STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Apr 27 2020
SC Court of Appeals

Appeal from Greenville County
Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

Respondent,

vs.

RICHARD KENNETH GALLOWAY,

Appellant.

Appellate Case No. 2018-001806

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

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

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 East North Street
Greenville, SC 29601
(864) 467-8282

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 10

ARGUMENTS

I. The trial court did not err in excluding expert testimony that someone diagnosed with schizoaffective disorder may create false memories because there was no testimony or medical records showing Victim suffered from this symptom or any other symptoms of schizoaffective disorder. Further, because the blind expert was allowed to testify to the jury that someone suffering from schizoaffective disorder may suffer from delusions or hallucinations, Appellant was not prejudiced by the exclusion of the testimony. Finally, any error was harmless because Appellant admitted to the abuse to Victim's mother and Victim's testimony was corroborated by her mother's testimony. 11

II. The trial court did not abuse its discretion in allowing expert testimony concerning the risk factors for child sexual abuse because the testimony about characteristics of sexually abused children is beyond the ken of a layperson, and the issue is not preserved for review 17

III. The trial court did not err in qualifying the witness because the State provided sufficient evidence as to the reliability of the field of child abuse dynamics and topics such as delayed disclosure; and the trial court was not required to sanction the State for the alleged failure of the expert witness to comply with the overly burdensome subpoena duces tecum to which the expert witness provided a good faith reply.. 23

IV. The trial court did not err in allowing testimony that Appellant was physically violent with Victim's mother because it was proper res gestae evidence to explain why Victim and Mother did

not disclose the sexual abuse to law enforcement, and the testimony was cumulative in nature to other bad acts to which Appellant did not object such as his physical assaults on Victim's biological father, his kidnapping of Victim's brother, his discharge of a weapon at three different buildings, and his attempt to run Victim's mother's vehicle off the road. 30

V. The trial court did not err in allowing Victim's mother to testify about a letter Appellant sent her over twenty-five years ago under the best evidence rule, and the testimony was cumulative to other evidence to which Appellant did not interpose an objection 35

CONCLUSION 38

TABLE OF AUTHORITIES

Cases:

Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003) 26

Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 487 S.E.2d 596 (1997) 26

Graves v. CAS Medical Systems, 401 S.C. 63, 735 S.E.2d 650 (2012) 27, 28

Honea v. Prior, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988) 28

Jackson v. Crews, 873 F.2d 1105 (8th Cir. 1989) 36

Kumho Tire Company v. Carmichael, 526 U.S. 137 (1999) 27

People v. Beckley, 456 N.W.2d 391 (Mich. 1990) 29

People v. Spicola, 947 N.E.2d 620 (N.Y. 2011) 29

Rock v. Arkansas, 483 U.S. 44 (1987) 12

State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015) 17

State v. Batangan, 799 P.2d 48 (Haw. 1990) 21

State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364 (1990) 10, 15

State v. Brown, 344 S.C. 302, 543 S.E.2d 568 (Ct. App. 2001) 15

State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) 17, 20, 21, 28

State v. Castro, 756 P.2d 1033 (Haw. 1988) 21

State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005) 19

State v. Funderburke, 251 S.C. 536, 164 S.E.2d 309 (1968) 34, 37

State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002) 10, 12

State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) 12

State v. Halcomb, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009) 35, 37

State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001). 12

State v. Hughes, 346 S.C. 339, 552 S.E.2d 35 (Ct. App. 2001) 25

State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018) 29

State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999) 33

State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008) 34, 37

State v. Martin, 391 S.C. 508, 706 S.E.2d 40 (Ct. App. 2011)...................................12, 26

State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014).......................................33

State v. Middleton, 657 P.2d 1215 (Or. 1983) (Roberts, J., concurring)..................... 21-22

State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985)...10, 16

State v. Oxner, 391 S.C. 132, 705 S.E.2d 51 (2011) 15

State v. Roenfeldt, 486 N.W.2d 197, 204 (Neb. 1992)...21

State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) 13

State v. Silver, 314 S.C. 483, 431 S.E.2d 250 (1993)..19

State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) 27

State v. Thomason, 355 S.C. 278, 584 S.E.2d 143 (Ct. App. 2003).................................19

State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010)..10, 12

State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996) 25

State v. Turner, 373 S.C. 121, 644 S.E.2d 693 (2007) 14

State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999) 20

State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991) 27

Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010).............................26, 27

<u>Other Authorities</u>:

Rule 5, SCRCrimP....................25

Rule 13, SCRCrimP....................25

Rule 401, SCRE....................13

Rule 403, SCRE....................13

Rule 702, SCRE....................12, 16, 21, 26

Rule 703, SCRE....................26

Rule 1002, SCRE....................36

Rule 1004, SCRE....................36

Rule 1002, FRE....................37

Rule 1004, FRE....................37

John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y, 45-46 (2010)....................28

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in excluding expert testimony that someone diagnosed with schizoaffective disorder may create false memories because there was no testimony or medical records showing Victim suffered from this symptom or any other symptoms of schizoaffective disorder. Further, because the blind expert was allowed to testify to the jury that someone suffering from schizoaffective disorder may suffer from delusions or hallucinations, Appellant was not prejudiced by the exclusion of the testimony. Finally, any error was harmless because Appellant admitted to the abuse to Victim's mother and Victim's testimony was corroborated by her mother's testimony.

II.

The trial court did not abuse its discretion in allowing expert testimony concerning the risk factors for child sexual abuse because the testimony about characteristics of sexually abused children is beyond the ken of a layperson, and the issue is not preserved for review.

III.

The trial court did not err in qualifying the witness because the State provided sufficient evidence as to the reliability of the field of child abuse dynamics and topics such as delayed disclosure; and the trial court was not required to sanction the State for the alleged failure of the expert witness to comply with the overly burdensome subpoena duces tecum to which the expert witness provided a good faith reply.

IV.

The trial court did not err in allowing testimony that Appellant was physically violent with Victim's mother because it was proper res gestae evidence to explain why Victim and Mother did not disclose the sexual abuse to law enforcement, and the testimony was cumulative in nature to other bad acts to which Appellant did not object such as his physical assaults on Victim's biological father, his kidnapping of Victim's brother, his discharge of a weapon at three different buildings, and his attempt to run Victim's mother's vehicle off the road.

V.

The trial court did not err in allowing Victim's mother to testify about a letter Appellant sent her over twenty-five years ago under the best evidence rule, and the testimony was cumulative to other evidence to which Appellant did not interpose an objection.

