STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Kershaw County
Hon. Doyet A. Early, III, Circuit Court Judge
Appellate Case Tracking No. 2018-001355

The State of South Carolina, Respondent,

v.

Nakia Johnson, Petitioner.

Opinion No. 2018–UP–109 (S.C. Ct. App. filed March 14, 2018)

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar Number 15608

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

HEATHER S. WEISS
Interim Solicitor, Fifth Judicial Circuit

ATTORNEYS FOR RESPONDENT

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I. The trial court properly denied Johnson's motion for a mistrial related to the admission of testimony by the forensic interviewer that "We also ask in the beginning if will they [sic] tell the truth during the interview process." Johnson's convictions and sentences for lewd act and criminal sexual conduct with a minor second degree should be affirmed.

STATEMENT OF THE CASE

Procedural History

The Kershaw County Grand Jury returned true-billed indictments against Johnson for criminal sexual conduct (CSC) with a minor in the first degree, CSC with a minor in the second degree, and committing a lewd act on a child. (Indictments; App. 526-529). Johnson proceeded to trial from June 22-26, 2015, in front of the Honorable Doyet A. Early, III. The jury found Johnson not guilty of CSC with a minor in the first degree, guilty of CSC with a minor in the second degree, and guilty of committing a lewd act on a child. (T.634-635; App. 513-514). Judge Early sentenced Johnson to twenty years for CSC with a minor second degree and fifteen years for committing a lewd act; the sentences are concurrent. (T.642; App. 521).

Johnson filed a Notice of Appeal. After briefing and oral argument, the Court of Appeals affirmed Johnson's conviction for lewd act, but reversed Johnson's conviction for CSC in the second degree. See State v. Johnson, Op. No. 2018–UP–109 (S.C. Ct. App. filed March 14, 2018). Both parties filed a Petition for Rehearing. The Court of Appeals denied both by Order filed June 21, 2018.

Both parties filed a Petition for Writ of Certiorari. This Court denied the State's Petition and granted Johnson's Petition as to a single question. Johnson served his Brief of Petitioner on November 19, 2018. This Brief of Respondent follows.

Factual Background

Johnson was the child victim's step-father. The child victim was the oldest child living in the home and had several brothers and sisters. (App.32; R.___). Initially, they lived in Fairfax, which is where the abuse began. Once Johnson learned the child victim had pubic hair, he would

ask the child victim about it. When her mother would be out of the house, Johnson would send the other children to a different part of the house. He would then pull down his pants and have the child victim pull down her pants. (App.37). Johnson would kiss the child victim on her lips, rub her breasts, and then rape her. (App. 37-38).

After the family moved in with the child victim's grandmother, Johnson would visit the child victim and her siblings.[1] Again, he would send the other children to different rooms and keep the child victim in a separate room with him. He would make the child perform oral sex on him while he held her head and moved it back and forth until he ejaculated. (App.39). Johnson also forced vaginal intercourse and then threaten the child victim that he would have to kill her mother if she found out because she would tell on him. (App. 40-41). Johnson raped and abused the child victim "whenever he got the opportunity." (App.41). Similar abuse occurred in multiple locations when other adults were not present. (App. 41-61).

On one occasion, one of the child victim's siblings wanted something from the store. While the other siblings and her mother were getting ready, the child victim was rushed to Johnson's car. They left without the rest of the family. (App. 61-62). The child victim's mother called wanting to know why he did not wait for the rest of them to go to the store. (App.118). He said he would come back, but when he did not she called again. After talking, briefly about what to get at the store, the child victim's mother indicated he phone rang. When she answered no one could hear her but she could hear the conversation. (App.119).

Johnson pulled into a graveyard and parked the vehicle. He told the child victim to pull down her pants and he pulled his down too. He started touching and feeling the child victim. (A.62). The child victim's mother overheard the following conversation:

---

[1] While in Fairfax, Johnson and the victim's mother got in an argument regarding his cheating so the victim, her mother and her siblings all moved out. (App.33).

> At first I couldn't make out what he was saying, but then I heard him say, you know I want to nut in you, but I can't. And I didn't hear anything. Then I heard him say, you know why? And she didn't say anything. He said, do you know why? And she said, because I'll get pregnant. And he asked her did she miss him. She didn't say anything. And he asked her how does she want to do it; does she want to get on top or does she want him to get on top. And I think she said, you on top.

(App.119). Johnson realized the victim's mother was on the phone listening to his conversation with the child victim about having sex. He then hurried to the store and back home. (App. 62-63).

