ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JUSTIN ADAMS,

APPELLANT

APPELLATE CASE NO. 2017-001018

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SC Court of Appeals

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 3

ARGUMENT

1.

In this child sexual abuse case, the trial court erred in denying appellant's motion to preclude the testimony of the minor child, including two out-of-court video recordings of the child's interviews, where the first interview, which was conducted by a police officer, was unreliable, and tainted the second interview, which was conducted four days later by a forensic interviewer 4

2.

The trial court erred in refusing to charge criminal intent as an element of first-degree criminal sexual conduct with a minor 15

3.

The trial court erred in refusing to charge the jury that it had to be unanimous as to the factual allegations contained in the indictment, which contained a "to wit" provision alleging fellatio and intrusion into the anus, therefore depriving appellant of his right to a unanimous verdict 18

4.

The trial court erred in denying appellant's motion for a new trial based on the undisputed fact that complainant's mother, who was subject to the court's sequestration order, was caught listening to testimony through the door of the courtroom 20

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000) 3

Ex parte Cannon, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009) 21

Richardson v. United States, 526 U.S. 813 (1999) 18

State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006) 3

State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006) 13

State v. Ferguson, 302 S.C. 269, 395 S.E.2d 182 (1990) 16

State v. Guinyard, 260 S.C. 220, 195 S.E.2d 392 (1973) 17

State v. Harris, 391 S.C. 539, 706 S.E.2d 526 (Ct. App. 2011) 3, 22

State v. Hudnall, 293 S.C. 97, 359 S.E.2d 59 (1987), ... 3

State v. Jeffries, 316 S.C. 13, 446 S.E.2d 427 (1994) 16

State v. Kirkland, 282 S.C. 14, 317 S.E.2d 444 (1984) 17

State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000) 3

State v. Michaels, 642 A.2d 1372 (N.J. 1994) .... passim

State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001) 3

State v. Samuels, 403 S.C. 551, 743 S.E.2d 773 (2013) 18, 19

State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) 3

State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999) 3

State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) 21

United States v. Robinson, 627 F.3d 941 (4th Cir. 2010) 19

Univ. of S. California v. Moran, 365 S.C. 270, 617 S.E.2d 135 (Ct. App. 2005) 3

Statutes

S.C. Code Ann. § 63-7-920(C) 10

S.C. Code Ann. § 16-3-651(h) 15, 16

S.C. Code Ann. § 16-3-655(A) 15, 16

S.C. Code Ann. § 16-3-655(A)(1) 16

S.C. Code Ann. § 16-3-655(C) 17

S.C. Code Ann. § 16-3-655(D)(1) 17

S.C. Code Ann. § 17-23-175(B)(2) 14

Other Authorities

The Criminal Law of South Carolina, 3rd ed. at 14 (1996) 16

STATEMENT OF ISSUE ON APPEAL

1.

In this child sexual abuse case, did the trial court err in denying appellant's motion to preclude the testimony of the minor child, including two out-of-court video recordings of the child's interviews, where the first interview, which was conducted by a police officer, was unreliable, and tainted the second interview, which was conducted four days later by a forensic interviewer?

2.

Whether the trial court erred in refusing to charge criminal intent as an element of first-degree criminal sexual conduct with a minor?

3.

Whether the trial court erred in refusing to charge the jury that it had to be unanimous as to the factual allegations contained in the indictment, which contained a "to wit" provision alleging fellatio and intrusion into the anus, therefore depriving appellant of his right to a unanimous verdict?

4.

Whether the trial court erred in denying appellant's motion for a new trial based on the undisputed fact that complainant's mother, who was subject to the court's sequestration order, was caught listening to testimony through the door of the courtroom?

STATEMENT OF THE CASE

On January 23, 2014, a Beaufort County grand jury indicted appellant Justin Adams for first-degree criminal sexual conduct with a minor. R. 540. On September 19, 2016, appellant was tried before the Honorable Brooks P. Goldsmith and a jury. R. 1. Alexandra M. Joseph and Dustin Whetsel represented the State and James A. Brown, Jr. represented appellant. R. 1. The jury convicted appellant. R. 463, l. 7 – 464, l. 9. Judge Goldsmith sentenced appellant to twenty-five years' imprisonment. R. 476, ll. 16 – 18. On March 30, 2017, Judge Goldsmith held a hearing on appellant's motion for a new trial based upon after-discovered evidence. March 30, 2017, R. 1. Judge Goldsmith denied the motion and entered a written order. R. 539. This appeal follows.