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Appellant Galloway for three counts of criminal sexual conduct with a minor in the first degree and one count of lewd act on a minor for events occurring between 1987 and 1990. Following a three day trial on May 14-16, 2018, the jury convicted Appellant of one count of criminal sexual conduct in the first degree and lewd act on a minor. The jury acquitted Appellant of one of the remaining counts of criminal sexual conduct on a minor and returned a hung verdict on the last count of criminal sexual conduct on a minor.

The presiding trial judge, the Honorable Perry H. Gravely, sentenced Appellant to consecutive sentences of thirty years imprisonment for criminal sexual conduct with a minor and ten years imprisonment for lewd act on a minor. Judge Gravely denied Appellant's subsequent motion to reconsider the sentence.

STATEMENT OF FACTS

Victim was thirty-nine years old at the time of trial, and she testified to abuse she received prior to her eleventh birthday. R. p. 70. By the time of trial she lived in Missouri and had not seen Appellant Galloway in years. Appellant was her uncle by marriage until he divorced Victim's aunt. R. p. 71. He later became romantically involved with Victim's mother, which provided Galloway the opportunity to sexually abuse Victim. R. p. 215.

Victim testified Victim's mother [Mother] worked at a Texaco gas station in Greenville and one night during the summer before Victim started fourth grade, Appellant babysat Victim and her brother at the University Inn where he was staying while Mother worked. R. p. 79; pp. 85-86. After putting both children to bed, Appellant got in bed with Victim, pulled her close, and minutes later, was reaching into her underwear. After a few minutes, he stopped. R. pp. 89-90. This was the first

occurrence in a pattern of sexual abuse Appellant inflicted upon Victim.

Victim told Mother what happened the next day, and Appellant did not watch the children again for a long time. R. p. 90. However, Victim, Mother, and Victim's brother later moved into a house to live with Appellant. Appellant took her one day to Brevard, North Carolina, to chop wood for his mother. While there, Appellant fondled Victim while she stood on the tailgate of his pick-up truck. R. pp. 92-94.

Another time, while at Appellant's mother's house in Greenville, Victim woke up to Appellant taking her pants off and performing oral sex on Victim. Appellant's mother was not home at the time. Victim testified while the abuse was occurring, she focused on the Christmas tree in the room. R p. 97.

Victim testified that although she was capable of showering on her own and showered on her own beforehand, Appellant nonetheless started insisting in helping Victim shower and he checked to make sure she was clean. Appellant fondled Victim's breasts and told Victim if he did not play with her breasts, they would not grow. R. p. 107. Appellant also fondled Victim inside her underwear after she fell asleep. R. p. 108. Additionally, he would perform oral sex on Victim in his bedroom. R. p. 108. She recalled him rubbing his hands between her labia when she was in fifth grade. R. pp. 108-110.

Mother continued to work at Texaco, and Appellant often kept Victim out of school to help Appellant either chop wood, or pick produce for resale at a roadside stand in North Carolina. Victim testified she was encouraged to play in the stream behind the roadside stand and get wet so Appellant could see through her shirt and her nipples would get hard. R. pp. 111-12. Victim also testified Appellant sexually assaulted her at his brother's home in North Carolina. R. p. 113.

Victim testified Appellant was physically violent with Mother. Victim testified during one episode of violence, she grabbed the phone to call 911 and Appellant grabbed the phone from her, threatening that if she called, he would kill Mother. R. pp. 115-16. Victim testified Appellant also disciplined her with a switch. He would make Victim pick out a branch for the switch and take her clothes off. Appellant then would hit her with the switch from her shoulders to her knees. This happened frequently when she was in fifth grade. R. p. 117.

Victim testified she left Appellant's residence with Mother and her brother when she was in sixth grade. R. pp. 118-19. They moved to University Inn Hotel, but Appellant found them and kicked in the door. He grabbed Victim's brother. Victim rode with Mother as she chased after Appellant's vehicle. Victim's brother was subsequently returned. R. p. 121.

They then moved in with Victim's grandparents, who were both alcoholics. As the grandparents became more violent, Victim testified Mother was considering moving back in with Appellant. Faced with this disquieting prospect, Victim disclosed the sexual abuse to Mother, who immediately left the house carrying a gun. The next morning, Mother summoned her outside to the fence where Appellant stood. Appellant told Victim she needed to forgive him or he would go to hell. Victim responded then she guessed he was going to hell. R. pp. 122-24.

She moved with her mother and brother to a duplex. Appellant drove into their yard and "did doughnuts." He also tried to run Mother and Victim off the road. Another time, Appellant and two other people pulled Victim's biological father out of the car and beat him up, breaking his ribs. R. pp. 124-27.

After sixth grade, the family left Greenville and rode with a truck driver to California. They returned East to a cabin in North Carolina where she started seventh grade. However, they moved

again, to Asheville, after Appellant found them. R. pp. 125-27. Victim bore a child at fifteen and moved out of the house at sixteen to live her first husband. She dropped out of high school and earned her GED. She joined the military, married again in 1999, and was stationed in Germany. When she divorced again and was released from the Army, she moved back to Missouri where she was stationed for some time. She started back her relationship with her second ex-husband, but he died in a car accident before they could remarry. R. pp. 131-34.

Victim later disclosed abuse to a counselor at a domestic violence shelter where she worked. She testified she was diagnosed with post-traumatic stress disorder (PTSD). R. pp. 135-36. She testified she rarely saw her Mother in subsequent years because Mother became involved in another abusive relationship and her relationship with Mother became strained. R. p. 138. In 2016, she decided to report Appellant's abuse to law enforcement in the various jurisdictions where she was abused. R. p. 138.

Defense counsel elicited testimony from Victim on cross-examination that she told Investigator Perry that Appellant one time shot up the Texaco station. R. p. 167. Victim also testified on cross-examination that she left the Army with a 70% disability rating for PTSD. R. p. 173. Victim verified on cross-examination that she told Investigator Perry she was previously diagnosed with schizoaffective disorder and treated at a hospital in 2012, and she suffered a brain injury in a car wreck the next year. R. pp. 185-86.

Mother testified she first met Appellant through her sister while Appellant was briefly married to her sister. They started dating when Appellant became a regular customer at the Texaco where she worked. R. p. 215. Mother confirmed she brought the children to Appellant at the University Inn where he was staying so he could babysit them. Afterwards, Appellant approached

Mother and told her that he was asleep and was groggy and mistook Victim for Mother when he woke up with Victim's leg on him and his arm around Victim. Victim subsequently told Mother about the sexual assault at University Inn. Mother testified she did not let the children stay with Appellant for a long while afterwards. R. pp. 216-17.

