant being charged for numerous instances of sexual abuse.[8] (Tr. pp. 82-85; pp. 197-201). Likewise, Dr. Anne Abel, a

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[7] Specifically, regarding the initial disclosure, Mother indicated Victim 1 revealed the abuse to her while she was speaking with her own mother about Appellant's sexual preferences, she called the police in response, and then Victim 2 revealed the abuse to her after the police had taken a report. (Tr. pp. 213-215). However, during the victims' testimony, Victim 1 alternately stated she revealed the abuse to Mother and her sister revealed the abuse to Mother, and Victim 2 indicated she revealed the abuse to Mother before the police were contacted. (Tr. pp. 106-107; p. 133; pp. 172-174).

[8] Sally Williamson, the forensic interviewer who conducted the interviews of the victims, also testified during trial in a hearing conducted outside the presence of the jury in order to establish the admissibility of the recording of the forensic interviews. (Tr. pp. 231-250). Ultimately though, the recording was not admitted into evidence because the solicitor was unable to effectively redact certain inadmissible portions of the interviews. (Tr. pp. 251-252).

pediatrician and expert in child abuse who participated in the medical examinations of the victims, discussed the results of the examinations, noted Victim 2 had no signs of injury, and indicated Victim 1 had two mounds on her hymen that could potentially have been caused naturally or by sexual abuse. (Tr. p. 259; pp. 266-267; p. 281). However, Dr. Abel's specifically noted an absence of injuries did not rule out the possibility of sexual abuse due to the fact injuries resulting from acts such as vaginal or anal penetration tended to heal very rapidly. (Tr. pp. 259-262; pp. 264-266).

Thereafter, at the conclusion of evidentiary phase of trial, defense counsel moved for a directed verdict on all seven counts of first-degree criminal sexual conduct with a minor. (Tr. pp. 286-287; pp. 310-311). In support of that motion, defense counsel argued no testimony had been presented to establish more than one count of oral penetration occurred involving Victim 1 while two of the counts solely alleged acts of oral penetration involving that particular victim. (Tr. pp. 288-289). Furthermore, regarding the remainder of the counts, defense counsel contended the testimony was so contradictory and convoluted the jury would be forced to speculate in order to reach a verdict. (Tr. pp. 289-291). In rebuttal, the solicitor argued sufficient evidence had been presented for the case to be submitted to the jury while noting it would be up to the jury to resolve the credibility issues raised by the evidence. (Tr. p. 293). Moreover, the solicitor noted the testimony left some confusion as to the exact number of incidents of sexual abuse but contended testimony had been presented from both girls regarding a variety of different incidents such that the directed verdict motion should be denied. (Tr. pp. 291-293).

After considering the matter overnight and meticulously reviewing his trial notes, the trial judge denied the directed verdict motion. (Tr. p. 293; pp. 301-303; p. 311). In denying the

motion, the trial judge found the testimony presented from both victims established Appellant anally penetrated Victim 1 three times in total, vaginally penetrated her one time at her grandmother's house, and orally penetrated her once at her grandmother's house and once at the Thunderbird Inn hotel. (Tr. pp. 302-303). Likewise, the trial judge found the testimony presented established Appellant vaginally penetrated Victim 2 at both her grandmother's house and at the Thunderbird Inn hotel, orally penetrated her at the same hotel, and put his penis in her "private part" at least five times. (Tr. p. 303). Based on that evidence, the trial judge concluded all of the charges should be submitted to the jury. (Tr. p. 303; p. 311).

Following the trial judge's judge ruling, the parties presented their closing arguments to the jury. (Tr. pp. 311-346). During defense counsel's closing argument, defense counsel focused on inconsistencies in the victims' testimony he characterized as "voluminous," "huge," and "major" in arguing the State failed to prove Appellant's guilt beyond a reasonable doubt. (Tr. pp. 326-329; pp. 331-335; pp. 340-341).

After the parties finished their closing arguments, the trial judge instructed the jury on the applicable law. (Tr. pp. 348-364). As part of his jury instructions, the trial judge explained the State had the burden of proving Appellant's guilt beyond a reasonable doubt for each of the charges, thoroughly explained reasonable doubt to the jury, instructed the jury on assessing witness credibility, identified the elements of first-degree criminal sexual conduct with a minor, indicated each of the counts had to be considered separately, and specifically advised the jurors their verdict must be unanimous.[9] (Tr. pp. 349-351; pp. 354-356; pp. 359-362).

[9] In instructing the jury on witness credibility, the trial judge presented an instruction to the jury that improperly singled out the testimony of juvenile witnesses while appearing to incorrectly suggest the testimony of such witnesses warranted greater scrutiny than the testimony of other witnesses. (Tr. pp. 355-356). Specifically, the trial judge instructed the jury: "[D]uring the course of this trial, ladies and gentlemen, you heard the testimony from children. Where a

Subsequently, at the conclusion of trial, the jury convicted Appellant of three counts of first-degree criminal sexual conduct with a minor involving Victim 1 and three counts of first-degree criminal sexual conduct with a minor involving Victim 2. (Tr. pp. 372-373). Meanwhile, the jury acquitted Appellant of the single count of first-degree criminal sexual conduct with a minor alleging oral, vaginal, and anal penetration of Victim 1. (Tr. pp. 372-373). Following the verdict, the trial judge imposed an aggregate sentence of life without parole upon Appellant. (Tr. p. 385).