STANDARD OF REVIEW

As to Issue 1, appellant argues the standard of review should be abuse of discretion, which is used for both the admission of evidence and the competency of a witness. State v. Hudnall, 293 S.C. 97, 99, 359 S.E.2d 59, 61 (1987), overruled on other grounds by State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

As to Issue 2, the issue is one of statutory construction and is therefore reviewed *de novo*. The issue of interpretation of a statute is a question of law for the court. Univ. of S. California v. Moran, 365 S.C. 270, 275, 617 S.E.2d 135, 137 (Ct. App. 2005).

As to Issue 3, "In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

As to Issue 4, the trial court's ruling on a motion for new trial based on after-discovered evidence "will not be disturbed except for an error of law or abuse of discretion." State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011). Where the trial judge's ruling is controlled by an error of law, this Court will reverse. State v. Spann, 334 S.C. 618, 622, 513 S.E.2d 98, 100 (1999).

ARGUMENT

1.

In this child sexual abuse case, the trial court erred in denying appellant's motion to preclude the testimony of the minor child, including two out-of-court video recordings of the child's interviews, where the first interview, which was conducted by a police officer, was unreliable, and tainted the second interview, which was conducted four days later by a forensic interviewer.

Relevant Factual and Procedural Background

Minor's First Recorded Interview with Officer Babkiewicz

On December 7, 2013, before a forensic interview could be conducted, Officer Joseph Babkiewicz ("Babkiewicz"), who worked for the Bluffton Police Department, took it upon himself to interview the five-year-old male complainant ("Minor") because he "built a bond" with Minor. R. 26, l. 11 – 28, l. 7. R. 36, ll. 9 – 11. The video of the interview shows how Officer Babkiewicz built the bond with Minor at the very beginning of the interview. (State's Ex. 1). Officer Babkiewicz and Minor enter the room and Officer Babkiewicz is holding a toy stuffed dog and has his gun on his hip. (State's Ex. 1). He asks Minor if he likes the dog and if he likes police officers. (State's Ex. 1, on file with this Court). Minor tells Officer Babkiewicz that a police officer had been to his house and he was Minor's "buddy." (State's Ex. 1). Officer Babkiewicz tells Minor, "I'd like to be your buddy, too." (State's Ex. 1).

Officer Babkiewicz and Minor then talk about their names and birthdays. (State's Ex. 1). Officer Babkiewicz tells Minor they were both born in July and that "all the cool kids were born in July" and they do a fist pound. (State's Ex. 1). Officer Babkiewicz then asks Minor if he liked the police officer he met, if he wanted to be like the police officer he met, and if he wanted

to be a police officer. (State's Ex. 1). Minor replies affirmatively to all but the last question, stating that a police officer's job was dangerous. (State's Ex. 1). Officer Babkiewicz then pulls out a shiny sticker of a badge and tells Minor it says "Junior Officer, Bluffton Police Department." (State's Ex. 1). Officer Babkiewicz gives Minor the badge sticker and Minor puts it on the front of his shirt, a "perfect spot" according to Officer Babkiewicz. (State's Ex. 1). Officer Babkiewicz congratulates Minor and tells him, "Welcome to the team!" (State's Ex. 1).

Officer Babkiewicz then tells Minor he wants to point out several things in the interview room. (State's Ex. 1). He points to the camera and asks Minor if he knows what it is. (State's Ex. 1). Minor says it is a camera "that watches bad guys." (State's Ex. 1). Officer Babkiewicz tells Minor the camera is watching him and he's not a bad guy and the camera watches anybody in the room. (State's Ex. 1). He then says that Minor's mother and "the other guys" are watching on the camera outside the room. (State's Ex. 1). When Minor asks a question about who is watching, Officer Babkiewicz assures Minor they can see and hear everything in the room. (State's Ex. 1). Officer Babkiewicz then has Minor wave to his mother through the camera. (State's Ex. 1).

Officer Babkiewicz then asks Minor if he knows what the truth is and Minor responds that it means to tell things that are real. (State's Ex. 1). Officer Babkiewicz says that was correct and adds it means that you do not lie. (State's Ex. 1). Officer Babkiewicz then tells Minor, **"This room has magical powers and it helps you tell the truth. . . So you have to tell the truth in this room. . . . Because if you don't you get zapped."** (State's Ex. 1) (emphasis added). The officer then laughs and says he was just joking, and for Minor to "just tell the truth, okay?". (State's Ex. 1). He promises Minor that he will tell the truth no matter what and wants Minor to do the same. (State's Ex. 1).

The police officer and Minor then draw together for several minutes. (State's Ex. 1). After getting Minor to draw a tiger and an eagle, Officer Babkiewicz has Minor draw a picture of himself. (State's Ex. 1). He has Minor point out his arms and legs and then, pointing to the genital area, asks Minor what he calls that part of the body. (State's Ex. 1). Minor replies that he calls it his legs. (State's Ex. 1). Officer Babkiewicz asks Minor what is higher than his legs and Minor says his chest. (State's Ex. 1). Officer Babkiewicz then changes the subject. (State's Ex. 1).

