STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable Perry H. Gravely, Circuit Court Judge

Opinion No. 5905 (S.C. Ct. App. Filed April 20, 2022)

Lower Court Case No. 2017-GS-23-07926-07929

THE STATE,

RESPONDENT,

V.

RICHARD KENNETH GALLOWAY,

APPELLANT

APPELLATE CASE NO. 2018-001806

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on June 2, 2022.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred in affirming the trial court's exclusion of testimony by the defense's blind expert in psychology and schizoaffective disorder that schizoaffective disorder could cause false memories, since the complainant was diagnosed with schizoaffective disorder prior to her claim that Petitioner molested her?

2.

Whether the Court of Appeals erred in affirming the trial court's ruling permitting the State's witness to testify as an expert in child sexual abuse dynamics and disclosures, despite the witness's failure to comply with a subpoena duces tecum that commanded her to bring any research, publications or reports that she relied on as an expert, since the State failed to prove the reliability of the substance of the expert's testimony?

3.

Whether the Court of Appeals erred where it affirmed the trial court's admission of evidence that Petitioner had physically abused the complainant's mother, where evidence of prior bad acts is limited to the uses enumerated in *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) and Rule 404(b), SCRE, since the evidence did not fit within an exception to Rule 404(b) or *Lyle*?

4.

Whether the Court of Appeals erred where it affirmed the trial court's admission of testimony that Petitioner had written a letter to the complainant's mother apologizing for abusing the mother, where the original writing is generally required to prove the content of the writing, since the original writing was not offered?

STATEMENT OF THE CASE

On September 26, 2017, a Greenville County Grand Jury indicted Petitioner for criminal sexual conduct with a minor in the first degree and lewd act on a child, offenses alleged to have occurred from 1987 – 1990. R. 577 – R. 580 Petitioner was also charged with two additional counts of criminal sexual conduct with a minor in the first degree. R. 16, ll. 5-22. Petitioner was tried before the Honorable Perry H. Gravely and a jury, from May 14 – 16, 2018. John Christopher Shipman and Jacob Goldstein represented Petitioner. Justin Holloway prosecuted the case. R. 1.

Petitioner was convicted on two of the four indictments: criminal sexual conduct with a minor in the first degree and lewd act on a minor. R. 577, l. 21 – 578, l. 11. However, the jury found Petitioner not guilty of a second count of criminal sexual conduct with a minor in the first degree, and it hung on a third count of criminal sexual conduct with a minor in the first degree. R. 577, l. 5 – 578, l. 2. Petitioner was sentenced to consecutive terms of thirty years for criminal sexual conduct with a minor in the first degree and ten years for lewd act on a minor. R. 562, ll. 18-22; R. 581- R. 582. The parties appeared before the court for a motion to reconsider sentencing on October 4, 2018. R. 565. The court denied the motion. R. 574, ll. 16-17.

On December 6, 2021, a three judge panel of the Court of Appeals heard oral argument. The Court of Appeals affirmed in a published opinion, *State v. Galloway*, Op. No. 5905 (S.C. Ct.

App. Filed April 20, 2022) (Howard Adv. Sh. No. 14 at 50). Petitioner moved for rehearing. The Court of Appeals denied rehearing. This petition for writ of certiorari follows.

REASONS WHY CERTIORARI SHOULD BE GREANTED

This Court should grant certiorari because substantial constitutional issues are directly involved as to Issue 1. *See* Rule 242(b), SCACR. Petitioner was improperly restricted from presenting in his defense the testimony of Dr. David Price, who was qualified as an expert in psychology, post-traumatic stress disorder and schizoaffective disorder. Dr. Price was prepared to testify that people with schizoaffective disorder have thought disorders which can cause false memories. It was undisputed that the complainant in this thirty-year-old child sexual abuse case had schizoaffective disorder. The trial court's ruling which excluded this evidence violated Petitioner's rights to due process and a meaningful opportunity to present a complete defense. A defendant has the right to present his version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. *Washington v. Texas*, 388 U.S. 14, 19 (1967). An accused's right to present his own witnesses to establish a defense is a "fundamental element of due process of law." *Id*. The opportunity to present a complete defense must be "meaningful." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). *See also California v. Trombetta,* 467 U.S. 479, 485 (1984); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