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witness is a child, you must determine, as with any witness, whether that testimony is believable. In deciding believability, you may consider not only the matters that I have already discussed with you, but you may also consider the age of the child, the child's ability to observe and remember facts, and the child's ability to understand and answer questions. It is up to you to decide whether the child understood the seriousness of appearing as a witness at this criminal trial, whether the child understood the questions, whether the child had a good memory, and whether the child understands the difference between lying and telling the truth. In addition, young children may be influenced by the way that questions are asked. It is up to you to decide whether the child understood the questions asked." (Tr. pp. 355-356).

ARGUMENT

I.

The trial judge properly denied Appellant's motion to quash the multi-count indictment charging him with seven distinct counts of first-degree criminal sexual conduct with a minor because the language used in those counts was sufficient to fully provide him with the required notice in regard to the charges he was facing and because the eighteen-month time span alleged in the counts was not unconstitutionally overbroad in light of the fact it could not be narrowed further based on the young age of the victims coupled with their inability to remember the precise times and locations of the many instances of sexual abuse inflicted upon them by their father.

Appellant contends the trial judge reversibly erred by refusing to quash the indictment issued in his case. In support of that contention, Appellant maintains the eighteen-month time span alleged in the seven counts of first-degree criminal sexual conduct with a minor for which he was tried was unconstitutionally overbroad and vague due to the fact it failed to provide sufficient notice, was not narrowed as much as possible, and was lacking in sufficient specificity. Contrary to Appellant's contention, the different counts of the multi-count indictment issued in Appellant's case were not unconstitutionally overbroad and provided sufficient notice such that the trial judge was able to know what judgment to pronounce in the event of a conviction, Appellant was able to know what he was called upon to answer, and Appellant was apprised of the elements of the offense charged in each count. Furthermore, the eighteen-month time span alleged in the different counts was not unconstitutionally overbroad and, instead, was sufficiently specific—particularly in light of the young age of the victims and the victims' inability to be any more specific regarding the timing and exact location of the many acts of sexual abuse they endured—such that Appellant was neither incapable of combating the charges raised against him nor taken by surprise in any manner. Accordingly, under those circumstances, there was no legitimate basis upon which to quash the multi-count indictment issued in Appellant's case, and

the trial judge properly denied Appellant's motion to quash. Appellant's convictions should be affirmed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "In appeals of pretrial rulings, [the appellate court] is 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.' " Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) (quoting State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)). Importantly, a trial judge's ruling on a matter "will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs when the trial judge's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

ANALYSIS

In South Carolina, an indictment issued by a grand jury is generally required before an individual can be held to answer in any court for a criminal offense. See S.C. Const. art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger."); see also S.C. Code Ann. § 17-19-10 ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury, except [under certain circumstances]."). Generally speaking, an indictment is a notice document, and its "primary purpose" is " 'to put the defendant on notice of

what he is called upon to answer, *i.e.*, to [apprise] him of the elements of the offense and to allow him to decide whether to ple[a]d guilty or stand trial.' " State v. Smalls, 364 S.C. 343, 346-347, 613 S.E.2d 754, 756 (2005) (citation omitted); see State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005) ("The indictment is a notice document.").

When evaluating an indictment, the indictment shall be considered to be sufficient if "the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent conviction." State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980); see S.C. Code Ann. § 17-19-20 ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided."). Importantly, "the true test of an indictment's validity is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." State v. Smalls, 336 S.C. 301, 307, 519 S.E.2d 793, 796 (Ct. App. 1999); see Gentry, 363 S.C. at 103, 610 S.E.2d at 500 ("[W]hether the indictment could be more definite or certain *is irrelevant*." (emphasis added)).

If a defendant wishes to challenge the sufficiency or validity of an indictment, the defendant must move to quash or dismiss the indictment prior to the jury being sworn. See S.C. Code Ann. § 17-19-90 ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be

sworn and not afterwards."). Such a motion challenging the sufficiency or validity of the indictment raises "a question of whether a defendant properly received notice he would be tried for a particular crime." State v. Tumbleston, 376 S.C. 90, 96, 654 S.E.2d 849, 852 (Ct. App. 2007); see also State v. Garrett, 305 S.C. 203, 206, 406 S.E.2d 910, 911 (Ct. App. 1991) ("A motion to quash an indictment addresses the sufficiency of the indictment, not the sufficiency of the State's evidence."), overruled on other grounds by State v. Ramsey, 311 S.C. 555, 430 S.E.2d 511 (1993).