The officer asks Minor if he knows why he is here and then tells him it is because he wants to talk to Minor about something he told his mother earlier. (State's Ex. 1). He then asks Minor if he remembers what he told his nana. (State's Ex. 1). Minor replies that Adams "massages my wacker." (State's Ex. 1). He also describes Adams massaging his wacker in the shower. (State's Ex. 1). Minor looks at the camera several times while describing the alleged abuse to Officer Babkiewicz. (State's Ex. 1). Officer Babkiewicz asks Minor if Adams touches him anywhere else and Minor said Adams put a "finger in my butt." (State's Ex. 1).

Officer Babkiewicz asks Minor where and when the assaults took place. (State's Ex. 1). He asks if Minor's mother is home. (State's Ex. 1). He asks if Adams says anything and when Minor says no, Officer Babkiewicz, asks, "Does he say not to tell anybody. . ." and then Minor glances at the camera and replies yes, and that it is a secret. (State's Ex. 1). Minor said Adams had done these things "ten times" and that the last time was "one hundred days ago," says he was kidding, and then the last time was seven days ago. (State's Ex. 1).

Minor asks a question about the drawings and Officer Babkiewicz says he wants to keep Minor's drawings. (State's Ex. 1). He then picks up the stuffed animal and tells Minor he is going to trade him the toy for the drawing. (State's Ex. 1). Minor says no and that he wants the

officer to have both the toy and the drawing. (State's Ex. 1). The officer then tells Minor he has a "whole bag of stuffed animals" and Minor can pick out any one he wants. (State's Ex. 1). Minor says he would like that and Officer Babkiewicz says, "Let's go for a walk. I've got a surprise for you." (State's Ex. 1). They leave the room. (State's Ex. 1).

When they return about four minutes later, Minor has two stuffed animals, both birds. (State's Ex. 1). Officer Babkiewicz tells Minor that anytime he looks at those birds, he should think of the officer because they are "buds forever." (State's Ex. 1). He also reminds Minor that he is a junior police officer and that not many kids "get to do that." (State's Ex. 1). They joke that Minor is the "coolest person in the whole world," and then Officer Babkiewicz asks him who is a person he does not like. (State's Ex. 1). Minor says he sometimes does not like a child friend of his because sometimes he lies. (State's Ex. 1).

The police officer then asks whether Minor likes Adams. (State's Ex. 1). Minor says yes, but there is one thing he does not like and that he already told Officer Babkiewicz about that. (State's Ex. 1). Officer Babkiewicz asks if it hurts when Adams "does that stuff," and Minor says yes. (State's Ex. 1). Officer Babkiewicz replies, "We don't want him to hurt you, ok?" (State's Ex. 1). He asks if Adams has "ever done anything else to you" and Minor says no. (State's Ex. 1). Minor then says there is one other thing he does not like—that when he gets home from school Adams never lets him have a snack. (State's Ex. 1). Officer Babkiewicz then asks if Adams ever does anything else "with his wacker." (State's Ex. 1). Minor says no, that "those things are the only things." (State's Ex. 1).

Minor then says Adams puts Minor's wacker in his mouth and tried to put Adams' wacker in Minor's mouth, but Minor does not do that because he thinks it is "nasty." (State's Ex. 1). Officer Babkiewicz asks if Adams tries to put his wacker in Minor's mouth and Minor

replies, "he just does it." (State's Ex. 1). After a few more questions that confirm that Adams has Minor perform oral sex on him, Officer Babkiewicz says, "Let's make a deal. I promise he won't ever do that to you again." (State's Ex. 1). Officer Babkiewicz says, "And if he tries to. . ." and Minor interrupts and says, "He's going to go to jail." (State's Ex. 1).

Officer Babkiewicz then says Minor can call him and he will give Minor's mother his phone number. (State's Ex. 1). He then tells Minor that they are buddies, friends, and are both police officers. (State's Ex. 1). They name Minor's new stuffed animals and Officer Babkiewicz tells him they are going to go show the toys to Minor's mother. (State's Ex. 1). They leave the room and the recorded interview ends. (State's Ex. 1).

Minor's Second Recorded Interview with a Forensic Interviewer

Four days after the interview with Officer Babkiewicz, on December 11, 2013, Minor went to Hope Haven for another recorded session with forensic interviewer Mary Beth Hefner ("Hefner"). R. 51, l. 22 – 52, l. 2. R. 57, l. 24 – 58, l. 1. (State's Ex. 2). Hefner attended a forty hour training in Columbia "to be certified in the art of forensic interviewing." R. 52, ll. 9 – 18.

