

SC SUPREME COURT'S BROADENING OF THE  
EXCITED UTTERANCE HEARSAY EXCEPTION  
POSITIVELY IMPACTS FAMILY COURT LITIGATION

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## **I. INTRODUCTION**

In April 2007, the Supreme Court of South Carolina utilized the “excited utterance exception” in a criminal case, State v. Ladner, and held that an incompetent child’s out-of-court statement was admissible into evidence where it met the criteria of an excited utterance.<sup>1 2 3</sup> The Court’s ruling is significant for two reasons: (1) the Court clearly set forth the predicates to establish the excited utterance exception to the hearsay rule, and (2) the Court held that despite the fact that the child was only 2 ½ years old at the time she made the statement and incompetent to testify at trial, her statement was still admissible under this exception.

The holding in Ladner is important not only in criminal cases, but universally, as it benefits family court practitioners when strategizing how to get important testimony into evidence without traumatizing a young child. Thus, Family Law practitioners should familiarize themselves with this case to successfully utilize this hearsay exception at trial.

## **II. DEFINITION OF “AN EXCITED UTTERANCE”**

An excited utterance hearsay statement is defined as an out of court statement that relates to a startling event or condition made while the declarant was under the stress of excitement

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<sup>1</sup> State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007).

<sup>2</sup> S.C.R.E 803(2): “Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”

<sup>3</sup> A child’s out-of-court, hearsay statement is admissible in abuse and neglect cases if the statement meets the requirements of S.C. Code § 19-1-180 and § 20-7-490. (See Exhibits B & C). While these statutes imply that they are only applicable in Social Services’ cases, there is an argument for their use in custody cases as well. However, other legal mechanisms are available to litigators to convince judges to admit these hearsay statements, and this article will focus upon using the excited utterance hearsay exception to admit a child’s out of court statement into evidence.



caused by the event or condition.<sup>4</sup> This exception is important when dealing with young children as witnesses because one may utilize it even though the witness is physically able to testify. As most attorneys and lay people recognize, calling a child to the witness stand is potentially mentally harmful and often emotionally traumatic to a child. Therefore, identifying legitimate means to avoid calling children as witnesses by having their testimony admitted through other witnesses is a strategy many litigators find both legally and morally sound.

Three elements must exist to meet the definition of an excited utterance:

- (1) The statement must relate to a startling event or condition;
- (2) The statement must have been made while the declarant was under the stress of excitement; and
- (3) The stress of excitement must be caused by the startling event or condition.<sup>5</sup>

Examples of excited utterances, include a child's subsequent retelling of an incident while still upset and "in a state of nervous excitement" such as the child's out-cries while being sexually or physically abused or telling another about their out-cries while still in the state of nervous excitement;<sup>6</sup> a child's frantic call for help to 911;<sup>7</sup> a child's exclamation after witnessing his parents argue during a visitation exchange or where the child is present and able to observe the event;<sup>8</sup> and a child's exclamation after witnessing spousal abuse or any other incidents of family violence.<sup>9</sup>

### **III. STATE v. LADNER: ADMISSIBILITY OF CHILD'S OUT OF COURT STATEMENT UNDER EXCITED UTTERANCE HEARSAY EXCEPTION**

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<sup>4</sup> See S.C.R.E. Rule 803 (emphasis added).

<sup>5</sup> *State v. Sims*, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002).

<sup>6</sup> *State v. Ladner*, 373 S.C. 103, 644 S.E.2d 684 (2007).

<sup>7</sup> *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266 (2006).

<sup>8</sup> Ike Van Eykel, *Getting Evidence Admitted Using the Exemptions and Exceptions to the Rule Against Hearsay* 16 (South Carolina Bar CLE 2003).

<sup>9</sup> *Id.* at 16.



Last spring's ruling by our state's Supreme Court, *State v. Ladner*, set forth our court's analysis of the admissibility of an out of court statement through the use of the excited utterance exception to the hearsay rule. The Defendant, Ladner, appealed the jury's guilty verdict of criminal sexual conduct with a two and a half year old minor by claiming the child victim's out of court statement was incorrectly allowed into evidence by the trial judge. Since this testimony was the "nail that sealed his fate," Ladner argued that the trial court's ruling was an error of law and that the conviction be reversed. Our Supreme Court disagreed with Mr. Ladner's argument and not only affirmed his conviction but also confirmed the admission of the child victim's out of court statement under the excited utterance exception to the hearsay rule.

#### **A. Facts and Procedural History of Ladner**

On the evening of Halloween 2003, at approximately 7:00 pm, Bryan Ladner picked up the victim and others from a house owned by Marla Jackson. He drove them to a nearby subdivision to trick-or-treat. Between 7:45 pm and 8:00 pm, Ladner returned to Ms. Jackson's home to drop off the victim, stating to others that he brought her back early because she was crying and throwing a temper tantrum. Thereafter, the victim sang a couple of songs, karaoke-style, to Ms. Jackson and her mother.

Approximately 45 minutes after returning to Ms. Jackson's home, the victim had "to pee." Her mother took her to the bathroom and noticed blood on the toilet paper. Ms. Jackson took a look at the victim and observed that she "was all red in her crotch area and swollen and she had scratches all behind her legs. She had a hand print – large hand print on her arm, a larger



hand print on her leg. She had scratches around her wrist.”<sup>10</sup> The victim also complained to her about pain in her vaginal area.

When Ms. Jackson asked the victim what had happened, the victim stated, “Brian [Ladner] did it.” Then, the victim said, “No, Bryan [Ladner] didn’t do nothing.” Ms. Jackson and others immediately took the victim to the emergency room where the treating physician opined that the injuries were consistent with sexual abuse that had occurred within the prior 12 to 24 hours.

Before trial, the State advised the Court that it would not call the victim as a witness and instead, the State informed the Court that it intended to implicate Ladner with the victim’s statement utilizing the excited utterance exception. Ladner’s defense counsel filed a Motion in Limine to exclude the victim’s statement as hearsay. The Trial Court denied Ladner’s Motion in Limine and ruled that the victim’s statement was admissible under the excited utterance exception.

On appeal, Ladner’s attorney argued that the victim’s statement was testimonial, and, therefore, he argued, the statement was inadmissible because he had had no prior opportunity to cross-examine the victim, which, under his theory, was a violation of the Confrontation Clause of the Sixth Amendment of the U.S. Constitution.<sup>11</sup> Ladner’s attorney also argued that the excited utterance hearsay exception did not apply (1) because the victim was not under the influence of a startling event when the statement was uttered; and (2) since the victim was

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<sup>10</sup> Ladner at 687.

<sup>11</sup> U.S. Const., amend. VI: Rights of Accused in Criminal Prosecutions: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.



declared incompetent to testify at trial, her hearsay statement made over one year prior to trial should also be considered unreliable. The South Carolina Supreme Court disagreed with both Ladner's arguments.