This Court should also grant certiorari because the decision of the Court of Appeals is in conflict with prior decisions of this Court as to Issues 2 – 4. *See* Rule 242(b), SCACR. As to Issue, 2, Shauna Galloway-Williams was improperly qualified as an expert in child sexual abuse dynamics and disclosures in light of her failure to comply with a subpoena that commanded her to bring any research, publications or reports that she relied on as an expert, since the reliability of the substance of her testimony was not proven. Galloway-Williams's assurances to the court

in *State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018), that she could provide her sources if given time, are in conflict with her failure to provide those sources several years later pursuant to subpoena, which indicated the lack of reliability of the subject-matter of her testimony. The Court of Appeals' affirmance on this issue is in conflict with *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010), which held that expert testimony must meet a reliability threshold before it may be considered by the jury.

As to Issue 3, the State was improperly permitted to introduce prior bad act evidence that Petitioner had fought with Complainant's mother, threatened to kill the mother, and that Petitioner was an "angry" and "violent" person who had violent outbursts. The State did not contend this evidence met an exception to Rule 404(b), SCRE. The Court of Appeals' affirmance of the admission of this evidence was in conflict with *State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 811 (1923), which held that prior bad acts of the defendant are inadmissible unless they prove, *inter alia*, identity, intent, or common plan or system.

As to Issue 4, the State was improperly permitted to introduce extrinsic evidence that Petitioner had at one time written Complainant's mother a letter in which he apologized for being abusive and "mean." The Court of Appeals' affirmance of the admission of this evidence is in conflict with a prior decision of this Court. *See Penton v. J.F. Cleckley & Co*., 326 S.C. 275, 282, 486 S.E.2d 742, 746 (1997) (best evidence rule provides that when the contents of a writing are sought to be proved, the original document must be produced unless some reason can be shown for its unavailability).

This Court should remedy these errors by granting certiorari. *See* Rule 242(b), SCACR.

ARGUMENT

1.

The Court of Appeals erred in affirming the trial court's exclusion of testimony by the defense's blind expert in psychology and schizoaffective disorder that schizoaffective disorder could cause false memories, since the complainant was diagnosed with schizoaffective disorder prior to her claim that Petitioner molested her.

Although the trial court found Dr. Price was qualified as an expert in schizoaffective disorder, it forbade him from testifying that schizoaffective disorder may produce false memories. The exclusion of this relevant evidence denied Petitioner a meaningful opportunity to present a complete defense.

Relevant facts

In 2016, law enforcement officials in Greenville received a letter from the complainant in which she accused Petitioner of molesting her when she was a child in the 1980's. R. 45, ll. 21-24; R. 371, ll. 19-25. Petitioner was ultimately charged with three counts of criminal sexual conduct with a minor (CSCM) in the first degree and with one count of lewd act on a minor based on these allegations.

The complainant testified that she began seeing a therapist in 2011 to treat her for post-traumatic stress disorder (PTSD). The complainant claimed she had PTSD as a result of childhood sexual abuse by Petitioner. R. 135, l. 19 – R. 136, l. 14. According to the complainant, in 2012, she was diagnosed with schizoaffective disorder. R. 185, ll. 18-20. Complainant admitted she was diagnosed with and hospitalized for this disorder prior to contacting law enforcement and prior to her trial testimony. R. 185, l. 18 – 186, l. 2.

After the State rested, defense counsel offered the testimony of Dr. David Price, who was ultimately qualified as an expert in psychology, PTSD, and schizoaffective disorder. R. 403, ll. 2-3; R. 440, ll. 6-23; R. 430, ll. 6-13. Dr. Price had not evaluated the complainant, and he was offered to testify as a "blind" expert. R. 425, ll. 12-22. During a proffer, Dr. Price explained that schizoaffective disorder can cause false memories. R., 423, l. 22 – 424, l. 1. Dr. Price also explained that some other causes can result in false memories. R. 421, l. 16 – 422, l. 16.