When Minor enters the room, his shiny Junior Bluffton Police Officer Badge is affixed prominently on his chest. (State's Ex. 2). Hefner draws a picture while making small talk with Minor about skateboarding and Christmas. (State's Ex. 2). When Hefner points out the camera, Minor says the security guards are watching and can come out and get the bad guys. (State's Ex. 2). Hefner tells Minor they are making a recording of their talk and emphasizes that Minor's mother and grandmother are **not** watching. (State's Ex. 2). She says the only people watching are some "friends of mine" to make sure the equipment worked and that Hefner asked all the right questions. (State's Ex. 2).

Hefner then tells Minor that the "only thing" she asks of him is to talk about "things that are real." (State's Ex. 2). Hefner asks Minor who lives in his house and he first names Adams. (State's Ex. 2). Hefner asks who Adams is and Minor says, "He's the one that's been doing the bad stuff to me." (State's Ex. 2). Minor tells Hefner that Adams is "in jail now." (State's Ex. 2).

When Hefner asks Minor what bad things Adams has done, Minor first says Adams has been hugging him where he is not supposed to hug him. (State's Ex. 2). Hefner asks Minor how he knows Adams is in jail and he replies that his mother told him the cops came and got Adams and put him in jail. (State's Ex. 2). While identifying body parts on a drawing, Minor tells Hefner that Adams was touching his wacker. (State's Ex. 2). Minor says Adams massaged his wacker with his hand while they were in the shower. (State's Ex. 2). Hefner asks Minor where he heard the word "massaging" and Minor says "nowhere" and after further questioning says no one told him that word. (State's Ex. 2). Minor also relates that Adams put his finger in Minor's butt and that it hurt. (State's Ex. 2). Minor then indicated that Adams made him perform oral sex on Adams and vice versa. (State's Ex. 2). Minor says Adams told him to keep it a secret. (State's Ex. 2). Minor says that the abuse also occurred in Adams' room while his mother was cleaning in the kitchen. (State's Ex. 2).

Hefner asks Minor who he told and Minor says his mother, his grandmother and the police. (State's Ex. 2). Minor said he had to tell the police otherwise Adams would not go to jail. (State's Ex. 2). Hefner leaves the room and when she returns, she asks more questions about Minor's home life. (State's Ex. 2). Minor says Adams never let him do what he wants or play the video games he wants, but makes him play Adams' video games. (State's Ex. 2). Hefner also asks Minor if he ever saw anything come out of Adams' penis and Minor says "pee,"

that it was yellow, and went down the drain. (State's Ex. 2). Hefner then thanks Minor for coming to the interview and tells him, "You did a good job today." (State's Ex. 2). Minor then denied that anyone had told him what to say. (State's Ex. 2).

The Pretrial Hearing on the Admissibility of the Recorded Interviews

Before trial, appellant filed a motion to preclude "testimony from a minor child due to a taint produced by improper interview techniques." R. 488. Appellant cited State v. Michaels, 642 A.2d 1372 (N.J. 1994). Judge Goldsmith held an extensive hearing on the admissibility of the videos, taking testimony from both Officer Babkiewicz and Hefner. R. 23, l. 12 – 111, l. 25.

On direct-examination, Officer Babkiewicz admitted he had "[v]ery minimal discussion as it relates to interviewing children" in his prior training. R. 27, ll. 20 – 23. On cross-examination, he admitted he **had no training** in the forensic interviewing of child victims. R. 30, ll. 17 – 19. He did not remember telling Minor the interview room had magic powers or that Minor would get zapped. R. 35, ll. 6 – 13. Officer Babkiewicz knew a forensic interview would be conducted, but had no concerns at the time that his interview of Minor would taint any later interviews because Minor's claims were "consistent with what he had already told his mother." R. 69, ll. 12 – 24. He was unaware of a statute that law enforcement agencies and child welfare services should coordinate their efforts to minimize the number of interviews of a child. R. 42, ll. 2 – 11. See S.C. Code § 63-7-920(C).

Hefner testified next at the hearing. R. 51, ll. 1 – 13. Her cross-examination illuminated the numerous problems with Officer Babkiewicz' interview of Minor. R. 58, l. 9 – 77, l. 10. When she interviewed Minor, she was aware that Minor had met with Officer Babkiewicz, but did not "know the extent of the interview or the interaction." R. 76, l. 15 – 77, l. 17. When she

testified at the hearing, Hefner had not seen the recording of the Babkiewicz interview. R. 76, ll. 15 – 19.