When a timely and proper challenge to the sufficiency of an indictment has been raised, what the trial judge is called upon to determine is: (1) whether the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce and the defendant to know what he is called upon to answer and to be able to make a decision as to whether to plead guilty or stand trial; and (2) whether the defendant is apprised of the elements of the offense intended to be charged. Tumbleston, 376 S.C. at 96-97, 654 S.E.2d at 852. In making such a determination, the trial judge must look to the indictment with a practical eye and examine the circumstances that existed prior to trial in order to determine whether the defendant was prejudiced in the sense that defendant was taken by surprise and unable to combat the charges against him as a result of the indictment. State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991). If an indictment satisfies the requisite conditions and, thus, is facially valid, the trial judge should deny the defendant's motion to quash or dismiss the indictment. See State v. Williams, 301 S.C. 369, 371, 392 S.E.2d 181, 182 (1990) (holding a motion to dismiss an indictment was properly denied because the indictment was facially valid and instructing the validity of an indictment is not affected by the character of the evidence considered by the grand jury); see also Tumbleston, 376 S.C. at 98, 654 S.E.2d at 853 ("[A]n indictment passes legal

muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood.").

Notably, in State v. Wade, our Supreme Court considered a challenge to the sufficiency of a first-degree criminal sexual conduct with a minor indictment that alleged Wade sexually abused the victim at some unspecified point in time during a twenty-four-month span of time. Id., 306 S.C. at 80, 409 S.E.2d at 781. In finding that indictment to be sufficient and not overbroad, the Supreme Court rejected Wade's contention the broad span of time alleged in the indictment denied him an ability to prepare a defense to the charged offense, noting Wade proceeded with a defense of complete denial and further noting an ordinary individual would not be able to account for his whereabouts for purposes of an alibi defense even if the span of time alleged was just a month or some shorter period of time. Id. at 83-84, 409 S.E.2d at 783. Furthermore, the Supreme Court noted the time span alleged in the indictment was narrowed "as much as possible under the circumstances" based on the fact the victim was eight years old and unable to pinpoint the exact date on which the offense occurred. Id. at 84, 409 S.E.2d at 783. In light of those circumstances, the Supreme Court analyzed the indictment in Wade's case and determined it was neither unconstitutionally overbroad nor prejudicial to Wade in the sense it took him by surprise and prevented him from combating the charges against him. Id. at 86, 409 S.E.2d at 784.

Similarly, in State v. Tumbleston, this Court considered a challenge to the sufficiency of two indictments alleging Tumbleston sexually assaulted his granddaughter during a forty-two-month span of time. Id., 376 S.C. at 93, 654 S.E.2d at 850-851. In finding the indictments to be sufficient, this Court noted a two-pronged test had been adopted for determining whether a purportedly overbroad indictment was sufficient that required a court to determine whether time

was a material element of the offense charged and whether the time period alleged in the indictment occurred prior to the return of the indictment. Id. at 98-99, 654 S.E.2d 853-854. Applying that test to Tumbleston's case, this Court concluded both prongs were satisfied as time was not an element of the charged sexual offenses and the indictments were issued subsequent to the time periods in which the offenses were alleged to have occurred. Id. at 99, 654 S.E.2d at 854. Furthermore, this Court rejected Tumbleston's contention the broad time period specified in the indictments prevented him from adequately preparing his defense in light of the fact the indictments contained the necessary elements of the offense coupled with the fact Tumbleston proceeded forward with a defense of denial that was simply disbelieved by the jury. Id. at 102, 654 S.E.2d at 855.

More recently, in State v. Baker, 411 S.C. 583, 588, 769 S.E.2d 860, 863 (2015), our Supreme Court considered a challenge to the sufficiency of multiple indictments that alleged sexual offenses involving minor victims occurred over a six-year span of time. In finding those indictments to be insufficient, a two-justice plurality joined by a single additional justice in result only noted the indictments in Baker's case originally alleged the sexual abuse occurred during an identifiable span of the summers of three separate years but were amended approximately two weeks before trial to greatly expand the time frame of the allegations to cover a period extending continuously over the course of *six entire years*.[10] Id. at 590, 769 S.E.2d at 864 (plurality