The court ruled that Dr. Price would be allowed to testify about PTSD and schizoaffective disorder. R. 430, ll. 6-19. However, the court disallowed any testimony on false memory, ruling that "you could open the door for every single case from that. So I'm not going to allow anything regarding false memory, repressed memory since he has not evaluated this particular person and be[en] able to diagnose[] that's what's going on here." R. 430, ll. 6-19.

Critically, Dr. Price was not permitted to testify before the jury to the important information he provided *in camera*: that persons with schizoaffective disorder have thought disorders which can cause false memories. R. 421, l. 17 – 424, l. 1.

The jury deliberated for 3 hours and asked several questions. They received an *Allen*[1] charge. R. 526, l. 1 – R. 549, l. 19. Ultimately, the jury only convicted Petitioner of two of the four charges. R. 549, l. 5 – 550, l. 11.

The Court of Appeals concluded that the restriction of Dr. Price's testimony was proper.

> We find the trial court considered the evidence for reliability. Although Dr. Price indicated schizoaffective disorder could result in false memories, he also acknowledged false memories could occur in the absence of the disorder, which casted doubt on a causal link. Furthermore, Dr. Price stated he would need to evaluate Victim, or at least review her records, to opine on whether Victim's memories of the alleged abuse were false. In addition, because of the absence of any evidence that Victim fabricated or

[1] *Allen v. United States*, 164 U.S. 492 (1896).

> otherwise imagined her recollections of her past abuse, its probative value would have been substantially outweighed by the possibility that it would confuse the issues or mislead the jury. Under these circumstances, we find the restriction on Dr. Price's testimony was within the trial court's discretion.

State v. Galloway, Op. No. 5905 (S.C. Ct. App. filed April 20, 2022) (Howard Adv. Sheet No. 14 at 55).

Discussion

The trial court's decision that Dr. Price was qualified to testify, just not about what would be particularly helpful to the jury, was an abuse of discretion. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967). An accused's "right to present his own witnesses to establish a defense . . . is a fundamental element of due process of law." *Id*. The opportunity to present a complete defense must be "meaningful." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citing *California v. Trombetta,* 467 U.S. 479, 485 (1984)). "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

The Court of Appeals' conclusion that Dr. Price's testimony on this matter was properly excluded under Rule 403, SCRE was incorrect. As an initial matter, Rule 403 was not the basis of the trial judge's ruling. The evidence Petitioner sought to introduce—that schizoaffective disorder could cause false memories—was relevant under Rule 401, SCRE, given the age of the case, nature of the allegations, and because the complainant admitted that she suffered from this disorder. The admission of this testimony was critical to Petitioner's defense because the normal

tools cannot ferret out false testimony if the witness believes that it is true. Dr. Price's testimony would have aided the jury by providing information it could use to determine whether the allegations were proven beyond a reasonable doubt. Although Dr. Price stated that other causes besides schizoaffective disorder could result in false memories, that information went to weight, not admissibility. Additionally, there was no requirement that other evidence be offered that the complainant "fabricated or otherwise imagined" her recollections of her past abuse in order for Dr. Price's testimony to be probative. It was probative because she had the disorder and this case came down to credibility.

The probative value of this testimony was substantial, and the evidence was not confusing or misleading, so it was admissible under Rule 403, SCRE. As seen, the trial court ruled that the evidence was inadmissible because a ruling admitting the evidence could somehow "open the door" in every case. However, every case does not involve thirty-year-old allegations and a complainant who has schizoaffective disorder.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. "[E]xpert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). Before the jury may consider expert testimony, the trial court must evaluate the substance of the testimony and determine whether it is reliable. *Watson*, 389 S.C. at 446, 699 S.E.2d at 175.

The trial court did not perform the required Rule 702 analysis and instead stated that a reason for excluding testimony about false memory was because Dr. Price did not evaluate the

complainant. R. 430, ll. 13-19. The court's failure to complete the Rule 702 analysis as to the reliability of Dr. Price's proffered testimony about false memory was error. Dr. Price was offered as a "blind" expert. He was not offered to opine on whether Complainant's claims were true, but to instead give the jury relevant information so that it could make that decision. Moreover, since the fact that Dr. Price was testifying as a "blind" expert did not prevent the court from admitting his other testimony about schizoaffective disorder, it was an abuse of discretion to find that his status as a "blind" expert precluded him from offering testimony on how memory can be affected by schizoaffective disorder.