The child victim's mother was waiting for them in the driveway. The child victim initially denied anything happened and then admitted what Johnson did to her. (App. 64-65). Johnson denied doing anything and the child victim said "yes, you did." The child victim's mother held a gun to Johnson's head, but eventually got out of the vehicle and Johnson left. (App. 65).

The child victim spoke with Mr. Kellin from the family resource center for a forensic interview. (App. 67). At trial, during direct examination of Mr. Kellin, the prosecutor asked: "How did you begin the interview?" The forensic interviewer responded:

> I interviewed by introducing myself, and very briefly in the beginning, we talk about just general topics. We check and see if they're aware that this is being recorded. We provide a couple of semi-instructions just about how to respond if they don't know something so that they're not trying to provide information to us just to try to provide us information or to guess.
>
> So we encourage them to -- if they don't know something, to say they don't know; if they don't understand, to say I don't understand and not to guess. We also ask in the beginning if will they tell the truth during the interview process.

(T.353-354; App. 232-233). It was at that point that Johnson's counsel indicated he had a motion. Counsel stated: "I move that that comment be struck. And, Your Honor, I move for a

mistrial based upon the fact of the words saying he instructs them to tell the truth . . . ." (App. 233). The concept of the child being asked to tell the truth was never mentioned again during the trial.

The trial court analyzed the comment in light of the Supreme Court's holding in Kromah. (T.355-356; App. 234-235). The court concluded: "And I think the context in which he has testified about the truthful statement would not taint it so as to make it inadmissible." (T.357; App. 236). The court further indicated:

> Well, the question was asked: Tell us generally how you conduct the interview. And he started off by telling us a number of things, including encouraging her to tell the truth, is basically what he said. I don't find that to be more prejudicial than probative, so I'm going to allow him to continue on with his testimony.

(T.358; App. 237). Shortly thereafter, the jury viewed the video and it was able to witness the forensic interviewer's initial remarks, introduction to the child victim, and instructions to the child victim just as he explained in the objected to testimony. (State's Exhibit 3).

The jury found Johnson not guilty of CSC with a minor in the first degree, guilty of CSC with a minor in the second degree, and guilty of committing a lewd act on a child. (T.634-635; App. 513-514). Judge Early sentenced Johnson to twenty years for CSC with a minor second degree and fifteen years for committing a lewd act; the sentences are concurrent. (T.642; App. 521).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

"A trial judge has **considerable latitude** in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) (emphasis added). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

"[W]hether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." State v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009). Whether a mistrial is manifestly necessary is a fact specific inquiry. "It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." State v. Rowlands, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct. App. 2000) (citations omitted). This Court 'favors the exercise of a **wise discretion of the circuit judge** in determining the merits of such motion in each individual case. State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 309 (1976) (emphasis added) (quoting State v. Singleton, 167 S.C. 543, 166 S.E. 725 (1932)). "Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases. This is as it should be because a

trial judge experiences 'a feel of the case' which oftentimes may not be detected from a cold printed record." State v. Perry, 278 S.C. 490, 494, 299 S.E.2d 324, 326 (1983).

ARGUMENT

I. The trial court properly denied Johnson's motion for a mistrial related to the admission of testimony by the forensic interviewer that "We also ask in the beginning if will they [sic] tell the truth during the interview process." Johnson's convictions and sentences for lewd act and criminal sexual conduct with a minor second degree should be affirmed.

The trial court properly denied Johnson's motion for a mistrial because the testimony improperly admitted from the forensic interviewer was not sufficiently prejudicial to warrant the extreme remedy of a mistrial. Further, any admission of the testimony was entirely harmless in light of corroborating evidence existing in the record and the fact the single comment as part of an overall explanation by the forensic interviewer of the beginning of the interview process would, in and of itself, could not reasonably have altered the jury's ability to reach the proper conclusion. This Court should affirm Johnson's convictions and sentences.

Assuming arguendo that it is proper to consider harmless error, the Court of Appeals correctly found any error harmless, and this Court should affirm Johnson's conviction for lewd act.[2] This case is not a mere battle of credibility. Instead, the child victim's testimony was corroborated in several significant ways which results in the single innocuous comment by the forensic interviewer being entirely harmless beyond any reasonable doubt.