### **B. The Excited Utterance Hearsay Exception and Confrontation Clause of the Sixth Amendment**

In analyzing Ladner's Confrontation Clause argument, the South Carolina Supreme Court relied upon a United States Supreme Court case.<sup>12</sup> In Crawford, the United States Supreme Court held that the admission of testimonial hearsay statements against an accused violates the Confrontation Clause if: (1) the declarant is unavailable to testify at trial, and (2) the accused has had no prior opportunity to cross-examine the declarant.<sup>13</sup> In civil cases, parties have similar rights under the Due Process clause.<sup>14</sup>

The Crawford Court held the following statements are testimonial and banned by the Confrontation Clause and hearsay rule:

1. *Ex parte* in-court testimony or its functional equivalent such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;
2. Extrajudicial statements contained in formalized testimonial materials such as affidavits, depositions, prior testimony or confessions;
3. Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial; and
4. Statements taken by police officers in the course of interrogations.<sup>15</sup>

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<sup>12</sup> Crawford v. Washington, 541 U.S. 36 (2004)

<sup>13</sup> Id. at 54.

<sup>14</sup> Goldberg v. Kelly, See 397 U.S. 254, 90 S.Ct. 1011 (1970).

<sup>15</sup> Id. at 51-52.



According to the Crawford Court, testimony “is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’”<sup>16</sup> The Crawford Court added that a formal statement to a government officer is testimony where a casual remark to an acquaintance is not.<sup>17</sup>

In Davis,<sup>18</sup> the U.S. Supreme Court further elaborated on testimonial statements, holding that a victim’s identification of her abuser in a 911 call was not testimonial but that a woman’s identification of her abuser to a police officer while he was taking her statement and the abuser was in the other room, is testimonial.<sup>19</sup>

A 1999 South Carolina Supreme Court case<sup>20</sup> held that generally, statements made outside of an official investigatory or judicial context are nontestimonial. Therefore, our Court in Ladner, after examining these other cases, found that the child victim’s out of court statement was clearly nontestimonial. Relying on Crawford, the Court found that the statement was more akin to a remark to an acquaintance than a formal statement to government officers, and the Court held that the statement did not amount to a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”

As additional support for the nontestimonial nature of the statement, the Court found that the interchange between Ms. Jackson and the victim was designed to ascertain the nature of the

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<sup>16</sup> Id. at 51, quoting 2N. Webster, An American Dictionary of the English Language (1828).

<sup>17</sup> The Crawford Court overruled Ohio v. Roberts, 448 U.S. 56 (1980) to the extent that it held that a hearsay statement is admissible if it bears adequate “indicia of reliability,” i.e. it falls under a firmly rooted hearsay exception or there is an adequate showing of “particularized guarantees of trustworthiness.” See Crawford at 60; Ohio v. Roberts, 448 U.S. at 66. The Court expressed that the test in Ohio v. Roberts was inappropriate to determine admissibility because it was too narrow on the one hand but too broad, on the other. Crawford at 60-61.

<sup>18</sup> Davis v. Washington, 547 U.S. at 813, 126 S.Ct. at 2266.

<sup>19</sup> The Davis Court explained that statements are nontestimonial when they are made in the course of police interrogation when the circumstances indicate that the interrogation’s purpose is to assist with an ongoing emergency. On the other hand, a statement is testimonial when there is no such emergency, at the time of the statement. The Court noted that the holdings related to police interrogations. Id. at 2273-74.

<sup>20</sup> State v. Davis, 337 S.C. 275, 283-84, 523 S.E.2d 173, 177 (1999).



injury, not to implicate a criminal assailant especially considering the location and circumstances when the child made the statement to Ms. Jackson. The Court also cited cases from other states to support its position that statements made by a child-victim to persons unconnected with law enforcement are non-testimonial, and therefore, they do not violate the Confrontation Clause.<sup>21</sup>

**C. Ladner's Argument that the Child's Statement does not Meet the Legal Definition of Excited Utterance Fails**

Ladner's attorney also argued that the child victim's statement was improperly admitted by the trial judge for two reasons: (1) the victim was no longer under the influence of a startling event at the time she made the statement; and (2) the victim was declared incompetent to testify at a pre-trial hearing, thereby making her hearsay statement unreliable.

**1. "Startling Event"**

The Court quickly disposed of Ladner's argument that the victim's statement was not an excited utterance because she was no longer under the influence of a startling event at the time the statement was made. The Court opined that the victim's statement clearly related to the startling event of being injured in her vaginal area; she complained of pain when the statement was made; and she made the statement while under stress of the attack. Since the stress and the statement were caused by the startling event itself, the Court reasoned that the requirements of S.C.R.E. 803(2) were easily satisfied. The Court also cited the Purvis case for support wherein

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<sup>21</sup> See Purvis v. State 829 N.E.2d 572 (Ind. Ct. App. 2005) (finding that a 10 year old victim's statement to his mother and her boyfriend, identifying the perpetrator of his molestation, immediately after it occurred was not testimonial); State v. Aaron L., 865 A.2d 1135 (Conn. 2005) (finding that the statement of a two and a half year old, "I'm not going to tell you that I touch daddy's pee-pee," was nontestimonial); and Herrea-Vega v. State, 888 So.2d 66 (Fla. Dist. Ct. App. 2004) (finding that the statement of a three year old girl that defendant had placed his tongue in her private parts was nontestimonial).





the Court found that a 10 year old's statement about molestation made immediately after the molestation and while "plainly upset" also met the excited utterance criteria.

## **2. Time Lapse**

While the Court in Ladner did not specifically address the time lapse of 45 minutes (or more) between the event and the victim's statement, or the child victim's return to "normalcy" by singing and eating candy, other courts have addressed the time lapse in conjunction with excited utterances. The Courts that have addressed the issue found that a time lapse between the event and the statement will not, in and of itself, bar the admission of the statement into evidence.<sup>22</sup> Ladner appears to have left the door open regarding the amount of time between the event and the statement. However, based on the Court's language, it is arguable that the statement can come at any time as long as it is made while under stress of the startling event.