As discussed in Issue 2 below, the trial court allowed the testimony of another education witness—Shauna Galloway-Williams—who was a "blind" expert, when the evidence was offered by the State. The court's exclusion of Dr. Price's testimony here was manifestly arbitrary, unreasonable, and unfair. *See State v. Grubbs*, 353 S.C. at 379, 577 S.E.2d at 496 (court's ruling on the admissibility of an expert's testimony is an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair). That is particularly so, since the State's witness was allowed to give expert testimony about the impact of trauma on memory. R. 283, l. 4 – 284, l. 2; R. 331, l. 14 – 332, l. 4.

The court erred when it precluded Petitioner from presenting a complete defense by excluding probative evidence offered by a qualified expert. *See Washington v. Texas*, 388 U.S. 14, 19 (1967). As seen, the jury deliberated for several hours and ultimately acquitted Petitioner of one of the charges and hung on another. Petitioner was prejudiced because had the jury been presented with the additional information from Dr. Price it would likely have found reasonable doubt. *See State v. Mizzell*, 349 S.C. 326, 333–34, 563 S.E.2d 315, 319 (2002) (finding error is

harmless beyond a reasonable doubt if the "reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt").

2.

The Court of Appeals erred in affirming the trial court's ruling permitting the State's witness to testify as an expert in child sexual abuse dynamics and disclosures, despite the witness's failure to comply with a subpoena duces tecum that commanded her to bring any research, publications or reports that she relied on as an expert, since the State failed to prove the reliability of the substance of the expert's testimony.

Although she was served with a subpoena duces tecum that commanded her to bring any "articles, publications, treatises, books, manuals, [and] data" upon which she relied, the witness did not comply. The admission of her testimony as an expert here was error, since her inability to comply with the subpoena demonstrated the unreliability of her testimony.

Relevant facts

The State proffered the testimony of Shauna Galloway-Williams, the executive director of a child abuse assessment center in the Greenville area. R. 267, l. 24 – 268, l. 6. Galloway-Williams also taught classes at the University of South Carolina Upstate in child advocacy. R. 269, ll. 16-24. Galloway-Williams stated she maintained 40 hours of continuing education credits every two years, and she had over 150 hours of skills-based training in assessing maltreated children. R. 269, ll. 7-15. Galloway-Williams was offered as a "blind" nonscientific expert. R. 291, l. 23 – 292, l. 10; R. 306, l. 24 – 307, l. 1. She was ultimately qualified as an expert in child sexual abuse dynamics and delayed disclosures. R. 322, ll. 17-20.

During the proffer, Galloway-Williams acknowledged that she did not perform research in these fields herself but said that her testimony was based on "decades of research." R. 306, ll.

10-16. Galloway-Williams also offered that "[s]ome research even supports that many adult[] [victims of child sexual abuse] don't report until they are adults." R. 275, ll. 22-23. In addition to delayed disclosures, Galloway-Williams proffered testimony covered a number of topics that she ultimately testified to before the jury: grooming; risk factors for childhood sexual abuse; and the impact of trauma on memory. R. 279, l. 4 – 280, l. 10; R. 281, ll. 5-23; R. 283, l. 4 – 284, l. 2.

At the conclusion of the proffer, defense counsel noted that Galloway-Williams had not complied with a subpoena duces tecum he issued to her. "**I sent Ms. Galloway a subpoena** . . . **last week**. **I asked her and directed her to bring with her to court today all the articles, publications, treatises, books, manuals, data that she would be relying upon**. **She chose to bring to court one article about forensic interviewing**. **She's not testifying as a forensic interviewer, so she didn't respond to the subpoena**." R. 313, l. 22 – 314, l. 7 (emphasis added). "There's no way [for the defense] to test the accuracy of [her] information." R. 314, ll. 18-19. Defense counsel argued against the admission of Galloway-Williams' testimony as an expert pursuant to Rule 702, SCRE based on a lack of reliability. R. 313, ll. 3-21. However, the court ruled her testimony admissible. R. 315, ll. 17-18; R. 308, ll. 10-14.