However, as Mother's relationship with Appellant progressed, Mother and her children moved in with Appellant. The children were not allowed to do much socially and they often worked with Appellant while she worked at Texaco. She confirmed that both children were good and did not need to be disciplined often. Additionally, the brother spent a lot of time outside, which would have left Appellant and Victim alone together inside the house. R. pp. 219-22.

Mother confirmed Appellant began stalking the family after they moved out of his house. R. p. 224. She confirmed Appellant kidnapped the brother and one time, Appellant beat up Victim's biological father. She also confirmed Victim's account that one time they fled to Magistrate Cagle's office and sought a protective order. R. pp. 225-28.

Importantly, Mother confirmed Victim's account of how she disclosed Appellant's sexual abuse when Mother considered moving back in with Appellant. Victim said, "No Mamma, we can't go back." R. p. 231, line 25 – p. 232, line 4. Mother testified that in response to the disclosure, she took a gun and visited Appellant, demanding if there was something he needed to tell her. Appellant replied he had talked with his mother and she told him he needed to ask for forgiveness from Mother and Victim. Mother confirmed Appellant visited them in the front yard of Victim's grandparents later and asked both Mother and Victim to forgive him for being abusive to them. Victim refused to forgive him, replying she guessed he was going to hell. R. pp. 230-34.

Galloway-Williams testified before the jury as an expert in child abuse dynamics. She

testified delayed disclosure of sexual abuse was common. She testified the most common reason a child does not disclose abuse is fear. She explained disclosure is commonly delayed if the perpetrator is in a position of authority. Children may also not disclose because they do not believe their voice is going to be heard. R. pp. 326-28. Galloway-Williams testified as to factors that made certain children more likely to be sexually abused. She further testified that if the child sees the perpetrator violent towards other people, the child would internalize the violence and be less likely to report the sexual abuse. R. pp. 332-28.

Investigator Robert Perry testified that in his present position, he has investigated several cases involving allegations of sexual abuse from the 1970s thought the 1990s. He does not find forensic evidence in these cases due to their age. On cross-examination, Investigator Perry confirmed Victim told him Appellant shot at a Texaco gas station where Mother worked, but Investigator Perry did not research police records or media records to confirm if the event occurred. R. p. 390.

The only witness for the defense was a psychologist, Dr. David Price. Dr. Price testified he never met Victim or interviewed Victim. Dr. Price testified about PTSD, noting typically someone with PTSD does not want to talk about the traumatic events causing the disorder. Dr. Price also explained schizoaffective disorder. He noted it was considered a thought disorder. Symptoms of the disorder may include the presence of delusions, hallucinations, and anhedonia. Dr. Price testified that delusions and hallucinations are not uncommon symptoms of schizoaffective disorder. R. pp. 443-47.

Dr. Price admitted on cross-examination that he previously evaluated Appellant in 2012. He also admitted he does not actively work in the field of dynamics of child abuse. R. pp. 448-49. Dr.

Price admitted on cross-examination that someone suffering from PTSD may have their memory of the traumatic events distorted or the memories may remain accurate, it just varies from individual to individual. R. pp. 449-51. Dr. Price testified most people diagnosed with schizoaffective disorder are diagnosed with the disorder between the ages of eighteen to twenty-eight. R. p. 453. On redirect examination, Dr. Price admitted that flashbacks may be recounted exactly or the flashbacks may be an inaccurate recollection of events. R. p. 462.

STANDARD OF REVIEW

All five issues raised by Appellant Galloway concern either the admission or exclusion of evidence. Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." (emphasis added)). The improper admission of evidence is reversible error only when the admission causes prejudice. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Similarly, the exclusion of evidence is reversible only where error and prejudice are shown. State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990).

ARGUMENT

I.

The trial court did not err in excluding expert testimony that someone diagnosed with schizoaffective disorder may create false memories because there was no testimony or medical records showing Victim suffered from this symptom or any other symptoms of schizoaffective disorder. Further, because the blind expert was allowed to testify to the jury that someone suffering from schizoaffective disorder may suffer from delusions or hallucinations, Appellant was not prejudiced by the exclusion of the testimony. Finally, any error was harmless because Appellant admitted to the abuse to Victim's mother and Victim's testimony was corroborated by her mother's testimony.

Appellant complains the trial court erred in limiting Dr. Price's testimony that someone suffering from schizoaffective disorder may create false memories. However, no evidence was presented at trial as to any symptoms of schizoaffective disorder that Victim might have suffered, including any false memories. Also, no evidence was presented that Victim suffered from any mental health issues during the time in her childhood that she alleged she was sexually abused, at the time she reported abuse in 2016, or when she testified in 2018. Without proof that Victim suffered false memories or other symptoms of schizoaffective disorder at any time, the jury would need to speculate in the absence of evidence to consider Dr. Price's excluded blind-expert testimony. His testimony was not relevant and not probative for the jury's consideration.

Dr. Price was qualified to provide expert testimony on schizoaffective disorder and post-traumatic stress disorder. Appellant complains the trial court erred in limiting his testimony by not allowing him to testify that people with schizoaffective disorder may produce false memories. Dr. Price was permitted to testify before the jury that possible symptoms of schizoaffective disorder may include delusions or hallucinations. He also was permitted to testify that someone suffering from

PTSD may have distorted memories. R. pp. 449-51.

The right to present a defense is not unlimited, but must "bow to accommodate other legitimate interests in the criminal trial process." Rock v. Arkansas, 483 U.S. 44, 55 (1987). While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence regardless of its admissibility under the rules of evidence. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586, 594 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives **great deference** to the trial court." (emphasis added)).

Under Rule 702, SCRE:

> 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.

Before admitting expert testimony, the trial judge must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011).

Even if the trial court determines proposed expert testimony meets the criteria of Rule 702,

SCRE, it still may be excludable if it is not relevant or is unduly prejudicial. See State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (noting both expert testimony and fact testimony about trauma resulting from sexual abuse is admissible if its probative value is not outweighed by the danger of unfair prejudice). Under Rule 401, SCRE: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under Rule 403, SCRE: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, ..."