## **3. Incompetency of Victim**

Ladner's attorney requested a competency hearing of the victim before trial where even he had to concede that the victim was incompetent to testify at trial. On appeal, Ladner's attorney argued if the victim was clearly incompetent to testify at trial, her statement over one year earlier, was similarly unreliable. Our Supreme Court, following the majority of other state

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<sup>22</sup> See United States v. Hefferon, 314 F.3d 211, 222 (5<sup>th</sup> Cir. 2002) (statement of child victim made one to two hours after event was admissible); United States v. Rivera, 43 F.3d 1291, 1296 (9<sup>th</sup> Cir. 1995) (statement made a half hour after an assault occurred qualified as an excited utterance because other factors such as the age of the declarant, the characteristics of the event and the subject matter of the statements are considered); United States v. Farley, 992 F.2d 1122, 1123 (10<sup>th</sup> Cir. 1993) (statement made the day after molestation could have been admitted as an excited utterance); Morgan v. Foretich, 846 F.2d 941, 947 (4<sup>th</sup> Cir. 1988) (statement made within three hours of returning from sexually abusive father's home fell within exception because that was the first opportunity to report); United States v. Iron Shell, 633 F.2d 77, 85-86 (8<sup>th</sup> Cir. 1980) (statements elicited by a police officer between forty-five minutes and one hour and fifteen minutes after an assault considered excited utterance); United States v. Nick, 604 F.2d 1199, 1202 (9<sup>th</sup> Cir. 1979) (statements within hours of molestation were excited utterances).



courts, disagreed and found that while a child may be incompetent to testify, a child's "spontaneous declarations and *res gestae*" are nonetheless admissible as excited utterances.<sup>23</sup>

The Court rationalized its holding even further as follows:

The legal rationales underlying the rules about both competency and the excited utterance hearsay exception make plain that one ruling has little to do with the other. The competency of a witness depends solely on the facts as they exist when the testimony is given.<sup>24</sup> Conversely, the intrinsic reliability of an excited utterance derives from the statement's spontaneity which is determined by the totality of the circumstances surrounding the statement when it was uttered.<sup>25</sup>

Our Court also made clear that "when a statement is admissible because it falls within a Rule 803 exception, it may be used substantively, that is, to prove the truth of the matter asserted. . . [I]f the victim's statement qualifies as an excited utterance, the State properly admitted it to prove that the appellant committed the assault."<sup>26</sup> Thus, our Supreme Court, in accord with many other states, makes clear that if one can show that a hearsay statement meets the definition of a excited utterance and such statement does not violate the Confrontation Clause, whether or not the witness is incompetent is irrelevant, and the statement may be used to prove the truth of the ultimate matter asserted.

#### IV. CONCLUSION

Ladner clearly stands for the proposition that South Carolina recognizes out of court excited utterances, even those of an incompetent child,<sup>27</sup> as admissible evidence as long as the statement meets the legal definition of an excited an utterance and does not violate the United

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<sup>23</sup> State v. Ladner (Citing Jay M. Zitter, Annotation, Admissibility of Testimony Regarding Spontaneous Declarations Made by One Incompetent to Testify at Trial, 15 A.L.R. 4<sup>th</sup> 1043 (1982).

<sup>24</sup> State v. Ladner at 7 (Citing 81 Am. Jur. 2d Witnesses § 160 (2004)).

<sup>25</sup> State v. Ladner at 7 (Citing State v. Sims, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002)).

<sup>26</sup> Id. at 691.(citing State v. Dennis, 377 S.C. 275, 283-84, 523 S.E.2d 173, 177 (1999)).

<sup>27</sup> Nothing in the opinion suggests that the ruling would not also apply to the excited utterances of an incompetent adult.



State's Constitution's Confrontation Clause. Although Ladner is a criminal case, nothing in the opinion suggests its holding and findings are restricted to criminal law.

Civil law practitioners, particularly those who practice family law, should cite Ladner to argue for the admission of a child's out-of-court excited utterance which could be valuable testimony in a variety of family court matters, including but not limited to divorces, custody disputes, visitation questions and child support matters. Further, utilizing this exception also allows the sensitive practitioner to avoid calling a child as a trial witness to avoid placing a child in the undesirable position of testifying against another, especially a loved one, which could potentially traumatize a child.<sup>28</sup>

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<sup>28</sup> This author recognizes the potential for the abuse of the use of excited utterance exception and points out that this article is limited to the wise use of this hearsay exception and leaves for another day the argument regarding how to attach the misuse of this exception by practitioners or situations where a child might be coached to make so-called excited statements purely to strengthen one's side's position.



## EXHIBIT A

### **F.R.E. 803 (2): Excited utterance.**

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

### **Predicate: To Establish Foundation for F.R.E. 803(2)**

1. An event occurred;
2. The event was startling or at least stressful;
3. The declarant had personal knowledge of the event;
4. The declarant made a statement about the event;
5. The declarant made a statement while he was in a *state of nervous excitement*; and
6. The nervous excitement was caused by the startling event.

**Example:** Child's frantic call for help to 911.

**Example:** Child's subsequent retelling while still upset and "in a state of nervous excitement" such as his out-cries while being sexually or physically abused.

**Example:** A child's exclamation after witnessing his parent's arguments during visitation exchanges or other heated events involving children.<sup>29</sup>

**Example:** This exception would also include a child's exclamation after witnessing spousal abuse or any of family violence.<sup>30</sup>

### **Lapse of Time In Relation to Excited Utterance:**

The important factor is that the declarant must still be under the stress or excitement of the event and thus not have an opportunity for reflection or fabrication.

1. The lapse of time between the event and the declarations;
2. The age of the declarant;
3. The physical and mental state of the declarant;
4. The characteristics of the event; and
5. The subject matter of the statements.<sup>31</sup>

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<sup>29</sup> Ike Van Eykel, Getting Evidence Admitted Using the Exemptions and Exceptions to the Rule Against Hearsay 16 (South Carolina Bar CLE 2003).

<sup>30</sup> *Id.* at 16.

<sup>31</sup> *United States v. Iron Shell*, 633 R.2d. 77, 85 – 86, (8<sup>th</sup> Cri. 1980)), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68



## EXHIBIT B

(Statute typically cited in abuse and neglect cases although there is no reason practitioners should not attempt to also consider this statute in custody matters which involve abuse and neglect even if the Department of Social Services is uninvolved.)

### **19-1-180. Out-of-court statements by certain children.**

(A) An out-of-court statement made by a child who is under twelve years of age or who functions cognitively, adaptively, or developmentally under the age of twelve at the time of a family court proceeding brought pursuant to Title 20 concerning an act of alleged abuse or neglect as defined by Section 20-7-490 is admissible in the family court proceeding if the requirements of this section are met regardless of whether the statement would be otherwise inadmissible.

(B) An out-of-court statement may be admitted as provided in subsection (A) if:

(1) the child testifies at the proceeding or testifies by means of videotaped deposition or closed-circuit television, and at the time of the testimony the child is subject to cross-examination about the statement; or

(2)(a) the child is found by the court to be unavailable to testify on any of these grounds:

(i) the child's death;

(ii) the child's physical or mental disability;

(iii) the existence of a privilege involving the child;

(iv) the child's incompetency, including the child's inability to communicate about the offense because of fear;

(v) substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of videotaped deposition or closed-circuit television; and

(b) the child's out-of-court statement is shown to possess particularized guarantees of trustworthiness.