Galloway Williams then testified before the jury on direct examination that delayed disclosure is "very common. It's more common than not from my experience and from the training and research." R. 326, ll. 8-11. Galloway-Williams also opined on the impact of trauma on memory, telling the jury that "time and date" are "abstract concept[s] that most children don't really master until 12 or 14 years old and still they struggle with. So, you know, to expect that a child, or even an adult can remember the time and date of specific events, traumatic events may be very challenging." R. 331, ll. 14-20. Galloway-Williams also claimed it would be

"impossible" for her to bring the materials which she used in forming her opinions to court. R. 353, ll. 12-16.

The Court of Appeals concluded the trial court's qualification of the witness was proper.

> At trial, Galloway-Williams testified at length regarding her qualifications as a licensed professional counselor, provided a source with an overview of the topics she was expected to testify about, and explained it contained an extensive bibliography of the topics related to child abuse. We find the trial court acted within its discretion in qualifying her as an expert witness regardless of whether she fully complied with the subpoena duces tecum.

State v. Galloway, Op. No. 5905 (S.C. Ct. App. filed April 20, 2022) (Howard Adv. Sheet No. 14 at 57).

Discussion

The defense served a subpoena duces tecum on the witness pursuant to Rule 13, SCRCrimP, which ordered her to bring to court any printed materials and data upon which she relied as an expert in the fields in which she was testifying, but the witness instead brought a lone article on a different topic—forensic interviewing. The witness's failure to comply with the subpoena meant that there was no way to determine if the materials the witness claimed she relied upon had been retracted or debunked, or to determine whether she relied upon data or anecdote.

In *State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018), this Court addressed an argument as to the reliability of this exact witness' testimony. In *Jones*, the defendant alleged "it was error to admit Galloway-Williams' testimony [about delayed disclosure and the role of non-offending caregivers] because there was no evidence demonstrating her opinions were accurate or reliable. Specifically, Jones alleges Galloway-Williams failed to identify or name studies any supporting her opinions, nor did she state whether any of the literature she relied on had been peer

reviewed." *Id*. at 638, 817 S.E.2d at 271-72. In finding the trial judge did not abuse his discretion in admitting Galloway-Williams' expert testimony, this Court reasoned that, "Although Galloway-Williams did not identify by name the articles serving as the basis for her opinions, she indicated she could provide citations if given an opportunity to gather them. Additionally, she explained her opinions were supported by peer-reviewed journals and trade publications, all of which were uniformly accepted and recognized by child sexual abuse experts and professionals." *Id*. at 639, 817 S.E.2d at 272.

"[I]n executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony." *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). "First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." *Id*. Next, "the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter." *Id*. "Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable." *Id*. All expert testimony, including nonscientific expert testimony, must meet "a reliability threshold for the jury's ultimate consideration." *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). "Reliability is a central feature of Rule 702 admissibility . . ." *Id*. "*State v. White* should apply in qualifying child abuse assessment experts because their testimony is non-scientific." *State v. Chavis*, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015).

Providing one article with "topics related to child abuse," was insufficient to comply with the subpoena and establish reliability in this case. As seen, in *Jones*, Galloway-Williams claimed she would be able to provide her source materials upon request. Several years passed between

the trial in *Jones* and this trial. Galloway-Williams's failure to comply with the subpoena in this case made her expert qualification an abuse of discretion under Rule 702, SCRE. Her failure to provide these materials pursuant to subpoena demonstrated that the subject-matter of her testimony was unreliable. *See Watson v. Ford Motor Co.*, 389 S.C. at 446, 699 S.E.2d at 175; *State v. White*, 382 S.C. at 270, 676 S.E.2d at 686; *State v. Chavis*, 412 S.C. at 106, 771 S.E.2d at 338. In *State v. Acker*, 435 S.C. 716, 729, 869 S.E.2d 873, 880 (Ct. App. 2022), Acker similarly argued that on reliability grounds it was error to admit Galloway-Williams's testimony where Galloway-Williams "did not provide the necessary specific research, publications, training information, or case studies on which she relied to support her testimony . . ." It is notable that Galloway-Williams has failed to produce these alleged materials in multiple cases. Also problematic is the State's argument in this case that this Court has given Galloway-Williams a seal of approval, claiming her "reliability is well-established by caselaw." *See* FBOR at 24.