[10] Notably, because the decision in Baker was a plurality decision, the portion of the decision reached on the narrowest ground constituted the precedential portion of that decision. See Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .' "). In Baker, Justice Pleicones's concurrence *in result only* constituted the narrowest ground upon which the plurality's decision was reached. See Baker, 411 S.C. at 592, 769 S.E.2d at 865 (plurality opinion) (reversing Baker's case after two justices specified particular reasons why they believed reversal was appropriate while a single justice agreed

opinion). In light of that exceedingly broad six-year time frame coupled with the lack of specificity included in the indictments, the plurality concluded the indictments were unconstitutionally overbroad due to the fact no defendant "could effectively defend himself against a six-year time frame." Id. at 591-591, 769 S.E.2d at 864-865 (plurality opinion). Furthermore, the plurality concluded Baker was personally prejudiced in his case based on the short preparation time he had in light of when the overbroad indictments were issued coupled with the fact potentially exculpatory evidence was destroyed prior to his trial. Id. at 590-591, 769 S.E.2d at 864 (plurality opinion). As a result, the plurality concluded the indictments issued in Baker's case were unconstitutionally overbroad and the trial judge erred by refusing to grant his motion to quash. Id. at 592, 769 S.E.2d at 865 (plurality opinion). However, the plurality expressly noted the indictments would have been sufficient "[h]ad [they] alleged that the conduct occurred during the summer months of the years 1998 through 2004, i.e., June 1 until September 1"—a span of time covering twenty-one total months. Id. at 592, n. 5, 769 S.E.2d at 865 (plurality opinion).

In the case sub judice, Appellant was indicted for seven counts of first-degree criminal sexual conduct with a minor, and the multi-count indictment issued in his case included the relevant language from the statute defining the offense with which Appellant was charged in each of the counts, identified the eighteen-month time span during which the abuse was alleged by the victims to have occurred, listed the specific victim and particular type or types of sexual battery involved in each count, and specifically stated all the incidents were alleged to have

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reversal was appropriate but joined in the result only without specifying any grounds as to why he believed the case should be reversed). As a result, the decision in Baker has *no* precedential value beyond the peculiar facts of that case. Cf. Wolfe v. Legg, 60 Wash. App. 245, 249, n. 2, 803 P.2d 804, 807 (Wash. Ct. App. 1991) ("[A particular appellate decision] was the result of a plurality decision with the fifth vote, concurring in the result only, being unaccompanied by an opinion. We therefore do not find it possible to assess the correct holding of the case.").

occurred in Florence County, which is the county in which Appellant's case was called to trial. See S.C. Code Ann. § 16-3-655(A)(1) (explaining a person is guilty of first-degree criminal sexual conduct with a minor if "the actor engages in sexual battery with a victim who is less than eleven years of age"); see also State v. Jacobs, 238 S.C. 234, 243, 119 S.E.2d 735, 739-740 (1961) ("An indictment is ordinarily sufficient if it is in the language of the statute."); State v. McIntire, 221 S.C. 504, 510, 71 S.E.2d 410, 412-413 (1952) ("The twofold purpose of the statute in requiring the indictment to allege the place of the commission of the crime is to lay jurisdiction of the court, and inform the accused *of the county* in which he is charged with the violation of the law." (emphasis added)). Under those circumstances, the indictments were sufficient to provide Appellant with notice that apprised him of the elements of the charged offenses, allowed him to decide whether to plead guilty or stand trial, and enabled the trial judge to know what judgment to pronounce in the event Appellant was convicted. See Edwards v. State, 372 S.C. 493, 496, 642 S.E.2d 738, 739 (2007) ("[A]n indictment is a notice document. The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted."); see also Smalls, 336 S.C. at 307, 519 S.E.2d at 796 ("[T]he true test of an indictment's validity is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.").

Additionally, neither the specific time of the alleged abuse nor the specific location where the abuse was alleged to have occurred were elements of first-degree criminal sexual conduct with a minor, which was the statutory offense Appellant was charged with in each of the counts

for which he was brought to trial. See State v. Moore, 24 S.C. 150, 156 (1886) (recognizing it is sufficient for an indictment to simply identify the county in which the crime was alleged to have occurred "[w]here the place is not a matter of essential description of the crime, but is alleged as a matter of jurisdiction only in the court"); State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 423 (Ct. App. 1991) ("The specific date and time is not an element of the offense of first degree criminal sexual conduct."); cf. Morgan v. State, 287 A.2d 592, 595 (Me. 1972) ("[Morgan] contends . . . that the indictment alleges only that the offense was committed in Cumberland County without particularizing a specific place in the County. . . . Since place is not an essential element of the crime of robbery, . . . the allegation of the present indictment . . . that the offense was committed in Cumberland County is adequate."). In light of that fact, the solicitor was *not* required to identify the specific date, time, and location of the charged crimes with exactitude in order for the indictments to be sufficient. See State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App. 1991) ("Where time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly occurred. . . . Here, both indictments sufficiently notified Wingo of the offenses with which he was charged since time is not a material element of either the offense of first degree criminal sexual assault or the offense of contributing to the delinquency of a minor and since the indictments allege the commission of the offenses during periods that preceded the date of the indictments."); see also United States v. Kimberlin, 18 F.3d 1156, 1159 (4th Cir. 1994) ("Where a particular date is not a substantive element of the crime charged, strict chronological specificity or accuracy is not required." (citation and internal quotations omitted)); Stacey v. State, 214 Ga. App. 130, 131, 447 S.E.2d 339, 340 (Ga. Ct. App. 1994) (recognizing the particular location where a crime is alleged to have occurred—aside from the county—is immaterial for indictment