(C) The proponent of the statement shall inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the defendant with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered. If the child is twelve years of age or older,



the adverse party may challenge the professional decision that the child functions cognitively, adaptively, or developmentally under the age of twelve.

(D) In determining whether a statement possesses particularized guarantees of trustworthiness under subsection (B)(2)(b), the court may consider, but is not limited to, the following factors:

(1) the child's personal knowledge of the event;

(2) the age and maturity of the child;

(3) certainty that the statement was made, including the credibility of the person testifying about the statement;

(4) any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;

(5) whether more than one person heard the statement;

(6) whether the child was suffering pain or distress when making the statement;

(7) the nature and duration of any alleged abuse;

(8) whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

(9) whether the statement has a ring of verity, has internal consistency or coherence, and uses terminology appropriate to the child's age;

(10) whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

(E) The court shall support with findings on the record any rulings pertaining to the child's unavailability and the trustworthiness of the out-of-court statement.

(F) Any hearsay testimony admissible under this section shall not be admissible in any other proceeding.

(G) If the parents of the child are separated or divorced, the hearsay statement shall be inadmissible if (1) one of the parents is the alleged perpetrator of the alleged abuse or neglect and (2) the allegation was made after the parties separated or divorced. Notwithstanding this subsection, a statement alleging abuse or neglect made by a child to a law enforcement official, an officer of the court, a licensed family counselor or therapist, a physician or other health care



provider, a teacher, a school counselor, a Department of Social Services staff member, or to a child care worker in a regulated child care facility is admissible under this section.

### EXHIBIT C

(Definitions, including statutory definitions of abuse and neglect)

#### **20-7-490. Definitions.**

##### ARTICLE 7. INTAKE

When used in this article, or in Article 9, Article 11, or subarticle 7 of Article 13, and unless the specific context indicates otherwise:

(1) "Child" means a person under the age of eighteen.

(2) "Child abuse or neglect", or "harm" occurs when the parent, guardian, or other person responsible for the child's welfare:

(a) inflicts or allows to be inflicted upon the child physical or mental injury or engages in acts or omissions which present a substantial risk of physical or mental injury to the child, including injuries sustained as a result of excessive corporal punishment, but excluding corporal punishment or physical discipline which:

(i) is administered by a parent or person in loco parentis;

(ii) is perpetrated for the sole purpose of restraining or correcting the child;

(iii) is reasonable in manner and moderate in degree;

(iv) has not brought about permanent or lasting damage to the child; and

(v) is not reckless or grossly negligent behavior by the parents.

(b) commits or allows to be committed against the child a sexual offense as defined by the laws of this State or engages in acts or omissions that present a substantial risk that a sexual offense as defined in the laws of this State would be committed against the child;

(c) fails to supply the child with adequate food, clothing, shelter, or education as required under Article 1 of Chapter 65 of Title 59, supervision appropriate to the child's age and development, or health care though financially able to do so or offered financial or other reasonable means to do so and the failure to do so has caused or presents a substantial risk of causing physical or mental injury. However, a child's absences from school may not be considered abuse or neglect unless the school has made efforts to bring about the child's



attendance, and those efforts were unsuccessful because of the parents' refusal to cooperate. For the purpose of this chapter "adequate health care" includes any medical or nonmedical remedial health care permitted or authorized under state law;

(d) abandons the child;

(e) encourages, condones, or approves the commission of delinquent acts by the child and the commission of the acts are shown to be the result of the encouragement, condonation, or approval; or

(f) has committed abuse or neglect as described in subsections (a) through (e) such that a child who subsequently becomes part of the person's household is at substantial risk of one of those forms of abuse or neglect.

(3) "A person responsible for a child's welfare" includes the child's parent, guardian, foster parent, an operator, employee, or caregiver, as defined by Section 20-7-2700, of a public or private residential home, institution, agency, or childcare facility or an adult who has assumed the role or responsibility of a parent or guardian for the child, but who does not necessarily have legal custody of the child. A person whose only role is as a caregiver and whose contact is only incidental with a child, such as a babysitter or a person who has only incidental contact but may not be a caretaker, has not assumed the role or responsibility of a parent or guardian. An investigation pursuant to Section 20-7-650 must be initiated when the information contained in a report otherwise sufficient under this section does not establish whether the person has assumed the role or responsibility of a parent or guardian for the child.

(4) "Physical injury" means death or permanent or temporary disfigurement or impairment of any bodily organ or function.

(5) "Mental injury" means an injury to the intellectual, emotional, or psychological capacity or functioning of a child as evidenced by a discernible and substantial impairment of the child's ability to function when the existence of that impairment is supported by the opinion of a mental health professional or medical professional.

(6) "Institutional child abuse and neglect" means situations of known or suspected child abuse or neglect where the person responsible for the child's welfare is the employee of a public or private residential home, institution, or agency.

(7) "Protective services unit" means the unit established within the Department of Social Services which has prime responsibility for state efforts to strengthen and improve the prevention, identification, and treatment of child abuse and neglect.

(8) "Subject of the report" means a person who is alleged or determined to have abused or neglected the child, who is mentioned by name in a report or finding.





(9) "Suspected report" means all initial reports of child abuse or neglect received pursuant to this article.

(10) "Unfounded report" means a report made pursuant to this article for which there is not a preponderance of evidence to believe that the child is abused or neglected. For the purposes of this article, it is presumed that all reports are unfounded unless the department determines otherwise.

(11) "Indicated report" means a report of child abuse or neglect supported by facts which warrant a finding by a preponderance of evidence that abuse or neglect is more likely than not to have occurred.

(12) "Probable cause" means facts and circumstances based upon accurate and reliable information, including hearsay, that would justify a reasonable person to believe that a child subject to a report under this article is abused or neglected.

(13) "Preponderance of evidence" means evidence which, when fairly considered, is more convincing as to its truth than the evidence in opposition.

(14) "Department" means the Department of Social Services.

(15) "Child protective investigation" means an inquiry conducted by the department in response to a report of child abuse or neglect made pursuant to this article.

(16) "Child protective services" means assistance provided by the department as a result of indicated reports or affirmative determinations of child abuse or neglect, including assistance ordered by the family court or consented to by the family. The objectives of child protective services are to:

(a) protect the child's safety and welfare; and

(b) maintain the child within the family unless the safety of the child requires placement outside the home.

(17) "Affirmative determination" means a finding by a preponderance of evidence that the child was abused or neglected by the person who is alleged or determined to have abused or neglected the child and who is mentioned by name in a report or finding. This finding may be made only by:

(a) the court;

(b) the Department of Social Services upon a final agency decision in its appeals process; or



(c) waiver by the subject of the report of his right to appeal. If an affirmative determination is made by the court after an affirmative determination is made by the Department of Social Services, the court's finding must be the affirmative determination.