Hefner agreed that children "should not have multiple interviews so that the child's memory is not tainted or affected." R. 59, l. 15 – 60, l. 3. After replying that she did not remember seeing the large junior officer sticker on Minor during her interview, she said she could not comment on whether a police officer should make a child a junior officer. R. 62, l. 7 – 63, l. 17. She then agreed that it would be improper to make a child interviewee "an honorary member of Hope Haven" because they are trained not to give children promises or rewards. R. 63, l. 18 – 64, l. 7. Hefner further testified:

> Q. No rewards to a child during an interview; is that correct?
>
> A. Correct.
>
> Q. Okay. How about vilifying the suspect of the investigation?
>
> A. That is not recommended in a forensic interview.
>
> Q. Okay. How about telling the interviewee that the subject of the investigation is going to be incarcerated or has been incarcerated?
>
> A. Again, as forensic interviewers we are strongly advised not to discuss that kind of information.
>
> Q. Okay. And how about telling them that if they don't tell the truth in that room that will be zapped?
>
> A. That is strongly—
>
> Q. I'm sorry?
>
> A. That is strongly ill advised to tell a child that they will be zapped. . . . What does zapped mean? I'm not sure what that means.
>
> A. I don't know either, but you would ill advise that?
>
> Q. That sounds like a threat.

R. 64, ll. 5 – 25.

Hefner further agreed that the interviewer should not tell a child they are his friend or buddy. R. 65, ll. 12 – 17. She said it was important to ensure children know that parents are not observing the interview because it could either taint the interview or cause children not to disclose something embarrassing. R. 71, l. 15 – 72, l. 13. When asked how a forensic interviewer could correct a taint from a prior interview, Hefner said, "I'm not sure how you would do that. I guess it depends on the context of the situation. How one feels it was tainted or—I mean there are a lot of factors that contribute to that. I mean it's not just one answer." R. 76, ll. 4 – 14.

After Hefner's testimony, the trial court heard extensive argument from the parties on whether Minor's testimony, including the recorded interviews, was admissible because Officer Babkiewicz' interview tainted all following interviews of Minor. R. 79, l. 19 – 111, l. 12. Relying on the Michaels case, appellant argued that Minor's testimony could not be presented because it was rendered unreliable by the suggestive interview procedures. R. 81, l. 4 – 83, l. 25. Appellant pointed out the suggestive tactics used by Officer Babkiewicz and Hefner's agreement that his tactics were improper. R. 83, l. 4 – 87, l. 20. Appellant also argued that the recordings were hearsay, and as such a general rule applied keeping out hearsay to the extent the Legislature enacted S. C. Code Ann. § 17-23-175 as an exception. R. 89, ll. 10 – 19. The State argued that the videos were both admissible under section 17-23-175 and that the question of taint was one for the jury. R. 95, l. 13 – 100, l. 23. The trial judge ruled the testimony was admissible, stating he agreed with the State's position, that Michaels was not controlling, and that he saw no bias in either interview. R. 109, l. 18 – 111, l. 12.

Discussion

The trial judge erred in denying appellant's motion because the suggestive and biased interview by Officer Babkiewicz tainted all of the young child's testimony. Citing the Michaels case, this Court has observed that the techniques used by forensic interviewers were devised in response to concerns about children's testimony being tainted by suggestive police interviews. State v. Douglas, 367 S.C. 498, 522-23, 626 S.E.2d 59, 72 (Ct. App. 2006) aff'd in part, rev'd in part 380 S.C. 499, 671 S.E.2d 606 (2009). As was amply demonstrated by Hefner's testimony, Officer Babkiewicz' interview violated established practices for interviewing children. The following interviews and testimony by Minor were rendered unreliable and tainted by this suggestive interview.

In Michaels, the court framed the issue as whether "the interview techniques used by the State in this case were so coercive or suggestive that they had a capacity to distort substantially the children's recollections of actual events and thus compromise the reliability of the children's statements and testimony based on their recollections." Michaels, 642 A.2d at 1377. The court listed several factors to consider, stating that, "The explicit vilification or criticism of the person charged with wrongdoing is another factor that can induce a child to believe abuse has occurred." Id. "Similarly, an interviewer's bias with respect to a suspected person's guilt or innocence can have a marked effect on the accuracy of a child's statements." Id. "The transmission of suggestion can also be subtly communicated to children through more obvious factors such as the interviewer's tone of voice, mild threats, praise, cajoling, bribes and rewards, as well as resort to peer pressure." Id. The court noted that the improper influence of their own techniques was recognized by law enforcement and led to their developing standards for interviewing young children. Id. at 1378.