The trial court abused its discretion given the unreliability of the subject-matter as demonstrated by the witness's failure to comply with the subpoena. This is particularly apparent when contrasted with the limitation on Dr. Price's testimony. *See State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013). *And see State v. Grubbs*, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing *Means v. Gates*, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001)) (court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair).

The complainant's testimony was the primary evidence against Petitioner. There was no physical evidence and there were no eyewitnesses to the alleged molestation, which was alleged to have occurred over thirty years ago. The State's use of Galloway-Williams to testify about delayed disclosures under these circumstances was an important part of its case. The State also

relied on Galloway-Williams' testimony on the topics of grooming, risk factors for childhood sexual abuse, and the impact of trauma on memory. It is well-known that juries may accord expert testimony excessive or undue weight. *Watson*, 389 S.C. at 449, 699 S.E.2d at 176. Under these circumstances, the erroneous admission of such evidence cannot be found harmless beyond a reasonable doubt. *See State v. Mizzell*, 349 S.C. 326, 333–34, 563 S.E.2d 315, 319 (2002) (finding error is harmless beyond a reasonable doubt if the "reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt"); *State v. Chavis*, 412 S.C. at 110-11, 771 S.E.2d at 340-41 (finding error was harmless where multiple witnesses corroborated the victim's testimony about her abuse, medical evidence supported her claims, and the defendant had taken provocative pictures of the victim in states of undress).

3.

The Court of Appeals erred where it affirmed the trial court's admission of evidence that Petitioner had physically abused the complainant's mother, where evidence of prior bad acts is limited to the uses enumerated in *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) and Rule 404(b), SCRE, since the evidence did not fit within an exception to Rule 404(b) or *Lyle*.

Evidence that Petitioner behaved violently against and threatened to kill the complainant's mother was evidence of prior bad acts. The State admitted that the evidence did not fit within a *Lyle* exception, and the improper propensity evidence should have been excluded under Rules 404(b) and Rule 403, SCRE.

Relevant facts

The complainant claimed Petitioner and her mother had physical fights, and defense counsel objected pursuant to Rule 404(b), SCRE. R. 114, l. 25 – 115, l. 5. The solicitor admitted the evidence did not fit a 404(b) exception. R. 115, ll. 7-10. Nevertheless, the court ruled the

testimony admissible. R. 115, ll. 12-13. The complainant further testified that Petitioner was an "angry" and "violent" person, and during one "really bad" incident Petitioner threatened to kill her mother. R. 115, l. 19 – 116, l. 1. The complainant said Petitioner frequently had "violent event[s]" and "violent outburst[s]." R. 116, ll. 4-8.

Admittedly, evidence of other bad acts came in without objection. The complainant claimed that among other things, Petitioner shot at her mother's house, shot at a Texaco station where her mother worked, shot at her grandparents' house, forced a car chase down the road to a judge's office, and broke in and kidnapped her brother from a motel. R. 167, l. 8 – 168, l. 11. Although the complainant claimed some of these events "made the news," or involved law enforcement no police reports or news reports were found by law enforcement to corroborate these claims. R. 188, l. 4 – 193, l. 18; R. 374, ll. 20-23; R. 388, l. 6 – 390, l. 10. Defense counsel strategically used the "outlandish details" of these other bad acts to support his position that the complainant was "storytelling." R. 501, l. 25 – 504, l. 8.

The Court of Appeals concluded that the evidence was both admissible and cumulative.