(18) "Court" means the family court.

(19) "Abandonment of a child" means a parent or guardian willfully deserts a child or willfully surrenders physical possession of a child without making adequate arrangements for the child's needs or the continuing care of the child.

(20) "Guardianship of a child" means the duty and authority vested in a person by the family court to make certain decisions regarding a child, including:

(a) consenting to a marriage, enlistment in the armed forces, and medical and surgical treatment;

(b) representing a child in legal actions and to make other decisions of substantial legal significance affecting a child; and

(c) rights and responsibilities of legal custody when legal custody has not been vested by the court in another person, agency, or institution.

(21) "Legal custody" means the right to the physical custody, care, and control of a child; the right to determine where the child shall live; the right and duty to provide protection, food, clothing, shelter, ordinary medical care, education, supervision, and discipline for a child and in an emergency to authorize surgery or other extraordinary care. The court may in its order place other rights and duties with the legal custodian. Unless otherwise provided by court order, the parent or guardian retains the right to make decisions of substantial legal significance affecting the child, including consent to a marriage, enlistment in the armed forces, and major nonemergency medical and surgical treatment, the obligation to provide financial support or other funds for the care of the child, and other residual rights or obligations as may be provided by order of the court.

(22) "Party in interest" includes the child, the child's attorney and guardian ad litem, the natural parent, an individual with physical or legal custody of the child, the foster parent, and the local foster care review board.

(23) "Physical custody" means the lawful, actual possession and control of a child.

(24) "Emergency protective custody" means the right to physical custody of a child for a temporary period of no more than twenty-four hours to protect the child from imminent danger.

Emergency protective custody may be taken only by a law enforcement officer pursuant to this article.



The State, Respondent, v. Bryan Ladner, Appellant.

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

Appeal From Berkeley County  
Daniel F. Pieper, Circuit Court Judge

Opinion No. 26310  
Heard February 14, 2007 - Filed April 23, 2007

AFFIRMED

Appellate Defender Aileen P. Clare, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, Patricia Ann Kennedy and Keshia V. White, of Berkeley Public Defenders, Inc., of Moncks Corner, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Shawn L. Reeves, all of Columbia, and Solicitor Ralph E. Hoisington, of Charleston, for Respondent.

JUSTICE WALLER: Appellant Bryan **Ladner** was indicted for criminal sexual conduct with a minor, first degree. A jury found appellant guilty, and the trial court sentenced him to 14 years' imprisonment. Appellant directly appeals from his conviction. We affirm.

### FACTS

Appellant was charged with digitally penetrating the victim's vagina on October 31, 2003. The victim, at the time, was approximately two and a half years old.

After the jury had been selected, but prior to any testimony being taken, the State informed the trial court it was not planning to call the victim as a witness.(fn1) Instead, the State intended to introduce the victim's statement implicating appellant through the excited utterance exception to the hearsay rule. In response, defense counsel stated that the victim might be called in the defense's case-in-chief, and therefore, appellant requested a competency hearing. Appellant also made a motion *in limine* to determine the admissibility of the hearsay statement.

The hearing on the motion *in limine* proceeded, and the State put up Marla Jackson.(fn2) Marla testified that on Halloween 2003 at around 7 p.m., appellant and others arrived at her house to take the victim trick-or-treating. About one hour later, appellant returned the victim to Marla's house. Within approximately 45 minutes of the victim returning to Marla's house, the victim went to the bathroom and complained that her crotch area(fn3) hurt when she urinated. It was discovered that the victim was bleeding, so Marla laid her down in the bedroom and saw that



she was red and swollen in her vaginal area. Marla asked the victim what happened, and the victim said, "Bryan did it." The victim then stated, "No, Bryan didn't do nothing."

The trial court ruled that the victim's statement to Marla identifying appellant as the perpetrator was admissible because it met all the elements of the excited utterance hearsay exception. Further, the trial court stated that the victim's incompetency based on her youth would not bar admission under the excited utterance rule. Defense counsel then requested the competency hearing. The victim was questioned by defense counsel and so clearly demonstrated she was incompetent to testify that at the close of questioning, defense counsel conceded she was not competent as a witness. Appellant requested that the trial court reconsider its hearsay ruling, but the trial court again ruled the statement admissible.

The following additional facts were developed during trial testimony. Appellant lived with his fiancé Joanna Sweatman. Joanna had been the victim's primary caretaker until September 2003, when the victim was sent to Tennessee to be taken care of by Joanna's mother, Eloise Cales.<sup>(fn4)</sup> Eloise traveled with the victim back to South Carolina on October 30, 2003. Arrangements were made on that day for Joanna and appellant to take the victim trick-or-treating the next evening.

Marla was the State's primary witness. She testified that she was an "aunt figure" to the victim. Marla drove Eloise and the victim from Tennessee to South Carolina the day before Halloween 2003; both Eloise and the victim stayed at Marla's house on October 30 and 31. Marla described how she got the victim ready for trick-or-treating around 6 p.m. on October 31:

[B]efore I put her panty hose on, I took her pull-up<sup>(fn5)</sup> off and washed her down because she had peed in her pull-up that we originally put on her after she had taken a bath earlier and I had to wash her, wipe her down and then put a new pull-up on her before I put her tights on her.

The victim was outfitted as a princess for Halloween: she had on a dress, make-up, and tights as her costume.

Around 7 p.m., Joanna picked the victim up from Marla's house; appellant was driving, and several others were in the car. Appellant drove the group to a neighboring subdivision to go trick-or-treating. Between 7:45 and 8 p.m., appellant returned the victim to Marla's house. Marla testified that she was on the porch giving out candy when the victim returned, and she noticed the victim had been crying because her face was red and her make-up was smeared.

Appellant explained that he brought the victim back because she was having a temper tantrum. According to Marla, appellant did not even stay two minutes at her house. Eloise came to the door and took the victim inside. Shortly thereafter, Marla also went inside the house. The victim sang a couple of songs, karaoke-style. After her singing, while sitting on the couch, the victim grabbed at her crotch and said she had "to pee." Eloise took her in the bathroom, and Marla went in to "find out what was going on." Eloise wiped the child and noticed blood on the toilet paper.<sup>(fn6)</sup> She told Marla to take a look at the victim. Marla testified as follows:



And me and my mom and Eloise was [sic] in the room and [the victim] was all red in her crotch area and swollen and she had scratches all behind her legs. She had a hand print - a large hand print on her arm, a larger hand print on her leg. She had scratches around her wrist. **And I asked her what happened, because she said her tooch hurt, and I asked her what happened and she said, Bryan did it. And then she goes, No, Bryan didn't do nothing, Bryan didn't do nothing.**

(Emphasis added).