The Michaels court especially criticized the interviewers' lack of impartiality and objectivity. Id. at 1379-80. The interviewers used threats and bribes. Id. at 1380. In a striking similarity to appellant's case, the court noted:

> For example, they were told that the investigators "needed their help" **and that they could be "little detectives."** Children were also introduced to the police officer who had arrested defendant and were shown the handcuffs used during her arrest; **mock police badges were given to children who cooperated.**

Id. (emphasis added). The Court concluded that that "the interviews of the children were highly improper and employed coercive and unduly suggestive methods. As a result, a substantial likelihood exists that the children's recollection of past events was both stimulated and materially influenced by that course of questioning." Id.

The effect of Officer Babkiewicz' using rewards and lack of objectivity could not be more apparent when Minor wears the shiny police badge sticker to the interview at Hope Haven four days later.. During the interview with Officer Babkiewicz, he knew his mother was watching and he knew what Officer Babkiewicz wanted to hear. Officer Babkiewicz gave him the police badge sticker, repeatedly reminded Minor they were buddies and police officers together, and gave him stuffed animals as rewards. Officer Babkiewicz admitted he had no training in interviewing children. See S.C. Code Ann. § 17-23-175(B)(2). Minor's statement was not detailed. The trial court erred in finding that Minor's testimony had not been irredeemably tainted by the officer's interview. This Court should reverse.

2.

<u>The trial court erred in refusing to charge criminal intent as an element of first-degree criminal sexual conduct with a minor.</u>

During the charge conference, appellant requested a charge on mens rea and criminal intent as an element of first-degree criminal sexual conduct. R. 314, l. 13 – 321, l. 2. R. 343, l. 19 – 349, l. 15. Appellant submitted the following proposed instruction on intent, titled, "Willful":

> An act is done "willfully if done voluntarily, intentionally, and with the specific intent to do something the law forbids. In other words, a criminal act is willful if the actor knows the conduct is unlawful and acts with bad purpose to disobey or to disregard the law.

(Court's Ex. 6). Appellant based this argument on the fact that Minor alleged the abuse happened while in the shower and appellant did not want the jury to convict him if they believed that he only bathed the child, but did touch his genitals or anus during the shower. R. 314, l. 13 – 321, l. 2. R. 343, l. 19 – 349, l. 15.

The State argued that "Nothing about that conduct could be done accidentally. If this were a touching case I would agree that willfully could be argued." R. 347, ll. 7 – 25. The solicitor said appellant was free to argue intent to the jury, but "It has no place in jury instructions." R. 347, ll. 17 – 25. The trial judge denied the request, agreeing with the position taken by the State. R. 348, l. 15 – 350, l. 20. Appellant renewed his request after the trial judge charged the jury. R. 458, ll. 2 – 5.

The statute for first-degree CSC with a minor is silent about the required mental state. <u>See</u> S.C. Code Ann. § 16-3-655(A) and S.C. Code Ann. § 16-3-651(h) (defining "sexual battery"). Section 16-3-655(A) states, in relevant part for this case, that "A person is guilty of criminal sexual conduct with a minor in the first degree if . . . the actor engages in sexual battery

with a victim who is less than eleven years of age." S.C. Code Ann. § 16-3-655(A)(1). "Sexual battery" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or 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." S.C. Code Ann. § 16-3-651(h). Neither statute says anything about intent.

Appellant argued that section 16-3-655(A) is not a strict liability crime. R. 348, ll. 1 – 14. Appellant stated, "And we believe it's not a strict liability because washing a child's butt your finger accidentally goes through the cavity or through the opening no matter how slight, I don't think that makes somebody all of a sudden a sexual predator because he bathed vigorously." R. 348, ll. 1 – 14.

The silence of a criminal statute on the level of intent required does not automatically convert the statute into one of strict liability. See State v. Jeffries, 316 S.C. 13, 446 S.E.2d 427 (1994); State v. Ferguson, 302 S.C. 269, 395 S.E.2d 182 (1990). Jeffries dealt with the mens rea required for kidnapping. Jeffries at 17-21, 446 S.E.2d at 429-31. The kidnapping statute, like the statute at issue here, "does not expressly state whether a *mens rea* is required." Id. The Court stated that when a criminal statute is silent, "we look to common law and the development of the statute to determine whether the legislature intended the crime to require a *mens rea*." Id. The Court found "no evidence of legislative intent to make the crime of kidnapping a crime of strict liability." Id.

Serious crimes are rarely crimes of strict liability. See William S. McAnich, et al., The Criminal Law of South Carolina, 3rd ed. at 14 (1996) ("Strict liability offenses rarely entail a substantial term of imprisonment."). Few crimes are more serious than first-degree CSC with a

minor, which carries a sentence ranging from a mandatory minimum of twenty-five years to death. S.C. Code Ann. § 16-3-655(D)(1). The statutory scheme seems to show the Legislature's intent to include a mens rea for first-degree CSC because third-degree CSC, a far less serious offense, has an intent requirement. S.C. Code Ann. § 16-3-655(C). Third-degree CSC requires the offense to be done "wilfully and lewdly" and "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child. Id. This Court should be reluctant to find the far more serious crime is one of strict liability while the less serious crime is not.