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Harmless error analyses are fact-intensive inquiries and are not governed by a definite set of rules. State v. Byers, 392 S.C. 438, 447–48, 710 S.E.2d 55, 60 (2011); State v. Davis, 371 S.C. 170, 181, 638

[2] The State acknowledges this Court has found testimony by the forensic interviewer explaining to the jury that the interviewer told the child victim to tell the truth during the interview is improper bolstering testimony. See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013); State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015).

S.E.2d 57, 63 (2006). Appellate courts must determine the materiality and prejudicial character of the error in relation to the entire case. Byers, 392 S.C. at 448, 710 S.E.2d at 60. "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). An error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008); see also State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) ("Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict.").

In direct examination of the forensic interviewer, the prosecutor asked: "How did you begin the interview?" The forensic interviewer responded:

> I interviewed by introducing myself, and very briefly in the beginning, we talk about just general topics. We check and see if they're aware that this is being recorded. We provide a couple of semi-instructions just about how to respond if they don't know something so that they're not trying to provide information to us just to try to provide us information or to guess.
>
> So we encourage them to -- if they don't know something, to say they don't know; if they don't understand, to say I don't understand and not to guess. We also ask in the beginning if will they [sic] tell the truth during the interview process.

(T.353-354; App. 232-233).

In the particular instance, the statement by the forensic interviewer was entirely harmless because the child victim's testimony was significantly corroborated. As the Court of Appeals noted, the testimony of the mother corroborated many of the facts of the child victim and provided evidence supporting the timing and occurrence of the lewd act committed by Johnson. She testified Johnson took her to the graveyard, had her pull down her pants and began fondling

her vagina. While Johnson was abusing her and talking about wanting to rape the child victim, the child victim's mother was on the phone listening to the conversation. The child victim explained that Johnson then drove quickly to the store and headed home.

The child victim's mother explained Johnson left to go to the store with only the child victim and none of the remainder of the family. On a phone call, the child victim's mother overheard Johnson:

> At first I couldn't make out what he was saying, but then I heard him say, you know I want to nut in you, but I can't. And I didn't hear anything. Then I heard him say, you know why? And she didn't say anything. He said, do you know why? And she said, because I'll get pregnant. And he asked her did she miss him. She didn't say anything. And he asked her how does she want to do it; does she want to get on top or does she want him to get on top. And I think she said, you on top.

(App.119). This testimony directly corroborated the child victim's testimony regarding the events of the incident of abuse which resulted in the lewd act charge.

Additionally, physical evidence corroborated the child victim's testimony. A sexual assault nurse examiner from Palmetto Health Richland Hospital testified she conducted an examination of the child victim after receiving the victim's history. (App. 165-166; 168).[3] In the history provided, the child victim indicated Johnson used his hand to touch her vagina earlier in the day. During the examination, the nurse noticed some redness in the child victim's genitalia. She used toluidine dye which helps to visualize any injuries. The dye indicated there was some trauma to the child victim's genital area. (App.174). Significantly, the nurse testified the redness and would be consistent with the history she was provided by the child victim. (App. 174-175).

[3] The child victim also reported other abuse to the SANE nurse. She detailed oral sex occurring at the beach. She further indicated Johnson "was playing with his private and that she knew that the white stuff, when he would nut, could get her pregnant." (App.179). She also reported multiple instances of penetration by Johnson. (App.190).

Further, the testimony could not reasonably have impacted the jury's verdict on either of the charges against Johnson. The child victim, like every witness who came before the jury to testify, was duly sworn in front of the jury. This oath specifically requires the telling of the truth. See Rule 603, SCRE ("Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."). So the jury was clearly aware of the importance of truth telling, and the forensic interviewer's single comment regarding his general instructions could not have impacted the jury's decision.[4]

Additionally, immediately after the forensic interviewer explained his procedure he uses at the beginning of an interview, the jury had the opportunity to witness the procedure on the forensic interview video. At the beginning of the interview the forensic interview introduces himself and asks some background and generic questions to the child victim. He points out the camera recording the interview to the child victim. Then he instructs the child victim to say "I don't know" or "I don't understand" instead of just guessing. Finally, before beginning the interview in more earnest he specifically asks the child victim to tell the truth. (State's Exhibit 3). All of this came before the jury without objection or request for redaction. The statement by the forensic interviewer merely presented a summary of how he began the interview, which was then seen by the jury, and the jury could not have been swayed by the innocuous statement that she was asked to tell the truth prior to her video recorded interview.[5]

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[4] The child's testimony at trial was not significantly different from the information provided in the forensic interview in regards to the type of abuse committed by Johnson. (State's Exhibit 3).