The victim was taken to an emergency room and treated by Dr. Charles Staples. Qualified as an expert in sexual assault examinations, Dr. Staples testified the victim had bruises on her left cheek, arm, and inside thigh; his vaginal exam revealed redness. In Dr. Staples' opinion, the victim's injuries were consistent with sexual abuse that was acute, i.e., it had occurred in the previous 12 to 24 hours.

The victim was transported to, and examined at, Carolina Medical Assessment Center for a full sexual assault examination. Dr. Elizabeth Gibbs, who was qualified as an expert in child sexual examinations, testified that her examination occurred around 1 a.m. on November 1, 2003. She reported that the victim's left leg had been constricted from her left leg being held up. Regarding the victim's vaginal injuries, Dr. Gibbs testified that the area was extremely swollen, there was a laceration on the left side, and bleeding was coming from the hymen. She also stated the victim was in a great deal of pain from the vaginal injuries. Dr. Gibbs opined the victim had suffered a blunt force penetrating injury to her vagina that had occurred within 24 hours of the time of examination. Moreover, Dr. Gibbs stated that although cases of digital penetration generally present with much less trauma than this victim had, her injuries nonetheless could have been caused by digital penetration.

Based on the victim's identification of appellant, the police interrogated appellant in the early morning hours of November 1, 2003. He gave two statements to Detective Aldo Bassi. In his second statement, appellant wrote the following:

[the victim] was tired and crying so [Joanna] asked me to take her home. She put [the victim and another child] in the car. [The victim] was crying [hysterically] and from the front seat I grabbed her arm to get her to stop, she didn't so I grabbed her leg still trying to get her attention for her to stop. She kept crying and I pushed on her diaper in groin area. She still wouldn't stop so I pushed on her crotch w/my finger. She [stopped] crying and was fine the rest of the way home. (It was my right hand and my finger slightly penetrated [sic] her) I did this out of frustration [and] anger to make her stop crying [hysterically].

At trial, however, appellant testified that the victim was "throwing a fit" as he was driving her back from trick-or-treating so he reached back and "popped her on the leg." Appellant stated that Detective Bassi put words in his mouth about what had happened to the victim. Appellant testified that he wrote the second statement because he "just wanted to go home."



## ISSUES

1. Was the victim's hearsay statement testimonial and therefore inadmissible under Crawford v. Washington?
2. Did the trial court err by admitting the victim's hearsay statement under the excited utterance exception?
3. Did the trial court err by denying appellant's request for a directed verdict?

## DISCUSSION

### 1. Testimonial vs. Nontestimonial under Crawford v. Washington

Appellant argues it was error to admit the victim's hearsay statement because pursuant to Crawford v. Washington, 541 U.S. 36 (2004), the hearsay statement was testimonial and therefore inadmissible because he had no prior opportunity to cross-examine the victim. We disagree.(fn7)

The Sixth Amendment's Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In Crawford v. Washington, the United States Supreme Court (USSC) held that the admission of testimonial hearsay statements against an accused violates the Confrontation Clause if: (1) the declarant is unavailable to testify at trial, and (2) the accused has had no prior opportunity to cross-examine the declarant. Crawford v. Washington, 541 U.S. at 54. With regard to testimonial statements, Crawford overruled Ohio v. Roberts, 448 U.S. 56 (1980), which held that a hearsay statement is admissible if it bears adequate "indicia of reliability," i.e., it falls under a firmly rooted hearsay exception or there is an adequate showing of "particularized guarantees of trustworthiness." See Crawford v. Washington, 541 U.S. at 60; Ohio v. Roberts, 448 U.S. at 66.

The Crawford Court declined to comprehensively define "testimonial." It did, however, state that the "core class of 'testimonial' statements" includes: ex parte in-court testimony or its functional equivalent, such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;

extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;  
statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial; and  
statements taken by police officers in the course of interrogations.

Crawford v. Washington, 541 U.S. at 51-52 (citations omitted). In addition, the USSC stated that testimony "is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Id. at 51 (quoting 2 N. Webster, *An American Dictionary of*



the English Language (1828)). The Crawford Court further observed that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Id. at 51.

Just last year, the USSC provided further guidance on the Crawford decision in Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006). There, the USSC dealt with two different domestic violence cases and held (1) a victim's identification of her abuser in response to initial questions from a 911 emergency operator was **not** testimonial, but (2) where police responded to a domestic disturbance, found the wife and husband at home, and took a statement from the wife about the husband's abuse (while the husband was in another room), the wife's statements were testimonial. The Davis Court explained:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 126 S.Ct. at 2273-74. The Davis Court specifically noted that its holdings related to police interrogations. Id. at 2274 n.1.

Furthermore, while Crawford apparently left Roberts viable as the primary authority for analyzing nontestimonial hearsay, Davis arguably "declared that the Sixth Amendment simply has no application outside the scope of testimonial hearsay." Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 Tex. L. Rev. 271, 285 (2006); see also U.S. v. Tolliver, 454 F.3d 660, 665 n.2 (7th Cir. 2006) (Davis "appears to have resolved the issue, holding that nontestimonial hearsay is not subject to the Confrontation Clause"), cert. denied 127 S.Ct. 1019 (2007).

The hearsay statement at issue in the instant case was made by a two-and-a-half year old girl to her caretakers immediately after they discovered blood coming from her vaginal area. The victim indicated that her "tooch" hurt, and Marla asked what happened. The victim responded by saying appellant "did it," and then quickly stating he "didn't do nothing."(fn8)

We find the victim's statement to Marla is clearly nontestimonial. Significantly, the victim's statement is much more akin to a remark to an acquaintance rather than a formal statement to government officers. See Crawford v. Washington, 541 U.S. at 51. Given the circumstances surrounding the victim's statement identifying appellant as the person who hurt her, as well as to whom the statement was made, the statement does not amount to "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. Significantly, Marla's questions, as well as the victim's responses, were not designed to implicate the criminal assailant, but to ascertain the nature of the child's injury. Cf. State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 61 (2006) (generally, statements made outside of an official investigatory or judicial context are nontestimonial).



Cases in other jurisdictions with similar facts have also held the child-victim's statements to be nontestimonial. See generally Jerome C. Latimer, *Confrontation After Crawford: The Decision's Impact On How Hearsay Is Analyzed Under The Confrontation Clause*, 36 Seton Hall L. Rev. 327, 364-66 (2006) (statements made by children to persons unconnected to law enforcement have consistently been found to be nontestimonial). For example, in Purvis v. State, 829 N.E.2d 572 (Ind. Ct. App. 2005), cert. denied, 126 S.Ct. 1580 (2006), the court held that the ten-year-old victim's statements to his mother and her boyfriend immediately after the boy was molested were not testimonial. The victim, after being asked by the mother's boyfriend "what happened?" stated that the defendant had "put his `private' into [the victim's] mouth and made [the victim] `suck on it.'" The boy repeated similar statements to his mother soon afterward. Id. at 576-77.