The State may cite cases holding that the offense of having sexual intercourse with a mental patient is a crime of strict liability. See State v. Kirkland, 282 S.C. 14, 317 S.E.2d 444 (1984); State v. Guinyard, 260 S.C. 220, 195 S.E.2d 392 (1973). As noted and relied upon in Guinyard, courts have uniformly rejected lack of knowledge of a child's age as a defense to statutory rape. Id. However, these cases deal with adults and the knowledge of the defendant that the victim is confined to a mental institution. Here, the argument has nothing to do with the status of the victim or the victim's age. The portion of the statute defining sexual battery includes the phrase "however slight," which, in a very narrow spectrum of cases, leaves the door open for one of the State's most serious crimes to be committed without any intent. This case, involving an allegation of an assault while bathing a child, is one of those few factual circumstances where intent is an issue. The trial judge gave no intent charge to the jury at all, not even a general charge on intent during his instructions. R. 449, l. 24 – 457, l. 17. The trial court erred in refusing appellant's requested charge and this Court should reverse.

3.

The trial court erred in refusing to charge the jury that it had to be unanimous as to the factual allegations contained in the indictment, which contained a "to wit" provision alleging fellatio and intrusion into the anus, therefore depriving appellant of his right to a unanimous verdict.

The State's indictment alleged that appellant, Justin Adams ("Adams"), during the year 2013, committed a sexual battery on the complainant, Minor, an eleven year old boy "to wit: fellatio and digital intrusion of the victim's anal opening." R. 540. Appellant argued that the indictment contained multiple factual allegations in one charge and asked the trial judge to charge the jury on unanimity. R. 301, l. 15 – 310, l. 10. R. 327, l. 12 – 343, l. 18. R. 486. Appellant cited State v. Samuels, 403 S.C. 551, 743 S.E.2d 773 (2013) and Richardson v. United States, 526 U.S. 813 (1999). Appellant's argument was that some members of the jury could believe only that appellant committed fellatio while other jurors could believe that appellant only inserted his finger into Minor's anal opening, but nevertheless all vote guilty, therefore violating his right to a unanimous verdict. R. 301, l. 15 – 310, l. 10. R. 327, l. 12 – 343, l. 18. The trial judge refused to give appellant's charge on unanimity. R. 343, ll. 16 – 18.

Appellant requested the following charge:

SPECIFIC UNANIMITY REQUIREMENT

AS TO THE DEFENDANT'S COURSE OF ACTION

In this case, you have heard testimony of different acts or conduct taken by the Defendant at different times or on different days. I charge you the jury that you must unanimously agree as to the exact act committed by the Defendant in violation of the statute before you can return a guilty verdict. If you can not agree unanimously as to the prohibited acts or conduct taken by the Defendant then you must return a verdict of not guilty.

R. 484. The trial judge refused to give appellant's charge. R. 343, ll. 16 – 18. The court's only charge with respect to a unanimous verdict was, "For there to be a verdict all 12 of you must agree." R. 457, ll. 2 – 3. Appellant renewed his objection after the trial judge's charge. R. 458, ll. 2 – 5.

As recognized by the Samuels Court, "Duplicitous indictments implicate a defendant's rights to notice of the charge against him, to a unanimous verdict, to appropriate sentencing and to protection against double jeopardy in a subsequent prosecution." Samuels at 556, 743 S.E.2d at 776 (internal quotations omitted). See also United States v. Robinson, 627 F.3d 941, 957-58 (4th Cir. 2010) ("Duplicitous indictments present the risk that a jury divided on two different offenses could nonetheless convict for the improperly fused double count."). "For example, such indictments present the risk that a jury divided on the two separate offenses in one count could nevertheless convict through a general verdict on the one count." Samuels at 556, 743 S.E.2d at 776. "[D]uplicitous indictments are generally considered defective and may be dismissed on that ground." Id. "[A] defendant will prevail on appeal when he establishes both that an indictment was duplicitous and that he was prejudiced by the duplicity." Id. at 557, 743 S.E.2d at 776.

As noted in Samuels, a duplicitous indictment can be cured with a proper jury instruction. Id. at 557-58, 743 S.E.2d at 777. The trial judge here could have easily corrected the duplicitous indictment that charged two factual counts by giving appellant's requested jury charge. This error cannot be harmless in this case with no physical evidence and where Minor's credibility was severely tainted by Officer Babkiewicz' interview. This Court should reverse.

4.