purposes when a specific location is not an element of the charged crime); Cook v. State, 100 Md. App. 616, 632, 642 A.2d 290, 298 (Md. Ct. Spec. App. 1994) ("An indictment alleging that the offense was committed in a particular county will satisfy the requirement that the place where the offense occurred must be stated with 'reasonable particularity.' " (citation omitted)), rev'd on other grounds, 338 Md. 598, 659 A.2d 1313 (Md. 1995). Instead, the solicitor was only required to fully apprise Appellant of the information available to the State regarding the time, place, and date of the crimes, and he did just that to the best of his abilities, which was demonstrated by defense counsel's expressed knowledge during the hearing on the motion to quash of the "broad" and "confusing" allegations raised by the victims during their recorded forensic interviews. See State v. Wilcox, 808 P.2d 1028, 1033 (Utah 1991) ("[W]e have recognized that there are notice problems, especially as to the date, place, and time inherent in prosecutions based on the testimony of very young victims. . . . If we were to hold that in all such circumstances, no offense could be charged because the alleged victim is too young to testify with certainty concerning the times, dates, or places where the abuse occurred, we would leave the youngest most vulnerable children with no legal protection. An abuser could escape prosecution merely by claiming that the child's inability to remember the exact dates and places of the abuse impaired the abuser's ability to prepare an alibi defense. In frank recognition of this fact, we have been less vigorous in requiring specificity as to time and place when young children are involved than would usually be the case where an adult is involved. . . . We have suggested that so long as the elements of the crimes are covered by the factual allegations and the defendant is fully apprised of the State's information regarding the time, place, and date of the crimes, any lack of factual specificity goes not to the constitutional adequacy of notice, but to the credibility of the State's case."); see also S.C. Code Ann. § 17-19-20 ("Every indictment

shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.").

Furthermore, in light of the circumstances that existed prior to trial, the indictments in Appellant's case did *not* prejudice Appellant to the extent he was taken by surprise and unable to combat the charges against him as a result of the indictment. Importantly, Appellant would have been fully aware upon reviewing the recording of the forensic interviews of the young victims were not able to specifically and consistently identify the dates, times, and locations of the incidents, and defense counsel was capable of exploiting the victims' uncertainty and inconsistency—which the jury was unquestionably made aware of during trial—to attack their credibility along with the overall credibility of the State's case. See State v. Cozza, 71 Wash. App. 252, 259-260, 858 P.2d 270, 275 (Wash. Ct. App. 1993) (recognizing a defendant's knowledge of a juvenile sexual abuse victim's inability to remember the precise circumstances of a sexual assault enables the defendant "to attack the credibility of the child witness" during trial). Likewise, as noted by defense counsel, Appellant's defense necessarily had to be a complete defense of denial as opposed to an alibi defense, which was not available to Appellant in light of the fact he—as the victims' father—regularly and routinely had contact with the victims during the period of the alleged abuse, and the eighteen-month time span identified in each of the counts of the indictment in no way impacted his ability to deny the charges during trial. See id. ("[W]hether single or multiple incidents of sexual contact are charged, a defendant has no due process right to a reasonable opportunity to raise an alibi defense. Although our ruling does not

allow the defendant to use the child's inability to recall dates as a sword to escape a trial, he or she can use the long time frame to attack the credibility of the child witness. In addition, the defendant may also deny the conduct, or offer innocent explanations for the child's sexual knowledge. Moreover, the requirement that the defendant be proved guilty beyond a reasonable doubt adequately protects the defendant's rights. The trier of fact hears both that the child witness cannot specify a date and that the defendant is thereby precluded from raising an alibi defense. Both are considered in the deliberations that require guilt to be found beyond a reasonable doubt." (citations omitted)); see also People v. Fritts, 72 Cal. App. 3d 319, 326, 140 Cal. Rptr. 94, 97 (Cal. Ct. App. 1977) ("Since appellant's alibi defense was not specific as to dates but total, in that he made a blanket denial of ever having molested his stepdaughter, he was not prejudiced by the manner of charging [him with a lewd act alleged to have occurred sometime during a twelve-month time span]."); State v. Brim, 2010 S.D. 74, __, 789 N.W.2d 80, 84 (S.D. 2010) ("The lack of precise dates of the abuse did not deprive Brim of his defense. . . . Brim's defense was a complete denial of any sexual act occurring during the entire period of time covered by the indictment."). Beyond those facts, Appellant and defense counsel were aware of the broad nature of the allegations at least fifteen months *before* Appellant's trial took place by virtue of language used in the multi-count indictment, which gave Appellant a substantially better opportunity to prepare his defense than the defendant was afforded in Baker. See generally State v. Register, 323 S.C. 471, 482, 476 S.E.2d 153, 160 (1996) ("The parties knew in September that this case was set for trial in January and full discovery had been afforded to Register from September forward. The fact that Register's counsel waited until the middle of December to investigate the evidence does not warrant a continuance.").