In finding no Confrontation Clause violation under Crawford, the Purvis court explained as follows:

The rationale of the rule in Crawford is to exclude from evidence statements that have not been cross-examined that were gathered for the purpose of use at a later trial. [The victim's] statements to [his mother and the man he treated as his father] were not elicited for the purpose of preparing to prosecute anyone but rather to gain information about what happened, find out if [the victim] was harmed, and remedy any harm that had befallen him.

Id. at 579. The court also noted that simply because "parents turn over information about crimes to law enforcement authorities does not transform their interactions with their children into police investigations." Id.

In State v. Aaron L., 865 A.2d 1135 (Conn. 2005), the Connecticut Supreme Court found that a statement made by the victim when she was two-and-a-half years old was properly admitted. The child had spontaneously told her mother: "'I'm not going to tell you that I touch daddy's pee-pee.'" Id. at 1145. Regarding the Crawford issue, the Court stated that "the victim's communication to her mother clearly does not fall within the core category of *ex parte* testimonial statements that the court was concerned with in Crawford." Id. at 1146 n.21.

In Herrera-Vega v. State, 888 So.2d 66 (Fla. Dist. Ct. App. 2004), a three-year-old girl "spontaneously told her mother, as she was putting on the child's underpants, that twenty-year-old Vega had placed his tongue in her `private parts.'" [The victim] reluctantly repeated the story to her father minutes later." Id. at 67. The court there held the trial court did not violate Crawford by allowing the parents to testify to their daughter's statements. Id. at 69.

In sum, the victim's hearsay statement in the instant case was not admitted in violation of Crawford because it is a nontestimonial statement. Accordingly, there was no Confrontation Clause violation.





## 2. Excited Utterance

Appellant also argues the victim's statement was improperly admitted under the excited utterance hearsay exception. Appellant's arguments on this issue are twofold. First, appellant contends the statement does not qualify as an excited utterance. Specifically, appellant argues the victim was no longer under the influence of the startling event as evidenced by her singing karaoke songs and eating candy after she returned to Marla's home. Second, appellant contends that because the victim was declared incompetent to testify at trial, her hearsay statement made over one year prior to trial is similarly unreliable. We disagree.

"Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. The general rule is that hearsay is not admissible. Rule 802, SCRE. There are, however, numerous exceptions to this rule, such as the excited utterance exception. The rules of evidence define excited utterance as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE.

An excited utterance may be admitted whether or not the declarant is available as a witness. See Rule 803, SCRE (entitled "Hearsay Exceptions; Availability of Declarant Immaterial"). Moreover, when a statement is admissible because it falls within a Rule 803 exception, it may be used substantively, that is, to prove the truth of the matter asserted. State v. Dennis, 337 S.C. 275, 283-84, 523 S.E.2d 173, 177 (1999). Consequently, in the instant case, if the victim's statement qualifies as an excited utterance, the State properly admitted it to prove that appellant committed the assault.

Looking at the rule, there are three elements that must be met to find a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. State v. Sims, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002). The excited utterance exception is based on the rationale that "the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." State v. Dennis, 337 S.C. at 284, 523 S.E.2d at 177. A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception, and that determination is left to the sound discretion of the trial court. Sims, *supra*.

In our opinion, the trial court did not abuse its discretion by admitting the victim's statement as an excited utterance. Clearly, the statement related to the startling event of the victim being severely injured in her vaginal area. The victim was complaining of pain and was bleeding when the statements were made, and thus, the victim made the declaration while under the stress of her attack. Finally, this stress obviously was caused by the startling event of the sexual assault itself. The requirements of Rule 803(2), SCRE, were easily satisfied in this case. See also Purvis v. State, 829 N.E.2d at 581 (where the court found the victim's statement to his father figure, made



almost immediately after being molested, and while the boy was "plainly upset," clearly "met all the criteria" for excited utterances).

We turn now to appellant's claim that because the victim was declared incompetent to testify, her excited utterance was inherently unreliable and therefore was erroneously admitted. This is a novel issue in South Carolina.(fn9)

The majority of courts that have encountered this issue have held that even though a child could be declared incompetent to testify at trial, the child's "spontaneous declarations or *res gestae* statements" are nonetheless admissible. See Jay M. Zitter, Annotation, *Admissibility of Testimony Regarding Spontaneous Declarations Made by One Incompetent to Testify at Trial*, 15 A.L.R. 4th 1043 (1982); see also 2 McCormick on Evidence § 272 (6th ed. 2006) ("an excited utterance is admissible despite the fact that the declarant was a child and would have been incompetent as a witness for that reason"); 2 Wharton's Criminal Evidence § 7:1 (15th ed. 1998) (noting that courts have admitted out-of-court statements by children found incompetent to testify).

In Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988), the Fourth Circuit dealt with this issue in a civil case for damages arising out of child sexual abuse. Before proceeding to the legal analysis of the evidentiary issues, the Morgan court noted generally the following:

An estimated one in five females suffers from sexual abuse as a child. . . . [I]n two-thirds of child abuse cases, the incident is never even reported. . . . Even when the incident is reported, prosecution is difficult and convictions are few. Much of this difficulty stems from the fact that methods of proof in child abuse cases are severely lacking. Often, the child is the only witness. Yet age may make the child incompetent to testify in court, and fear, especially when the perpetrator is a family member, may make the child unwilling or unable to testify.

Id. at 943 (footnotes and citations omitted).(fn10) After thoroughly analyzing the hearsay issue, the court decided that four of the victim's statements made to her mother when the victim was two and three years old should have been admitted as excited utterances; significantly, the court also found that the victim's "youthful incompetency" would not prevent the admission of the hearsay statements. Id. at 946-48.

The Washington Court of Appeals faced this exact issue in a case with facts strikingly similar to the case at bar. See State v. Bouchard, 639 P.2d 761 (Wash. Ct. App. 1982). In Bouchard, the defendant's conviction for indecent liberties with his three-year-old granddaughter was affirmed; the victim had suffered a perforated hymen which the State asserted was the result of the grandfather's digital penetration of the victim. Id. at 762. The hearsay evidence was described by the court as follows:

The little girl's mother testified that when her daughter returned home she complained of "water" in her pants. When the mother changed the child's clothing, she found blood around her daughter's lower abdominal and vaginal areas. When questioned about the blood, the child told



her mother, "Grandpa did it." The father and attending physicians testified that the child made similar statements to them.

Id. at 763. The Bouchard court rejected the defendant's arguments that the statements were inadmissible hearsay and the victim's incompetency should have prevented the admission of the statements. The court held the victim's statements fell within the excited utterance exception to the hearsay rule and specifically stated "[t]he fact that the declarant herself (an infant) would not be competent to testify does not prohibit the use of the excited utterances." Id.