<u>The trial court erred in denying appellant's motion for a new trial based on the undisputed fact that complainant's mother, who was subject to the court's sequestration order, was caught listening to testimony through the door of the courtroom.</u>

Despite video evidence and an admission by Minor's mother ("Tabitha") that she violated the court's sequestration order, the trial judge refused to grant appellant's motion for a new trial. Defense counsel learned from his paralegal after closing arguments that Tabitha was lying on the floor outside the courtroom door, attempting to listen to testimony through the crack in the door. March 30, 2017, R. 3, l. 14 – 7, l. 3. After the trial, appellant obtained video from courthouse security which shows Tabitha on the floor at the courtroom door. R. 489. Appellant attached stills from the video to his motion for new trial and Tabitha is visible in a hunched over position at the door. R. 489.

The State called Tabitha as a witness at the hearing on appellant's motion for a new trial and she admitted violating the sequestration order. March 30, 2017, R. 519, l. 2 – 520, l. 1. She claimed she could not hear "most of what was said" and said what she did hear did not influence her. March 30, 2017, R. 519, l. 2 – 520, l. 1. On cross-examination, Tabitha admitted lying during her trial testimony about whether she had a romantic relationship with Adams after the abuse allegations were made. March 30, 2017, R. 520, l. 22 – 527, l. 1. As defense counsel argued, "we have direct proof of perjury" during Adams' trial. March 30, 2017, R. 526, l. 24 – 527, l. 1.

The State agreed that Tabitha's behavior was "cartoonish." March 30, 2017, R. 533, l. 15 – 534, l. 2. However, the State argued that Tabitha would have been allowed in the courtroom pursuant to the Victim's Bill of Rights. March 30, 2017, R. 517, ll. 10 – 16. March 30, 2017, R.

531, l. 15 – 532, l. 3. The solicitor said that if she had known Tabitha so badly wanted to be in the courtroom, she would have asked the Court to permit it. March 30, 2017, R. 531, l. 15 – 532, l. 3. Appellant argued that evidence of Tabitha's misconduct would have been powerful evidence to the jury that she was not credible. March 30, 2017, R. 531, ll. 1 – 9. March 30, 2017, R. 533, l. 7 – 537, l. 14. Appellant argued that the remedy would have been to strike Tabitha's testimony or to allow witnesses to further show that Tabitha's willingness to violate the judge's order made it more likely that the child had been manipulated and coerced. March 30, 2017, R. 514, ll. 2 – 21. Judge Goldsmith denied the motion for a new trial, agreeing with the State that the Victim's Bill of Rights would have allowed Tabitha to be in the courtroom. March 30, 2017, R. 537, ll. 17 – 18. R. 539.

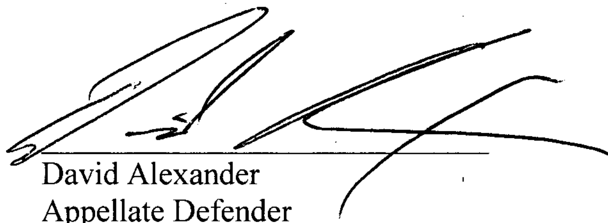
The trial judge erred in relying on the Victim's Bill of Rights to excuse a flagrant violation of the sequestration order. Judge Goldsmith granted the sequestration request at the beginning of the case. R. 141, l. 6 – 142, l. 23. At the conclusion of her testimony, Judge Goldsmith reminded Tabitha that she could not talk to any other witness about her testimony. R. 200, ll. 13 – 15. While the Victim's Bill of Rights would have allowed the State to object to the sequestration order as it related to Tabitha, it did not allow Tabitha to violate the order when she knew she was subject to it.

The credibility of the witnesses in a child sexual abuse case is of paramount importance. State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). Tabitha's intentional conduct constituted contempt of court. "All courts have the inherent power to punish for contempt, which is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice." Ex parte Cannon, 385 S.C. 643, 660, 685 S.E.2d 814, 824 (Ct. App. 2009) (internal quotations

omitted). The trial judge erred in refusing to find that Tabitha's conduct was contemptuous and would have changed the result of the trial had appellant been able to show her conduct to the jury. State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) (setting forth the standard for granting a new trial based on after-discovered evidence). This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand for a new trial.



David Alexander
Appellate Defender

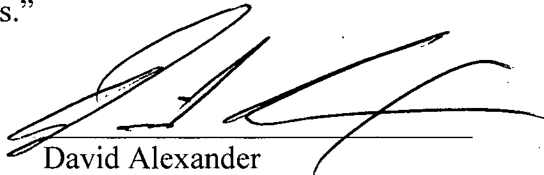
ATTORNEY FOR APPELLANT

This 23rd day of July, 2019.

CERTIFICATE OF COUNSEL

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

July 23, 2019



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