Moreover, the language included in the counts of the indictment was sufficient to protect Appellant from twice being placed in jeopardy for the same crimes. See State v. Guthrie, 352 S.C. 103, 108, 572 S.E.2d 309, 312 (Ct. App. 2002) (instructing an indictment "should be sufficiently specific to protect the accused against double jeopardy"). Critically, in Appellant's case, the language included in each of the counts of the indictment specified the county where the abuse was alleged to have occurred, the statutory offense alleged to have been committed, the particular victim alleged to have been abused, the distinct type or types of sexual abuse alleged to have been committed, and the general eighteen-month time span within which the abuse was alleged to have occurred. In light of that broad language, Appellant could validly raise a double jeopardy claim after his trial if the State subsequently sought to prosecute him for sexually abusing Victim 1 and Victim 2 in Florence County during the specified time period in any of the specified manners, and, thus, the multi-count indictment was sufficiently specific to protect Appellant's double jeopardy rights. See Eakes v. State, 665 So. 2d 852, 860 (Miss. 1995) ("While Eakes claims the indictment lacks the specific location the abuse occurred and the reference to the statute violated, the indictment clearly states that the violations occurred in Kemper County and cites [the relevant statutory provisions]. Eakes' double jeopardy claim is also disingenuous. . . . Eakes could claim double jeopardy if additional actions are brought charging him with sexually abusing [the victim named in the indictment] in Kemper county on or about the dates specified."); see also United States v. Shorter, 874 F.3d 969, 977 (7th Cir. 2017) ("As the government points out, broadly-worded indictments charging the defendant with fraudulent billings during a specified time period *would* bar later prosecution for *any* billings during those time periods.").

Critically, when viewing those facts and circumstances with a practical eye while also taking into consideration the inability of the young victims, who were only seven to eight years old when they were sexually assaulted, to be more consistent and precise in identifying the dates, times, and locations of the repeated instances of sexual abuse, the time periods and other information alleged in the different counts of the indictment issued in Appellant's case were reasonable and sufficient to provide Appellant with adequate notice to prepare his defense without being unconstitutionally overbroad. See Smalls, 336 S.C. at 307, 519 S.E.2d at 796 (recognizing "the true test of an indictment's validity is *not* whether it could be made more definite and certain" (emphasis added)); cf. Tumbleston, 376 S.C. at 102, 654 S.E.2d at 855 ("We reject the notion that a specified time period prevented Tumbleston from adequately preparing his defense to the charges. Reading the indictments objectively from a reasonable person's view, we conclude they contain the necessary elements of the offenses charged and sufficiently apprise Tumbleston that he must be prepared to address his conduct towards [the victim] between 2001 and June of 2004."). Demonstrating the reasonableness of the indictment issued in Appellant's case, the eighteen-month time frame alleged in the different counts was much, much more narrow than the six-year time period found to be improper in the Baker decision. Cf. Baker, 411 S.C. at 592, 769 S.E.2d at 865 (plurality opinion) ("[W]e hold the trial judge erred in refusing to quash the indictments as the non-specific, *six-year* period covered in the indictments was unconstitutionally overbroad because it lacked specificity as to when the alleged acts occurred." (emphasis added)). In fact, the time period alleged in Appellant's case was even *shorter* than the twenty-one-month span of time the plurality indicated would have been sufficiently specific to pass constitutional muster in Baker. See id. at 592, n. 5, 769 S.E.2d at 865 (plurality opinion) (expressing belief the indictments in Baker's case would have been

sufficient if they had alleged the sexual abuse occurred during a span of time covering twenty-one months in total).

For all the foregoing reasons, the multi-count indictment issued in Appellant's case—like the indictments issued in Wade and Tumbleston—was sufficiently specific to provide Appellant with the required notice in regard to the charges he was facing and was not unconstitutionally overbroad, particularly in light of the fact the eighteen-month time frame identified in the counts could not reasonably be narrowed any further due to the victims' young ages and inabilities to remember or distinguish the repeated instances of sexual abuse with complete precision as demonstrated by their "broad" and "confusing" statements during the forensic interviews. Cf. Wade, 306 S.C. at 86, 409 S.E.2d at 784 (finding an indictment alleging the charged incident occurred at some point during a twenty-four-month span of time was not unconstitutionally overbroad where the time frame identified in the indictment had been narrowed as much as possible in light of the fact *the victim was eight years old at the time of trial* and was unable to identify the exact date of the offense); Tumbleston, 376 S.C. at 102, 654 S.E.2d at 855 (rejecting Tumbleton's contention the indictments issued in his case, which alleged the charged incidents occurred at some point during a forty-two-month span of time, were unconstitutionally overbroad). Accordingly, the trial judge properly refused to quash the multi-count indictment issued in Appellant's case. See Tumbleston, 376 S.C. at 94, 654 S.E.2d at 851 ("The trial court's factual conclusions as to the sufficiency of an indictment will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion."). Appellant's convictions should be affirmed.