The evidence Victim suffered from schizoaffective disorder presented at trial was limited to Victim's admission on cross-examination that she told the detective she was diagnosed with schizoaffective disorder and her admission that she was hospitalized for schizoaffective disorder in 2012. R. pp. 185-86. Defense counsel did not ask Victim about any of the symptoms Victim might have suffered from her schizoaffective disorder. The defense did not produce medical records or present any testimony to the circumstances of her hospitalization. The defense did not present any evidence as to the presence of any symptoms of schizoaffective disorder that Victim may have exhibited. Therefore, it is speculative at best that Victim produced false memories as a result of her suffering from schizoaffective disorder. Accordingly, the trial court did not err in excluding this portion of the blind expert testimony because insufficient foundation was presented to make Dr. Price's testimony relevant. The jury would have needed to rankly speculate, without evidence, that Victim suffered these symptoms in order to believe that the memories of sexual abuse were fabricated as a result of her mental condition.

In State v. Turner, 373 S.C. 121, 129-30, 644 S.E.2d 693, 698 (2007), the appellant argued

the trial court erred by not allowing him to question the victim regarding her diagnosis of schizophrenia and the names of the medications she was taking. During the in camera proceedings, the trial court observed, "There would be very little that would assist the jury in evaluating her ability to recall what happened or her credibility. The court felt it would require speculation on the jury's part to connect the medical testimony to her ability to testify truthfully." Id. at 130, 644 S.E.2d at 698.

The Supreme Court found no error, opining, "Because the victim was taking her medication at the time of the robbery and at the time of the trial, her schizophrenia diagnosis and the types of medications she was taking were irrelevant to her ability to truthfully recall the events. Further, appellant has not shown why the specific information was needed or any nexus between the medications the victim was taking and any alleged misidentification of appellant." Id. at 131, 644 S.E.2d at 698.

Further, the Supreme Court found the appellant failed to show he was unfairly prejudiced by the limitation because the victim testified on direct examination that she took medication and was taking the medication on the day of the robbery; and on cross-examination, the appellant elicited testimony that if she does not take medication, over a period of time, she will get confused, forgetful and may hear voices. Id.

In the present case, as in Turner, there was no evidence connecting Dr. Price's excluded testimony with the fact testimony presented. No evidence was presented that Victim incurred false memories at any point as a result of schizoaffective disorder. No testimony was presented Victim suffered from schizoaffective disorder in her childhood during 1987 to 1990, or at any time prior to 2012. Moreover, no evidence was presented that she was suffering from symptoms of the disorder

when she reported the sexual assaults to law enforcement authorities in 2016. No evidence was presented that her treatment for the disorder in 2012 was not successful or that medication and treatment failed to contain any symptoms Victim might have otherwise suffered.

Appellant was not prejudiced by the exclusion of the testimony. Exclusion of evidence is reversible only where error and prejudice are shown. State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990). In the instant case, Dr. Price was allowed to testify that someone suffering from schizoaffective disorder may suffer delusions or hallucinations. Additionally, Dr. Price testified that someone suffering from PTSD may suffer flashbacks that are not accurate memories. Therefore, essentially the same information was provided to the jury. When other properly admitted testimony reveals essentially the same information, the improper exclusion of admissible evidence is harmless. State v. Brown, 344 S.C. 302, 543 S.E.2d 568 (Ct. App. 2001) (finding, in a speeding prosecution, that even if magistrate should have allowed the video of the roadway into evidence, it was cumulative to testimony concerning the roadway and a diagram of the road that was used at trial) *overruled on other grounds by* State v. Oxner, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011).

Additionally, any error was harmless because Mother corroborated many of the events Victim described. In a surprising departure from many other trials for sex crimes, Appellant, the perpetrator, was the first to disclose the first occurrence of sexual abuse, telling Mother something occurred at University Inn, but claiming it was a mistake because he thought Victim was Mother when he woke up with his arm around Victim. R. p. 216, line 18 – p. 217, line 9. Further, Mother confronted Appellant after Victim later disclosed the longstanding sexual abuse to Mother. Appellant sought forgiveness rather than deny the abuse. R. pp. 230-34. Therefore, evidence guaranteed the jury would not believe the allegations of abuse were driven by schizoaffective disorder-induced false

memories. Given this level of corroboration and the lack of evidence Victim suffered any of the described symptoms of schizoaffective disorder, any error was harmless and Appellant was not prejudiced by the limitation on Dr. Price's irrelevant testimony. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

II.

The trial court did not abuse its discretion in allowing expert testimony concerning the risk factors for child sexual abuse because the testimony about characteristics of sexually abused children is beyond the ken of a layperson, and the issue is not preserved for review.

Appellant argues the trial court abused its discretion because it allowed Galloway-Williams to testify about the risk factors for child sexual abuse. Appellant argues such testimony is not beyond the ken of lay jurors, but this claim is not supported by a sufficient objection to the trial court nor legal authority to this Court. Because most jurors are not familiar with the dynamics of child sexual abuse, the testimony was beyond the ken of lay jurors and proper for expert testimony.

How the issue arose

During trial, Appellant's counsel made a motion to require the trial court to exercise its gatekeeping function under Rule 702, SCRE, as to Galloway-Williams' expected testimony. Counsel advised the trial court, "And I expect we're going to have a motion at that time after the testimony is proffered objecting to her being qualified as a witness and being allowed to provide testimony to the jury in this case. So, I don't know that [the prosecutor] needs to touch on every single detail of her testimony, but the substance of it, the heart of it, I think, yes." R. p. 263, lines 1-13.

The trial court noted that Galloway-Williams' expert testimony was found admissible under Rule 702, SCRE in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015). However, defense counsel argued a hearing was required, relying on State v. Anderson, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015). So the trial court presided over an in camera hearing on the matter. When Galloway-Williams took the stand in camera, the trial court amusingly referred to some prior event,

telling Galloway-Williams, "I won't shock you like I did in Pickens." So it appears the trial court was familiar with Galloway-Williams' testimony from at least one past trial. R. p. 267, lines 16-18.

Galloway-Williams testified to her considerable credentials, including: (1) she was currently the Executive Director of the Julie Valentine Center; (2) she earned a bachelor's degree in psychology and master's degree in counseling; (3) she attended the continuing education required for her to maintain her South Carolina license as a professional counselor; (4) her attainment of over 150 hours of skills-based training related to the investigation and assessment of children where there are allegations of child maltreatment; (5) her coursework as an adjunct professor at USC-Upstate teaching a course in child maltreatment and a course on gender violence in society; (6) her experience providing professional assistance, including counseling, to children when there is an allegation of child maltreatment, neglect, or sexual assault; and (7) her twenty years of experience in the mental health field. R. pp. 267-72.