We hold that the incompetency of a declarant at the time of trial does not preclude the admission of that declarant's excited utterance through a different, competent witness. See, e.g., State v. Bauer, 704 P.2d 264, 267 (Ariz. Ct. App. 1985) ("excited utterances of children who are incompetent to testify because of their age are admissible in evidence"); Kilgore v. State, 340 S.E.2d 640, 643 (Ga. Ct. App. 1986) (rejecting the contention "that because the victim would have been incompetent to testify in court, her out-of-court statements were thus unreliable and incompetent"); People v. Smith, 604 N.E.2d 858, 871 (Ill. 1992) (excited utterances are sufficiently reliable to be admitted even where the declarant is incompetent); Com. v. Pronkoskie, 383 A.2d 858, 861 n.5 (Pa. 1978) ("a finding of incompetency to testify does not necessarily undermine the indicia of reliability attendant upon an excited utterance of the incompetent witness"); Bouchard, supra.

The legal rationales underlying the rules about both competency and the excited utterance hearsay exception make plain that one ruling has little to do with the other. The competency of a witness depends solely on the facts as they exist when the testimony is given. 81 Am. Jur. 2d *Witnesses* § 160 (2004).(fn11) Conversely, the intrinsic reliability of an excited utterance derives from the statement's spontaneity which is determined by the totality of the circumstances surrounding the statement when it was uttered. Sims, supra. This reliability "will normally remain undiluted by faulty memory, inability to understand questions or otherwise to communicate on the witness stand." Pronkoskie, 383 A.2d at 861 n.5. In other words, the trustworthiness of the excited utterance "stems not from [the declarant's] competency, but rather from the unique circumstances in which [the] statements were made." People v. Smith, 604 N.E.2d at 871. Thus, the fact that a declarant is not able to testify at trial does not diminish the reliability of that declarant's excited utterance. Because the reliability of the excited utterance is unaffected by the incompetency determination, but rather is independently evaluated under long-standing rules developed from the common law, we find appellant's argument that the victim's incompetency at the time of trial should disqualify the admission of her excited utterance untenable.

Accordingly, in the instant case, it was well within the trial court discretion to admit the victim's statements under the excited utterance exception to the hearsay rule.



### 3. Directed Verdict

Finally, appellant argues the trial court erred by denying his directed verdict motion because the evidence only raised a suspicion that he was guilty. We disagree.

On a directed verdict motion in a criminal case, the trial court is concerned with the existence or non-existence of evidence, not its weight. *E.g.*, State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999). If the State presents any evidence which reasonably tends to prove the defendant's guilt, or from which the defendant's guilt could fairly and logically be deduced, the case must go to the jury. *Id.* A defendant is only entitled to a directed verdict when the State fails to put up evidence of the offense charged. State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). On appeal from the denial of a directed verdict motion, this Court must view the evidence in a light most favorable to the State. Burdette, *supra*.

We find the trial court correctly denied the directed verdict motion in this case. Viewing the evidence in a light most favorable to the State, including the testimony which places appellant with the victim at the most likely time the injury was inflicted, the victim's identification of appellant as the perpetrator, as well as appellant's inculpatory statements, it is clear that the case was properly submitted to the jury. To the extent appellant is arguing that the State's case was based on unreliable evidence, the trial court is only concerned with the existence of the evidence, not its weight, when deciding a directed verdict motion. McHoney, *supra*; Burdette, *supra*.

### CONCLUSION

For all the above reasons, appellant's conviction is **AFFIRMED**.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

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Footnotes:

1. At the time of trial, the victim was approximately three and a half years old. The State indicated to the trial court that although it originally had planned on calling the victim as a witness, the State's position was that the child could not testify because of her tender years.

2. The victim was staying at Marla's house when the relevant events occurred. The relationships between the victim and her various caretakers will be further explained *infra*.

3. The child referred to her crotch area as her "tooch."

4. Both Joanna and Eloise were defense witnesses. Eloise testified that the victim's mother was "unable" to take care of the victim and asked Joanna to take care of her. Joanna testified that her brother was dating the victim's mother "and he didn't want a baby in the house so they



brought her to me and gave her to me and asked me to keep her." Joanna explained that she was paid to take care of the victim and she did so for approximately one year.

5. A pull-up is similar to a diaper and is used by toddlers who are not fully potty-trained.

6. Blood was also observed on the victim's pull-up.

7. Regarding issue preservation, we agree with appellant that although there was no contemporaneous objection during Marla's trial testimony, the hearsay issues are not procedurally barred because proper objections were made at the pretrial proceedings held just before Marla's testimony. See State v. Forrester, 343 S.C. 637, 642-43, 541 S.E.2d 837, 840 (2001) (where no evidence is taken between the trial court's *in limine* ruling and the admission at trial of the evidence, the issue is preserved).

8. Other hearsay statements by the victim identifying appellant were also admitted during the State's case. When asked if the victim told him what had happened, Dr. Staples testified, without objection, as follows: "She indicated to me that she had been touched by her aunt's boyfriend that was previously identified at triage as someone named Bryan. And I asked her if the aunt's boyfriend was Bryan and she told me yes." Because the trial court's ruling dealt only with Marla's testimony, however, we restrict our analysis to this particular statement by the victim. Nonetheless, we note that since there was no objection to this part of Dr. Staples' testimony, any arguable error regarding Marla's testimony would be deemed harmless. See State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985) (erroneous admission of hearsay evidence is subject to harmless error analysis; error is only harmless when it could not reasonably have affected the result of the trial); State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) ("It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence.").

9. In Sims, there was a somewhat similar factual scenario; however, this precise legal issue was not raised. There, a five-year-old boy witnessed a brutal attack on his mother, who later died. At trial, the boy was declared competent to testify, but while on the stand, he stopped answering questions and would not tell the jury the identity of the person who was in the apartment on the night his mother was attacked. The responding police officer was recalled to the stand and testified that the boy had identified the defendant. The trial court subsequently ruled the statement was admissible hearsay. Sims, 348 S.C. at 20, 558 S.E.2d at 520. This Court affirmed, finding the boy's statement was an excited utterance.

10. See generally Robert G. Marks, Note, *Should We Believe The People Who Believe The Children?: The Need For A New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 Harv. J. on Legis. 207, 207, 214 (1995) (where the author observes that the "sexual abuse of children is one of America's most terrifying social problems" and child sexual abuse "is an extremely difficult crime to prosecute").



11. Under South Carolina law, a person will be found incompetent as a witness "if the court determines that (1) the proposed witness is incapable of expressing himself concerning the matter as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth." Rule 601(b), SCRE.

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