> [A]lthough we agree with the trial court [sic] admission of the evidence because we find it was relevant to Victim's delayed disclosure, we find the trial court erroneously failed to conduct a balancing test. However, we find the court's error was harmless because many other instances of Galloway's violence were admitted without objection. Victim testified without objection that Galloway broke into a hotel room and kidnapped her younger brother. Victim and Waldrop both testified Galloway drove his truck into the yard "doing doughnuts." Victim testified Galloway attempted to run her mother's car off the road and once chased them in the car. Victim also recounted an incident in which Galloway pulled her father from a vehicle, busted his face, and broke his ribs. Waldrop testified Galloway shot at their duplex, harassed her at work, and beat up her boss. Because so many other instances of Galloway's violence were admitted without objection, we find any error in failing to conduct a Rule 404(b) analysis when admitting Victim's initial testimony about Galloway's violence was harmless.

State v. Galloway, Op. No. 5905 (S.C. Ct. App. filed April 20, 2022) (Howard Adv. Sheet No. 14 at 59).

Discussion

"Evidence of other bad acts is generally inadmissible to prove a defendant's guilt for the crime charged; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE." *State v. King*, 424 S.C. 188, 199, 818 S.E.2d 204, 210 (2018). *See also State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Here, the State agreed the evidence did not fall within a *Lyle* exception. The trial court admitted the evidence without finding it met a 404(b) exception.

"Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE." *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009); *accord State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). The court must determine "whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *State v. King*, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018). However, the trial court failed to conduct any analyses under Rules 404(b) or 403. In *Spears*, *supra*, this Court held that where it was not implicit or apparent from the record whether the trial court considered whether the probative value of a prior bad act was substantially outweighed by unfair prejudice, "the trial court erred by failing to conduct an on-the-record balancing test." *Spears*, 403 S.C. at 254, 742 S.E.2d at 881. The Court of Appeals concluded the evidence was "relevant to Victim's delayed disclosure," but that does not mean the evidence would pass a 403 balancing test. There was no temporal connection between the bad acts and the alleged sexual abuse. There was no need to show that Petitioner fought with Mother to explain why he allegedly sexually abused Complainant. Neither Complainant nor

Mother claimed they failed to disclose sexual abuse because of fear. The evidence predisposed the jury to favor guilt and would not have passed the balancing test. *See State v. Johnson*, 293 S.C. 321, 326, 360 S.E.2d 317, 320 (1987) (much of prior bad act testimony "established no material fact or element of the crime for which appellant was on trial; instead, it served to prejudice the jury by focusing its attention on appellant's propensity to commit criminal acts").

Moreover, the Court of Appeals erred in concluding the evidence was cumulative. It is not a waiver to object to some things and not to others. Counsel is expected to make strategic decisions about which items of evidence to lodge an objection against. Although there was evidence of other bad acts admitted without objection, that testimony was of other "outlandish" acts that defense counsel used to support his position that the complainant was "storytelling." R. 167, l. 8 – 168, l. 11; R. 188, l. 4 – 193, l. 18; R. 374, ll. 20-23; R. 388, l. 6 – 390, l. 10; R. 501, l. 25 – 504, l. 8.

However, the testimony that Petitioner assaulted the complainant's mother and threatened to kill her was not outlandish and simply painted Petitioner as a bad man with a violent character. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. King*, 424 S.C. at 201, 818 S.E.2d at 211 (quoting *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). Given the lack of physical evidence and the jury's struggle with the case, the admission of this bad character evidence was not harmless beyond a reasonable doubt.

4.

<u>The Court of Appeals erred where it affirmed the trial court's admission of testimony that Petitioner had written a letter to the complainant's mother apologizing for abusing the mother, where the original writing is generally required to prove the content of the writing, since the original writing was not offered.</u>

Absent any evidence about where the letter was or what happened to it, admitting testimony about the letter's contents was error.

Relevant facts

The complainant's mother claimed that after she broke up with Petitioner, he wrote her a letter in which he apologized for being abusive and tried to rekindle their relationship. R. 229, ll. 21-24; R. 233, ll. 12-18. Defense counsel objected to hearsay and pursuant to "the best evidence rule." R. 233, ll. 19-22. The solicitor said, "Your Honor, there is no letter, so there's no way to have better evidence—" R. 234, ll. 1-2. The court ruled it admissible based on "state of mind." R. 234, ll. 7-8. The complainant's mother went on to testify that in the letter, Petitioner "apologized for being mean to us and he said he wouldn't do it anymore and he really wanted us to come back." R. 262, ll. 12-14.