The trial court found she was qualified to provide expert testimony after defense counsel advised he did not have any "specific questions about her qualification necessarily" but defense counsel still wanted to understand the substance of the expert testimony. R. pp. 271-73.

Galloway-Williams then testified in camera, defining delayed disclosure and explaining factors that result in delayed disclosure (R. pp. 275-78). Additionally, she testified about grooming (R. pp. 278-80); piecemeal disclosure (R. pp. 280-81); the effect of threats and violence on delayed reporting (R. pp. 281-83); and a child's ability to remember details of the abuse (R. p. 283). In the mix, she provided testimony about the risk factors for child sexual abuse (R. p. 281).

Defense counsel engaged in a lengthy cross-examination, but did not challenge testimony regarding the risk factors for child abuse. R. pp. 285-88. After the trial court reaffirmed his ruling

finding the testimony admissible, defense counsel placed his objections on the record, arguing none of the three prongs of Rule 702, SCRE were met for the testimony as a whole. He targeted testimony concerning delayed disclosure and the non-offending caregiver's role in enabling or discouraging disclosure, arguing it was not beyond the common knowledge of jurors, and he also argued testimony regarding a children's ability to recall or remember details of abuse was not proper. R. pp. 309-12. He asserted Galloway-Williams was not qualified because she did not do research or keep statistics, and made an argument about Galloway-Williams' response to defense counsel's broad subpoena request. R. pp. 313-15. However, defense counsel never argued that Galloway-Williams' testimony about the risk factors for child sexual abuse was improper testimony.

When Galloway-Williams testified before the jury, defense counsel reasserted his previous objection made in camera when the prosecution moved for the trial court to qualify Galloway-Williams as an expert. Trial counsel at this time also added an objection that the expert testimony was bolstering even though Galloway-Williams never interviewed or spoke with Victim. R. pp. 321-22. When Galloway-Williams testified about risk-factors before the jury, defense counsel did not interpose an objection. R. pp. 336-37.

Appellant's argument is not preserved for review. The ground asserted on appeal must be supported by the objection raised at trial. State v. Silver, 314 S.C. 483, 486, 431 S.E.2d 250, 251 (1993). The argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review. State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."). Defense counsel offered several meritless arguments to the trial court, but not the one advanced now on appeal, that testimony about the risk

factors of abuse were not beyond the common knowledge of jurors. Instead, defense counsel argued, against the overwhelming weight of authority, that delayed disclosure was not beyond the common knowledge of jurors. Yet he did not target the limited testimony presented on the risk factors. Accordingly, this Court should not review the issue on appeal.

Now on appeal, Appellant contends Galloway-Williams should not have been allowed to testify specifically to the risk factors of sexual abuse because it is information that is not beyond the ken of lay jurors. Appellant fails to cite any authority to support this assertion, but instead, Appellant cites State v. Weaverling, 337 S.C. 460, 474-475, 523 S.E.2d 787, 794 (Ct. App. 1999) and State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015). Those cases support a contrary position to Appellant's argument because those cases found behavioral characteristics of sexually abused children are beyond the common knowledge of laypersons and therefore expert testimony does assist the finder of fact pursuant to Rule 702, SCRE. Specifically, this Court noted in Brown, "Numerous jurisdictions considering this issue have similarly concluded it is more appropriate for an expert to explain the behavioral traits of child sex abuse victims to a jury." Brown, 411 S.C.at 342, 768 S.E.2d at 246. So Appellant argues even though the behavioral characteristics of child abuse are beyond the knowledge of laypersons, for some unspecified reason, risk factors of child abuse are not. However, this Court concluded in Brown, testimony was appropriate from qualified experts on the general behavioral characteristics of child sex abuse victims because it did not fall within the ordinary knowledge of jurors who did not have prior experience, "either directly or indirectly" with sexual abuse. Brown, 411 S.C. at 342, 768 S.E.2d at 251.

The entirety of Galloway-Williams' expert testimony represents testimony that is beyond the knowledge of most jurors, and therefore, helpful to the trial of fact. Rule 702, SCRE. The Nebraska

Supreme Court observed the following:

> The reasoning for a rule allowing an expert to testify about sexual abuse in generalities, without being familiar with the alleged victim, is that **few jurors have sufficient familiarity with child sexual abuse** to understand the dynamics of a sexually abusive relationship, and the behavior exhibited by sexually abused children is often contrary to what most adults would expect.

State v. Roenfeldt, 486 N.W.2d 197, 204 (Neb. 1992) (emphasis added, citation and internal quotation marks omitted).

Behavioral testimony on the effects of sexual abuse on children and their reactions to sexual abuse has been a topic of expert testimony for over a quarter of a century. The Supreme Court of Hawaii observed in 1990 that "sexual abuse of children 'is a particularly mysterious phenomenon.'" State v. Batangan, 799 P.2d 48, 51 (Haw. 1990) (quoting State v. Castro, 756 P.2d 1033, 1044 (Haw. 1988)). The Hawaii Supreme Court quoted with approval the observations of other courts as follows:

> While jurors may be capable of personalizing the emotions of victims of physical assault generally, and of assessing witness credibility accordingly, tensions unique to trauma experienced by a child sexually abused by a family member have remained largely unknown to the public. . . . [T]he routine indicia of witness credibility – consistency, willingness to aid the prosecution, straight forward rendition of the facts – may, for good reason, be lacking. As a result jurors may impose standards of normalcy on child victim/witnesses who consistently respond in distinctly abnormal fashion.

Batangan, 799 P.2d at 51 (quoting State v. Moran, 728 P.2d 248, 251 (Ariz. 1986) and State v. Middleton, 657 P.2d 1215, 1222 (Or. 1983) (Roberts, J., concurring)).

In the instant case, Galloway-Williams' testimony about risk factors for abuse was not beyond the ken of laypersons because laypersons typically do not have experience with sexual abuse.

Therefore, the trial court did not abuse its discretion.

III.

The trial court did not err in qualifying the witness because the State provided sufficient evidence as to the reliability of the field of child abuse dynamics and topics such as delayed disclosure; and the trial court was not required to sanction the State for the alleged failure of the expert witness to comply with the overly burdensome subpoena duces tecum to which the expert witness provided a good faith reply.

Appellant claims that Galloway-Williams should not have been allowed to testify based on what Appellant's trial counsel unilaterally felt was an inadequate response to an overly broad and harassing subpoena duces tecum. Appellant's trial counsel did not ask the trial court to enforce the subpoena by requiring Galloway-Williams to retrieve additional materials. The trial court did not err in declining to grant the motion to suppress Galloway-Williams' testimony based on defense counsel's broad request, especially in light of Galloway-Williams' good-faith response to the request.