II.

The trial judge properly denied Appellant's directed verdict motion as to all seven of the charged counts of first-degree criminal sexual conduct with a minor because, when viewed in a light most favorable to the State, the evidence and testimony presented during trial established Appellant's guilt for all seven counts, including for the two distinct counts charging Appellant solely with putting his penis in the mouth of one of his daughters.

Appellant contends the trial judge erred by denying his directed verdict motion as to *one* of the two first-degree criminal sexual conduct with a minor counts alleging he orally penetrated Victim 1 with his penis. In support of that contention, Appellant maintains he was entitled to a directed verdict because no evidence was presented to establish there was more than one instance of oral penetration involving Victim 1. To the contrary, when viewed in a light most favorable to the State as required, the testimony of both Victim 1 and Victim 2 constituted direct evidence from which the jury could have found Appellant guilty of all seven counts of first-degree criminal sexual conduct with a minor, including the two distinct counts charging him solely with putting his penis in the mouth of Victim 1. In light of that direct evidence, the trial judge properly denied Appellant's directed verdict motion as he was required to do, and all seven counts were correctly submitted to the jury for resolution of any credibility issues raised by the evidence. Appellant's convictions should be affirmed.

STANDARD OF REVIEW

On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004). In other words, "unless there is a total failure of evidence tending to establish the charge

laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986); see also Crawford v. United States, 375 F.2d 332, 334 (D.C. Cir. 1967) ("It is not the function of appellate judges to weigh the evidence and decide that if they had doubts other reasonable persons were compelled to have the same doubts. If that were the test the jury of twelve would be relegated to the very low grade function of secondary fact finders.").

ANALYSIS

When presented with a motion for a directed verdict challenging the sufficiency of the evidence presented, the question before the trial judge is simply whether any rational juror could find the essential elements of the crime beyond a reasonable doubt from the evidence viewed in a light most favorable to the State. State v. Bennett, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016); see Jackson v. Virginia, 443 U.S. 307, 319 (1979) ("[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."). In resolving that question, the trial judge must be concerned solely with the existence or non-existence of evidence and is *not* permitted to personally weigh the evidence, decide credibility issues, or resolve conflicts in the testimony or evidence presented. Harvey v. Strickland, 350 S.C. 303, 308, 566 S.E.2d 529, 532 (2002); see State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997) ("When ruling on a motion for a directed verdict, the trial judge is concerned with the existence of evidence, not its weight."); see also State v. Ham, 268 S.C. 340, 342, 233 S.E.2d 698, 698 (1977) ("Where the determination of guilt is dependent upon the credibility of the witnesses, a motion for a directed verdict is properly refused."); State v. Franklin, 80 S.C. 332, __, 60 S.E. 953, 955 (1908) ("The orderly administration of justice requires that all proper evidence should

be admitted, and the jury must determine the facts, and testimony should be exceedingly clear and without contradiction where a circuit judge assumes to direct a verdict.").

Significantly, if there is *any* direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused or from which guilt may be fairly or logically deduced, the trial judge should deny a directed verdict motion and submit the case to the jury. State v. Robinson, 310 S.C. 535, 538, 426 S.E.2d 317, 319 (1992); see State v. Littlejohn, 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955) ("[O]n a motion for direction of verdict, the trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced."); see also Crawford, 375 F.2d at 334 ("The jury question of whether there was proof of guilt beyond a reasonable doubt presents a stricter or higher standard than the trial court's consideration of whether there is sufficient evidence to allow the jury to find guilt beyond a reasonable doubt, and it rests in the unreviewable ratiocinations of twelve reasonable persons whose deliberations are protected by the highest security."). By doing so under such circumstances, the trial judge correctly avoids improperly encroaching upon the jury's exclusive role to find the facts, weigh the evidence, evaluate witness credibility, and resolve any evidentiary conflicts that may have arisen during trial. See Jackson, 443 U.S. at 319 ("[The directed verdict] standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."); see also Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174-175 (2010) ("The jury serves as the fact finder and is charged with the duty of weighing the

evidence admitted at trial and reaching a verdict. . . . [I]t is exclusively within the jury's province to decide how much weight the evidence deserves.").

In the case at bar, Appellant was charged and tried for seven distinct counts of first-degree criminal sexual conduct with a minor, including for two counts solely alleging he orally penetrated Victim 1 with his penis. During trial, both victims testified Appellant inflicted a number of sexual batteries upon them when they were seven to eight years old. See S.C. Code Ann. § 16-3-655(A)(1) (instructing a person is guilty of first-degree criminal sexual conduct with a minor if "the actor engages in sexual battery with a victim who is less than eleven years of age"); see also S.C. Code Ann. § 16-3-651(h) (defining "sexual battery" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes"). Regarding the nature of the sexual batteries involving Victim 1, Victim 1 testified—although sometimes inconsistently—to three separate instances of vaginal penetration, one specific instance of oral penetration, one instance in which she was touched in her mouth, and multiple instances of anal penetration while also broadly stating Appellant put his penis in her mouth and vagina between five and ten times in total.[11] Likewise, Victim 2 testified to witnessing one act of anal penetration involving her sister, one or more acts of vaginal penetration involving her sister, and one act of oral penetration involving her sister while further acknowledging she had previously stated she observed an additional act of oral penetration involving her sister.