[5] Significantly, further evidence the jury was not confused, prejudiced, or swayed in any way by the statement of the forensic interviewer can be found in the fact Johnson was acquitted of the most serious charge he faced, CSC with a minor first degree.

As an additional sustaining ground, this Court should find the Court of Appeals erred in its analysis of the mistrial issue presented by Johnson. Further this Court should either reverse the Court of Appeals' opinion and affirm both of Johnson's convictions and sentences for lewd act and criminal sexual conduct with a minor second degree, or in the alternative, vacate the Court of Appeals' opinion and remand for the Court of Appeals to apply the proper analysis consistent with a determination of whether the trial court erred in denying a motion for a mistrial.[6]

Johnson raised the following issue in his Brief of Appellant related to the testimony of the forensic interviewer:

> Should the trial judge **have granted a mistrial** when David Kellin, a child advocacy interviewer, testified he instructed the child to "tell the truth during the interview process," when that testimony is prohibited by State v. Kromah and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?

(Br. App. i; 1; 14; App.533; 535; 548) (emphasis added). As a result, the **sole** issue that should have been considered by the Court of Appeals is whether the trial judge erred in refusing to grant the extreme remedy of a mistrial based on the existence of manifest necessity. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); Burris v. Propst Lumber & Logging, Inc., 396 S.C. 85, 94, 719 S.E.2d 695, 700 (Ct. App. 2011) (finding "specific issue is not preserved for appellate review because Employer did not specifically raise this point in its Statement of Issues on Appeal."). Additionally, Johnson specifically concluded his argument on this issue by indicating: "The trial court judge erred by **not granting a mistrial**, and this Court should order a new trial."

[6] The State is asking this Court to ultimately affirm the rulings and findings of the trial court and jury. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

(Br. App. 15; App.549)(emphasis added). As a result, Johnson clearly limited consideration of any error to whether or not the trial court properly denied his request for a **mistrial**. The Court of Appeals should have similarly limited its consideration and analysis.

"The appellants have the responsibility to identify errors on appeal, not the [c]ourt. . . . As Chief Judge Alex Sanders so aptly stated, 'appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.' " Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001) (last alteration by court) (quoting State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991)). In this case, Johnson has not challenged any ruling of the trial court regarding the exclusion of testimony or the striking of testimony. He does not ask this court to find error in failing to exclude the testimony. He has **solely** raised an issue related to whether it was error to deny the serious consequence of a **mistrial**. Any other arguments, whether based on Rule 403, SCRE, improper admission of evidence, or other grounds, were not properly raised before the Court of Appeals and should not have formed the basis for the Court's Opinion. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (holding that an unchallenged ruling, right or wrong, is the law of the case); State v. Jones, 344 S.C. 48, 58–59, 543 S.E.2d 541, 546 (2001) (declining to address an issue on appeal because the supporting argument was "so conclusory that it has been abandoned"); Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999) (issue is deemed abandoned on appeal if it is argued in a short, conclusory statement without supporting authority). The issue raised to this Court should not be considered preserved because it was not properly raised to the Court of Appeals. See e.g., State v. Berry, 418 S.C. 500, 795 S.E.2d 26 (2016).

As a result, this Court should, at a minimum, vacate the Court of Appeals' opinion and remand to the Court of Appeals for a determination of the issue utilizing the proper standard based on Johnson's issue raised in his Final Brief of Appellant – whether the trial court erred in failing to find grievous circumstances necessitating the grant of the extreme remedy of a mistrial. In the alternative, as will be discussed below, the State submits the record is sufficient to allow this Court to make a determination of a mistrial was unnecessary, reverse the Court of Appeals decision in part, and affirm the trial court's rulings and both of Johnson's convictions and sentences.

Once the issue is properly viewed through the standard of review applicable to a mistrial motion, this Court should, based on Rule 220(c), reverse the Court of Appeals' opinion and find the trial court did not abuse its discretion in denying the extreme measure of a mistrial based on the single, isolated comment which could not have swayed the reasoning of the jury. The Courts of this state have also recognized that the grant of a mistrial is restricted to only the most serious situations in which there is no other means available to protect the rights of the defendant. "A mistrial should not be ordered in every case where incompetent evidence is received." State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999). "The grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way." Id. (citations omitted) (emphasis added). It is for this reason the Courts have held that trial courts should be reluctant to grant a mistrial. "The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes." State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) (emphasis added). In reviewing the need for a mistrial and exercising its "wise discretion" a trial court should consider "the character of the testimony, the

circumstances under which offered, the nature of the case, other testimony in the case, and perhaps other matters, should be considered." Craig, 267 S.C. at 269, 227 S.E.2d at 309–10. "The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way." State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011).