How the issue arose

On May 8, only six days before trial, defense counsel sent Galloway-Williams a subpoena asking for "all articles, publications, texts, manuals, treatise, facts and data" upon which Galloway-Williams would base her opinion. Galloway-Williams sent back an e-mail response two days later, on May 10, which she discussed during the in camera hearing:

> So, I did bring you an article on forensic interviewing because it is an article that I referenced in the email after I also explained to you that it would be impossible to bring every article, treatise, book, text, training manual that I'm basing my opinion on. Because the field is based on, again, over twenty years of research. So, the article I gave you gives you a good overview with a pretty lengthy bibliography of the topics related to child abuse. It's called forensic interviewing, but within that article, there is a subsection on delayed reporting.

R. p. 353, lines 12-22.

The trial court cautioned defense counsel when he attempted to interrupt Galloway-Williams, then Galloway-Williams continued:

> So my response to you was that it's near impossible to gather all of those materials and to produce them. I did give you reference cites that you were looking for, National Children's Alliance, National Children's Advocacy Center. They are lengthy – you can find lots of information about these articles – about these topics in those areas.

R. p. 353, line 23 – p. 354, line 11. Trial counsel's cross-examination ended feebly with a repeat of the remonstration that Galloway-Williams brought only one article. R. p. 354, lines 9-11.

Trial counsel never sought to explain to the trial court why the information, including the article that provided a beneficial overview and reference cites, was inadequate. Trial counsel, as far as the record indicates, never sought to narrow the scope of the subpoena or provide guidance as to what additional materials he needed. The record also fails to indicate that trial counsel investigated the materials cited in the e-mail or the article. It is clear that trial counsel was only using the subpoena to engage in gamesmanship. The trial court did not err in declining to suppress Galloway-Williams' obviously reliable expert testimony.

Appellant complains Galloway testified "without possessing any printed materials about her field [which] should have alarmed the trial judge." The trial court did not abuse its discretion by failing to be alarmed, however, because the reliability of Galloway Williams' testimony is well-established by case law. Notably absent from Appellant's brief is any authority that an expert who provides abundant testimony about their experience, their training, and information in the field, nonetheless is required to bring "documentation" as Appellant alleges in his brief. Br. of App. p. 19.

Appellant's argument falters because Appellant did not request the trial court to compel

Galloway-Williams to bring more materials. In State v. Hughes, 346 S.C. 339, 552 S.E.2d 35 (Ct. App. 2001), an expert in child sexual abuse treatment and counseling testified for the State and opined the child's behavior was consistent with child sexual abuse. On cross-examination, she admitted she used her notes to refresh her memory and the defendant sought to inspect the notes pursuant to Rule 612, SCRE. This court reversed the trial court because the trial court "apparently believed it was powerless to order [the witness] to produce anything that was not in the courtroom." In his dissent in Hughes, Judge Goolsby opined that the trial judge's comments indicated he was engaging in an exercise of discretion in denying the request for the witness to produce the notes and also noted defense counsel could have ensured the documents were in court by issuing a subpoena duces tecum under Rule 13, SCRCrimP. Id. at 345-46; 552 S.E.2d at 38-39.

By analogy, under Rule 5, SCRCrimP, the trial court retains discretion to determine what remedy, if any, is appropriate for a violation of the rule. State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996) (finding under Rule 5, the court may order the offending party to permit discovery or inspection, grant a continuance, or prohibit the party from introducing the undisclosed evidence, or enter any other appropriate order the court deems just under the circumstances). In the instant case, the trial court could in his discretion, allow Galloway-Williams to testify even though she did not bring all the articles she ever read, all the training materials she ever viewed, or notes of the therapy and interviews with abused children she has conducted. Defense counsel could have requested the trial court order Galloway-Williams to produce more materials, but he did not. The record shows Galloway-Williams attempted to provide a source with an overview of the topics and citations for defense counsel's further investigation. The record is silent as to whether counsel actually conducted any research of the cited materials in the article Galloway-Williams provided to counsel.

Under Rule 702, SCRE:

> 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.

Before admitting expert testimony, the trial judge must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011).

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). Generally, courts allow experts to testify if they are more qualified in the field than a juror on the subject. Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997). An expert witness may state an opinion based on facts not within his first-hand knowledge, and may base his opinion on information, whether or not admissible, made available to him before the hearing if the information is of the type reasonably relied upon in the field. Rule 703, SCRE; Dawkins v. Fields, 354 S.C. 58, 64, 580 S.E.2d 433, 436 (2003). Defects in an expert witness' education and experience go to the weight, not the admissibility, of the expert's testimony. Gooding, 326 S.C. at 253, 487 S.E.2d at 598.

The requirement of showing reliability only relates to the area of expertise, and not the reliability of an expert witness' testimony. State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012) ("To be clear, the reliability of a witness's testimony is not a prerequisite to determining

whether or not the witness is an expert."). Further, the trial court must take care in its undertaking of the gatekeeper function without infringing on the jury's duty as a factfinder, the gatekeeper role merely requires the trial court "decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law." Watson, 389 S.C. at 445, 699 S.E.2d at 174.

The admission of expert testimony is within the sound discretion of the trial court. State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). The need for this standard is astutely explained by the United States Supreme Court as follows:

> [The abuse of discretion] standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.

Kumho Tire Company v. Carmichael, 526 U.S. 137, 152 (1999).

In Graves v. CAS Medical Systems, 401 S.C. 63, 735 S.E.2d 650 (2012), our Supreme Court found the circuit court erred by not allowing a doctor to be qualified as an expert on Sudden Infant Death Syndrome (SIDS) even though the doctor testified she did not consider herself an expert on SIDS. Id. at 78, 735 S.E.2d at 657. The Court noted "an expert need not be a specialist in the particular branch of the field." Id. The doctor had thirty years' experience as a neonatologist and stayed current on SIDS literature. The doctor routinely encountered SIDS in her practice. The Court found that the circuit court abused its discretion in excluding the testimony. Id. at 78, 735 S.E.2d at 657-58.

In Honea v. Prior, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988), Prior contended the circuit

court erred in qualifying two social workers as experts to testify on a victim's mental condition. However, the Court of Appeals observed: "A witness may be competent to testify as an expert although the witness acquired his or her knowledge through practical experience **and not by scientific study, training, or research**." Id. at 530, 369 S.E.2d at 849 (emphasis added). The Court of Appeals found each social worker was qualified based on her education, post-graduate training, and clinical experience with victims of sexual assault, as well as her opportunities to observe the victim. Id. at 531, 369 S.E.2d at 849. In the instant case, Galloway-Williams was well qualified to testify about child abuse dynamics. The trial court did not abuse its discretion.