[11] Specifically, as to the oral penetration, the solicitor asked Victim 1 if Appellant "put his private part in [her] mouth" at any time at the Thunderbird Inn hotel, and Victim 1 responded, "Yes, sir." (Tr. p. 119). Thereafter, as her testimony continued, the solicitor asked Victim 1 if Appellant actually did "put his penis in [her] vagina or [her] mouth," and she responded by stating "[h]e actually did it" before confirming those acts were committed five to ten times in total. (Tr. pp. 124-125).

Meanwhile, regarding the nature of the sexual batteries involving Victim 2, Victim 2 testified to at least two instances of vaginal penetration, at least two instances of oral penetration, and two instances of anal penetration while Victim 1 indicated she personally observed one instance of oral penetration involving Victim 2. In light of that testimony, the jury was presented with *direct evidence* of multiple sexual batteries committed against each of the victims, including evidence of at least two instances of oral penetration involving Victim 1 by virtue of Victim 1's testimony, Victim 2's testimony, and Victim 2's admission of her prior inconsistent statement about the additional act of oral penetration she witnessed. See State v. Salisbury, 343 S.C. 520, 524, 541 S.E.2d 247, 249 (2001) ("Direct evidence is evidence based on actual knowledge and proves a fact without inference or presumption."); see also State v. Copeland, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982) ("Henceforth from today, we will allow testimony of prior inconsistent statements to be used as substantive evidence when the declarant testifies at trial and is subject to cross examination. . . . We believe the adoption of this rule will more effectively aid in the discovery of the truth, and more adequately insure the freedom of the innocent and the conviction of the guilty.").

Because direct evidence was presented establishing all seven counts of first-degree criminal sexual conduct with a minor, the trial judge was *required* to deny the directed motion and submit the case to the jury. See State v. Brown, 205 S.C. 514, 520, 32 S.E.2d 825, 827 (1945) ("Where there is any evidence, however slight, on which the jury may justifiably find the existence or the non-existence of material facts in issue, or if the evidence is of such character that different conclusions as to such facts reasonably may be drawn therefrom, the issues should be submitted to the jury."); see also State v. Al-Amin, 353 S.C. 405, 411, 578 S.E.2d 32, 35 (Ct. App. 2003) (recognizing the trial judge is "required" to submit a case to the jury when

substantial evidence is presented reasonably tending to prove the guilt of the accused or from which the accused's guilt may be fairly and logically deduced), overruled on other grounds by State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015). By doing so, the trial judge permitted the jurors in their collective role as the trial's exclusive fact-finders to resolve any credibility issues raised by the evidence, including the issues raised by the inconsistent testimony offered by the victims about the instances of oral penetration inflicted upon Victim 1.[12] See Ham, 268 S.C. at 342, 233 S.E.2d at 698 ("Where the determination of guilt is dependent upon the credibility of the witnesses, a motion for a directed verdict is properly refused."); see also State v. Richburg, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968) ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury. . . . Among other considerations is the credibility of the witnesses[.]"). Accordingly, the trial judge committed no error by denying the directed verdict motion, and there is no proper basis upon which to disturb his ruling on appeal. See Weston, 367 S.C. at 292-193, 625 S.E.2d at 648 ("If there is *any direct evidence* or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [appellate court] *must* find the case was properly submitted to the jury." (emphasis added)). Appellant's convictions should be affirmed.

[12] As an example of an inconsistency in Victim 1's testimony, Victim 1 followed her affirmation Appellant put his penis in her mouth at the Thunderbird Inn motel by contradictorily stating "he had tried to put in in my mouth and I had moved it away from my face." (Tr. p. 119). Notably, such inconsistencies merely created factual issues for the jury to resolve. See State v. Butler, 407 S.C. 376, 382, 755 S.E.2d 457, 460 (2014) ("[A]s the trial court recognized when ruling on the directed verdict motion, [Butler]'s various, inconsistent accounts of how the stabbing occurred created credibility issues and questions of fact to be resolved by the jury.").

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

July 23, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUL 23 2018
SC Court of Appeals

Appeal from Florence County
Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2017-001045

THE STATE,

Respondent,

vs.

VANCE ROSS,

Appellant.

PROOF OF SERVICE

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

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 23rd day of July, 2018.

Destiny Blue

DESTINY BLUE
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ALAN WILSON
ATTORNEY GENERAL

July 23, 2018

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RE: State v. Vance Ross – Appellate Case No. 2017-001045

Dear Ms. Hudgins:

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

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

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