The Court of Appeals determined that the letter was admissible and cumulative.

> The letter referred to abusive behavior against Victim's mother, not sexual abuse of Victim, which was the controlling issue. Thus, the original letter is not required because it referenced a collateral matter under Rule 1004(4), SCRE. Furthermore, even if the admission of the letter was error, we find it was harmless error . . . In this case, any error in admitting the letter was harmless as cumulative based on the many other instances of violence admitted without objection. *See Kirton*, 381 S.C. at 37–38, 671 S.E.2d at 122 (stating the admission of inadmissible evidence is harmless where it is merely cumulative to other evidence that is admitted without objection).

State v. Galloway, Op. No. 5905 (S.C. Ct. App. filed April 20, 2022) (Howard Adv. Sheet No. 14 at 60).

Discussion

"To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute."

Rule 1002, SCRE. *See Penton v. J.F. Cleckley & Co*., 326 S.C. 275, 282, 486 S.E.2d 742, 746 (1997) (best evidence rule provides that when the contents of a writing are sought to be proved, the original document must be produced unless some reason can be shown for its unavailability).

Rule 1004, SCRE provides that an original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

> (1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
>
> (2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or
>
> (3) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
>
> (4) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue.

In order to admit evidence of the contents of a letter without the original letter or a copy, the proponent of the evidence—the prosecutor—was required to show that the original was lost or destroyed, that the loss or destruction was not in bad faith, and that the original could not be obtained by any available judicial process or procedure. It did not do so. Instead, the solicitor only said, "there is no letter," before the court ruled. This was error. *See Riggs v. Royal Beauty Supply, Inc.*, 879 S.W.2d 848, 850-51 (Ct. App. Tenn. E.S. 1994) (where witness simply stated "I'm sorry. I don't have the letter," the proponent of other evidence of contents of the letter failed to establish foundation under Tenn. R. Evid. 1004 and the witness's testimony about the letter's contents was properly excluded). Assuming *arguendo* that the evidence fell within the hearsay exception of a then-existing mental or emotional condition, the evidence was still

admitted in violation of the best evidence rule. The proponent of the evidence did not meet its burden to show what happened to the letter and explain why it could not be obtained by judicial process.

The Court of Appeals' conclusion that the letter related to a collateral matter rather than being closely related to a controlling issue was erroneous. *See Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 580 (D. Md. 2007) (providing illustration of difference between controlling issue and collateral matter under Fed. R. Evid. 1004: a doctor testifying as an expert in a personal injury case can testify she is licensed to practice medicine without having to produce the license itself, but where a defendant is charged with practicing medicine without a license, his testimony alone that he has a license will not be accepted, as the license is closely related to a controlling issue). The controlling issue in this case was whether Petitioner molested Complainant, and propensity evidence was closely related to this controlling issue. Propensity evidence is generally inadmissible given its efficacy in convincing a factfinder the defendant is guilty of the crime charged since he has committed other bad acts. *See generally Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime because the evidence would "weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge").

The Court of Appeals also erroneously determined the evidence was cumulative. The admitted evidence was not cumulative to other, separate bad acts because counsel made the strategic decision not to object to the separate bad acts. R. 501, l. 25 – 504, l. 8. Testimony that Petitioner apologized for abusing the complainant's mother, however, was not outlandish and it

painted Petitioner as an abusive man. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. King*, 424 S.C. at 201, 818 S.E.2d at 211 (quoting *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). Here, given the age of the case, the lack of physical evidence, and given the jury's struggle to reach a verdict, the admission of propensity evidence of Petitioner's abusive nature cannot be considered harmless beyond a reasonable doubt.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.

Respectfully Submitted,

s/ *Joanna K. Delany*
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ATTORNEY FOR PETITIONER

This 5th day of July, 2022.