A law review article confirms the reliability of expert testimony on subjects such as delayed disclosure:

> Psychological research demonstrates that delayed reporting is common among sexually abused children. Frequently when children finally disclose, they give slightly different versions of the abuse to different interviewers. Finally, although there is debate about how many sexually abused children recant, it is undisputed that some children recant and some recant their recantation. **Thus, from a psychological point of view, expert testimony about delay, inconsistency, and recantation is not controversial. From the legal perspective, such testimony is not worrisome.**

John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y, 45-46 (2010) (footnotes omitted) (emphasis added). This article was cited favorably in Brown. 411 S.C. at 343, 768 S.E.2d at 251.

Further, "[D]isclosure in child abuse cases is generally delayed because of coercion, guilt, or some other reason, [and thus] there will be no physical evidence to corroborate the victim's allegations. Therefore . . . expert testimony will . . . assist the jury in understanding the evidence." People v. Beckley, 456 N.W.2d 391, 402 (Mich. 1990). "Indeed, the majority of states permit expert

testimony to explain delayed reporting, recantation, and inconsistency . . . ." People v. Spicola, 947 N.E.2d 620, 635 (N.Y. 2011).

The Supreme Court examined the reliability of opinion testimony Galloway-Williams provided in State v. Jones, 423 S.C. 631, 638-39, 817 S.E.2d 268, 271 (2018). The Supreme Court observed:

> 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 professional journals and trade publications, all of which were uniformly accepted and recognized by child sexual abuse experts and professionals. Galloway-Williams also testified she participates in the peer review process and has given numerous presentations on the subject. When questioned on cross, she testified she was unaware of any organizations that found her methods unreliable . . . .

Id. at 638-39, 817 S.E.2d at 271. In the instant case, the trial court did not err because evidence supports the reliability of Galloway-Williams' expert testimony and the trial court exercised its discretion in allowing her testimony notwithstanding defense counsel's dissatisfaction with Galloway-Williams response to his broad subpoena request.

IV.

The trial court did not err in allowing testimony that Appellant was physically violent with Victim's mother because it was proper res gestae evidence to explain why Victim and Mother did not disclose the sexual abuse to law enforcement, and the testimony was cumulative in nature to other bad acts to which Appellant did not object such as his physical assaults on Victim's biological father, his kidnapping of Victim's brother, his discharge of a weapon at three different buildings, and his attempt to run Victim's mother's vehicle off the road.

Appellant contends the trial court erred in overruling Appellant's objection to testimony that Appellant was physically violent with Mother. The testimony was probative to help explain why Victim and Mother did not disclose Appellant's sexual abuse to law enforcement. It also is not prejudicial because the prosecution elicited testimony on a number of other bad acts Appellant committed plus Appellant's counsel elicited some further violent events in a clear exercise of strategy.

How the issue arose

Victim testified Appellant's relationship with Mother started out okay, but then things "got bad fast," with physical fights. R. p. 114, line 19 – p. 115, line 2. At this point, Appellant interposed an objection, arguing it was inadmissible under Rule 404(b), SCRE. The prosecution answered it was relevant evidence, but then asked to approach to present further argument. However, the trial court declined further argument and ruled it would allow the testimony, so the prosecution did not complete its discussion about the purpose of admitting the testimony. R. p. 115, lines 3-14.

Victim continued to testify that when Appellant was angry, he was violent. She testified he had physical altercations with Mother and one in particular was really bad. She did not describe the episode though – instead the prosecution interjected a question as to whether she ever called 911.

Victim replied she tried once to call 911 and Appellant grabbed the phone and asked her what she was doing. She said she would call the police and he responded that if she did, he would kill Mother. R. p. 115, line 16 – p. 116, line 1.

Asked if the physical abuse occurred regularly, Victim answered,

> There would be an outburst and there would be – there would be a violent event, then there would be some like quiet anger in the house, then everything would be okay for a while. Then it would – something else would happen, then it would be another violent outburst. Sometimes we would leave and go stay somewhere else for a day or two, but we came back.

R. p. 116, lines 2-10.

In addition to testimony about the domestic violence visited upon Mother, Victim testified Appellant disciplined her harshly for things like biting her nails or not making her bed neatly enough by being made to pick a switch from a tree, take her clothes off, and proceed to be beaten with the switch by Appellant from shoulders to knees to the extent sometimes that blood was drawn. R. pp. 116-17. Counsel did not object to this testimony.

Victim testified, without an on-record objection, that Mother and the children stayed at University Inn where Appellant broke in, kicked in the door, and kidnapped Victim's younger brother. R. pp. 120-21.

Victim testified after she moved into a nearby duplex with Mother and her brother, Appellant would drive his truck through the back yard, "doing doughnuts." R. p. 124, lines 10-21. Appellant also would tailgate Mother's car and try to run her car off the road. R. p. 124, line 24- p. 125, line 3. Victim testified another time, Appellant was chasing them in their car, and Mother took them to the Magistrate's Office to seek protection. R. pp. 125-26. Defense counsel did not object to any of this

testimony.

Victim testified that one time, Appellant and his sister pulled Victim's biological father out of his truck and hit and kicked him. Victim testified the father suffered broken ribs and a busted face. R. pp. 126-27. Defense counsel did not object to any of this testimony.

Appellant's defense counsel elicited testimony from Victim on cross-examination that Appellant shot at the Texaco station and exhorted, "But you didn't tell us anything about that yesterday." R. p. 167, lines 8-18. Therefore, contrarily, defense counsel was complaining that Victim did not testify about prior bad acts. Defense counsel also elicited testimony that Appellant shot at Victim's grandparent's house and had a fight with Victim's uncle. R. p. 168

Mother confirmed these bad acts occurred, and added additional events: She confirmed Appellant drove into the yard of the duplex and did "doughnuts." She added that he shot at their duplex, and told the prosecutor, "I mean, a lot of stuff happened at the duplex. Let me know how much you want to hear." R. p. 223, lines 8-15. Mother confirmed Appellant kidnapped Victim's brother. R. p. 223. Mother also confirmed Appellant tried to run Mother's car off the road and she fled with her children to the Magistrate's Office to seek protection. R. pp. 226-27. Mother confirmed Appellant beat Victim's father severely, and she needed to take the father to the hospital that night. R. pp. 227-28. Mother testified Appellant harassed her at the Texaco station and he beat up her boss. Officers responded to that incident. R. pp. 228-29. Mother further testified, without objection, that the gun she used to confront Appellant after Victim disclosed was "a handgun a customer gave me at work, you know, for protection. It wasn't store protection, it was protection from [Appellant], you know." R. p. 231, lines 2-9.