The Court of Appeals erred in finding a mistrial was necessary as it related to any offense. The Court of Appeals' opinion indicates the trial court allowed incompetent testimony from the forensic interviewer regarding the instruction to tell the truth and sets forth a near *per se* rule that this testimony should result in a mistrial. It is clear from the Court of Appeals' Opinion the Court conflated analysis related to a mistrial with analysis of an evidentiary issue. Specifically, the Court held:

> The State argues Kellin's one comment did not rise to the level of being so prejudicial as to require a mistrial. Although it is true the prejudice in Anderson was "overwhelming" and Kellin's testimony only mentioned truth-telling once, we feel constrained by the language in *Kromah* and *Anderson* to find any mention of the word "truth" during a forensic interview or during a forensic interviewer's testimony to be improper.

Johnson, Op. No. 2018-UP-109 at page 6. Instead, this Court should determine the single, isolated statement, which was merely a portion of a long summary of procedure by the forensic interviewer, did not qualify as a "grievous" incident resulting in "urgent circumstances" necessitating the ending of the trial.

The trial court, which should be given extensive deference, clearly and thoroughly explained the lack of prejudice and the minimal impact caused by the testimony. The trial court specifically found the interviewer did not comment on the believability or credibility of the child. The trial court concluded: "I think the context in which he has testified about the truthful

statement would not taint it so as to make it inadmissible." (App.236). After explaining the statement was made as part of a discussion regarding "a number of things" by the interviewer, the court found it was not sufficiently prejudicial. (App.237). The Court of Appeals failed to give the trial court proper deference in making its determination the trial court abused its discretion in denying the mistrial as it related to the second degree CSC with a minor charge.[7]

Additionally, all of the corroboration and other analysis related to the harmlessness of the statement are applicable to demonstrate the lack of sufficient prejudice to warrant the extreme measure of a mistrial. The nature of this phone conversation, which clearly included a discussion of Johnson committing CSC with a minor, provides significant corroboration of the fact Johnson and the child victim had a sexual relationship. The contents of the discussion lend credibility to the child's testimony regarding the CSC with a minor, just as the circumstances of the phone call and the child victim and Johnson leaving lend credibility to the lewd act charge.

The Court of Appeals also overlooked the highly significant fact that Johnson **never** requested a curative instruction from the trial court.[8] A mistrial is only appropriate in a circumstance in which no other means may correct the error. In this case, had a curative instruction been requested, it could have cured any possible error in the testimony. Johnson never requested a curative instruction. Accordingly, this Court should find a mistrial was not manifestly necessary in light of the alternative remedies available to Johnson but never requested of the trial court.

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[7] Notably, the Court of Appeals does not even mention the holding of the trial court finding the prejudice of the statement to be minimal and finding it did not "taint" the proceeding such that a mistrial was not warranted. This holding is entitled to wide deference by the appellate court, deference which was not properly given by the Court of Appeals.

[8] Instead the Court of Appeals' Opinion can be read to put the burden on the trial court to give one even when not requested because the Court assigned error to the trial judge for failing to give one even though it was never requested.

As a result of the clear errors of analysis in the Court of Appeals' Opinion, this Court should reverse the Court of Appeals opinion and affirm the trial court's ruling, as well as Johnson's convictions for CSC second degree and lewd act, based on the clear lack of prejudice in the record.[9]

[9] As stated before, if this Court does not believe it should reverse the Court of Appeals and affirm the trial court based on Rule 220(c), the State asks this Court to vacate the Court of Appeals' opinion and remand for the Court of Appeals to consider the issue under the proper standard applicable to a motion for a mistrial.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

HEATHER S. WEISS
Interim Solicitor, Fifth Judicial Circuit

BY: _____
William M. Blitch, Jr.

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

ATTORNEYS FOR RESPONDENT

December 18, 2018

STATE OF SOUTH CAROLINA

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Hon. Doyet A. Early, III, Circuit Court Judge
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v.

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PROOF OF SERVICE

I, William M. Blitch, Jr., certify that I have served the within Brief of Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

E. Charles Grose, Jr., Esquire
The Grose Law Firm, LLC
404 Main Street
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.
This 18th day of December, 2018.

William M. Blitch, Jr.
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727