The testimony about the physical confrontations between Appellant were probative because

the testimony explains a reason why Victim would be reluctant to disclose the sexual abuse visited upon her by Appellant. "The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). Res gestae evidence is admissible so long as the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014); Rule 403, SCRE.

In the instant case, Victim and Mother delayed disclosure of the sexual abuse to law enforcement for roughly twenty-five years. The violent nature within the household explains this. Note Galloway-Williams provided expert testimony that not only threats directly to a child, but also a child's observation of a perpetrator's violence on others, will inhibit the child from disclosing sexual abuse. R. pp. 337-38.

Further, Appellant was not prejudiced by the admission of Victim's testimony about violence against Mother because it was cumulative in nature to evidence of other violent acts such as (1) testimony that Appellant made Victim strip and he whipped her with a switch until she bled; (2) Appellant hit and kicked Victim's biological father; (3) Appellant attempted to force Mother's vehicle off the road; (4) Appellant assaulted Mother's boss at the Texaco and law enforcement was called; (5) Appellant shot at the duplex; (6) Appellant shot at the Texaco station; (7) Appellant stalked the family; and (8) Appellant kidnapped Victim's brother.

The introduction of allegedly inadmissible evidence is harmless when the evidence is merely cumulative to other evidence presented without objection. State v. Kirton, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122-23 (Ct. App. 2008); State v. Funderburke, 251 S.C. 536, 540, 164 S.E.2d 309, 311

(1968) ("Cumulative evidence has repeatedly been defined to be additional evidence of the same kind to the same point."). Therefore, this Court should affirm the conviction and sentence.

V.

The trial court did not err in allowing Victim's mother to testify about a letter Appellant sent her over twenty-five years ago under the best evidence rule, and the testimony was cumulative to other evidence to which Appellant did not interpose an objection.

Mother testified she confronted Appellant after Victim disclosed Appellant had been sexually abusing her. Mother testified a couple of days after confronting Appellant, Appellant came to her parents' house where Mother and Victim were staying. Mother and Victim approached Appellant at the fence in the front of the yard. R. pp. 232-33. The prosecutor asked a compound question asking what happened when they came down to the fence and "[d]id he catch your attention in any way?" R. p. 233, lines 9-10. Mother then testified Appellant pulled his big truck in the driveway and added, "And plus, it was right after that letter that he had wrote to me and wanted me to come back." R. p. 233, lines 11-14.

The prosecutor asked what the letter talked about and Mother testified, "He just talked to me about he was sorry that he's been abusive –" At that point, Appellant objected based on hearsay and the best evidence rule. R. p. 233. The trial court asked if the letter was available and the prosecutor asked, "Your Honor, there is no letter, so there's no way to have better evidence." R. pp. 233-34. The trial court ruled, "Well, I'm going to allow it, I think based on state of mind." R. p. 234, lines 7-8. Mother then testified Appellant "apologized for being mean to us and he said he wouldn't do it anymore and he really wanted us to come back." R. p. 234, lines 11-14.

The question of whether to admit evidence under the best evidence rule is addressed to the discretion of the trial court. <u>State v. Halcomb</u>, 382 S.C. 432, 443, 676 S.E.2d 149, 154 (Ct. App. 2009). The preliminary question is whether "there has been sufficient evidence to prove loss,

destruction or unavailability of an original document so as to justify the admission of secondary evidence . . . ." The question of the adequacy of this showing is also within the discretion of the trial court. Id. at 443, 676 S.E.2d at 154-55.

Rule 1002, SCRE, requires that to prove the content of a writing, the original writing is required. However, under Rule 1004, SCRE:

> The 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
> . . .
>
> (4) The writing, recording, or photograph is not closely related to a controlling issue.

In the instant case, the prosecutor proffered the letter was unavailable and given that the letter was from over a quarter of a century ago, this would be expected. Therefore, the trial court did not abuse its discretion in accepting the prosecutor's proffer that the letter was not obtainable under Rule 1004(1) and (2). Additionally, the writing was not closely related to a controlling issue under Rule 1004(4) because Appellant was not charged for any of the physical assaults on Victim and the specific content of the letter was not at issue – Mother's testimony about the letter was admissible to show Appellant's conciliatory demeanor and attrition at that point in time. Accordingly, the trial court did not abuse its discretion. See Jackson v. Crews, 873 F.2d 1105, 1110 (8th Cir. 1989) (finding witness' testimony he received a flyer describing plaintiff's arrest by defendant and asking for any witnesses to contact plaintiff was allowed because the testimony was not trying to prove the

contents of the writing under Rule 1002, FRE, and "even if [plaintiff was] trying to prove the content of the flyer, he would have been exempted from producing the flyer because the issue was collateral to the principal issue in the trial" under Rule 1004(4)FRE).

Further, Appellant was not prejudiced by Mother's testimony about the letter. Appellant argues that the testimony "painted appellant as an abusive man." However, as discussed in Issue IV, Appellant did not object to other evidence of Appellant's violent acts, which included physically assaulting three other men (Victim's uncle, Victim's biological father, and Mother's boss), shooting at buildings, whipping Victim's naked body with a switch until she bled, and attempting to run Mother's vehicle off the road. Accordingly, the letter is merely cumulative to other evidence of bad acts to which Appellant did not object. The introduction of inadmissible evidence is harmless when the evidence is merely cumulative to other evidence presented without objection. State v. Kirton, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122-23 (Ct. App. 2008); State v. Funderburke, 251 S.C. 536, 540, 164 S.E.2d 309, 311 (1968) ("Cumulative evidence has repeatedly been defined to be additional evidence of the same kind to the same point.").

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY:_____s/David Spencer__________
DAVID SPENCER

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

ATTORNEYS FOR RESPONDENT

April 27, 2020

RECEIVED
Apr 27 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

Respondent,

vs.

RICHARD KENNETH GALLOWAY,

Appellant.

Appellate Case No. 2018-001806

CERTIFICATE OF COUNSEL

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

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

By: s/David Spencer
DAVID SPENCER

Office of Attorney General

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

ATTORNEYS FOR RESPONDENT

April 27, 2020