STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

THE STATE,

Respondent,

vs.

RICHARD KENNETH GALLOWAY,

Petitioner.

Appellate Case No. 2022-000914

RETURN TO PETITION FOR WRIT OF CERTIORARI

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I. The trial court did not err in excluding expert testimony that someone diagnosed with schizoaffective disorder may create false memories because no evidence was provided that Victim suffered from this symptom or any other symptoms of schizoaffective disorder. Petitioner was not prejudiced by the exclusion of the testimony because the expert was allowed to testify someone suffering from schizoaffective disorder may suffer from delusions or hallucinations. Any error was harmless because Petitioner admitted to the abuse to Victim's mother and Victim's testimony was corroborated by her mother's testimony.

II. The trial court was not required to sanction the State for the alleged failure of the expert witness to comply with defense counsel's eleventh-hour, overly burdensome subpoena duces tecum to which the expert witness provided a good faith reply, and the State presented sufficient evidence of the reliability of the field of child abuse dynamics.

III. The trial court did not err in allowing testimony Petitioner 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 numerous other bad acts to which Petitioner did not object.

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

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner 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 trial on May 14-16, 2018, the jury convicted Petitioner of one count of criminal sexual conduct in the first degree and lewd act on a minor. The jury acquitted Petitioner 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 Petitioner 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 Petitioner's subsequent motion to reconsider the sentence.

The Court of Appeals affirmed the convictions by opinion filed April 20, 2022. State v. Galloway, 436 S.C. 453, 872 S.E.2d 646 (Ct. App. 2022). Petitioner petitioned for rehearing and then upon denial, petitioned this Court for a writ of certiorari.

STATEMENT OF FACTS

Victim, thirty-nine years old at the time of trial, testified to abuse she received before she was eleven. By the time of trial, she lived in Missouri and had not seen Petitioner Galloway in years. Tr. pp. 98-99. Petitioner was briefly married to Victim's aunt, and was later in a romantic relationship with Victim's mother. Tr. p. 99; p. 243.

Victim testified the first instance of what became a pattern of abuse occurred while Petitioner babysat Victim and her brother at University Inn where he stayed while Mother worked at a Texaco gas station one night before Victim started fourth grade. Tr. p. 107; pp. 113-14. After he put both

children to bed, then he got in bed with Victim and reached into her underwear. Tr. pp. 117-18.

Victim told Mother what happened the next day, and Petitioner did not watch the children again for a long time. Tr. p. 118. However, Victim, Mother, and Victim's brother later moved into a house to live with Petitioner. While Petitioner and Victim were in Brevard, North Carolina to chop wood, Petitioner fondled Victim as she stood on the tailgate of his pick-up truck. Tr. pp. 120-22.

While at Petitioner's mother's house in Greenville, Victim woke up to Petitioner removing her pants and performing oral sex on Victim. Petitioner's mother was not home. Victim focused on the Christmas tree in the room to distract herself from the assault. Tr. p. 125.

Although Victim was capable of showering on her own, Petitioner nonetheless insisted on helping Victim shower. Petitioner fondled Victim's breasts and told Victim if he did not play with her breasts, they would not grow. Petitioner also fondled Victim inside her underwear after she fell asleep. Additionally, he would perform oral sex on Victim in his bedroom. She recalled him rubbing his hands between her labia when she was in fifth grade. Tr. pp. 135-38.

Mother continued to work at Texaco, and Petitioner often kept Victim out of school to help Petitioner 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 Petitioner could see through her shirt and so her nipples would get hard. Tr. pp. 139-40. Petitioner sexually assaulted her at his brother's home in North Carolina. Tr. p. 141.

Victim testified Petitioner was physically violent with Mother. During one episode of violence, Victim grabbed the phone to call 911 and Petitioner grabbed the phone from her, threatening to kill Mother if she called. Petitioner also disciplined her with a switch, making her take

her clothes off. Petitioner then would hit her with the switch from her shoulders to her knees. This happened frequently when she was in fifth grade. Tr. pp. 143-45.

Victim left Petitioner's residence with Mother and her brother in sixth grade. They moved to University Inn, but Petitioner found them, kicked in the door, and grabbed Victim's brother. Victim rode with Mother as she chased after Petitioner's vehicle. Victim's brother was subsequently returned. Tr. pp. 146-49. They moved in with Victim's grandparents, both alcoholics who became more violent. Victim testified Mother considered moving back in with Petitioner, prompting Victim to disclose the sexual abuse to Mother, who immediately left with a gun. The next morning, Mother called her outside to the fence where Petitioner told Victim she needed to forgive him or he would go to hell. Victim responded then she guessed he was going to hell. Tr. pp. 150-52.

They moved to a duplex. Petitioner drove into their yard and "did doughnuts." He also tried to run Mother and Victim off the road. Another time, Petitioner and two other people pulled Victim's biological father out of the car and beat him up, breaking his ribs. Tr. pp. 152-55.

After sixth grade, the family left Greenville for California, but later returned to a cabin in North Carolina where she started seventh grade. However, they moved again, to Asheville, after Petitioner found them. Tr. pp. 155-57. 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, earned her GED, 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. Her relationship rekindled with her second ex-husband, but he died in a car accident before they could remarry. Tr. pp. 159-62.

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). Tr. pp. 163-64. She rarely saw her Mother in subsequent years because Mother became involved in another abusive relationship. Tr. p. 166. In 2016, Victim decided to report Petitioner's abuse to law enforcement in the various jurisdictions where she was abused. Tr. p. 166.

Defense counsel elicited testimony that Victim told Investigator Perry that Petitioner once shot up the Texaco station. Tr. p. 195. Victim testified on cross-examination she left the Army with a 70% disability rating for PTSD. Tr. p. 201. Victim verified on cross-examination 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. Tr. pp. 213-14. Investigator Perry testified **on cross-examination** that Victim told him Petitioner 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. Tr. p. 418.

Mother testified she met Petitioner during Petitioner's brief marriage to her sister. They later dated. Petitioner babysat the children at his hotel room. Petitioner preemptively told Mother afterwards he was asleep and groggy and mistook Victim for Mother when he woke up with Victim's leg on him and his arm around Victim. Subsequently Victim told Mother about the sexual assault, and Mother did not let the children stay with Petitioner for a while afterwards. Tr. pp. 243-45. However, as Mother's relationship with Petitioner progressed, Mother and her children moved in with Petitioner. Tr. pp. 247-50.

Petitioner stalked the family after they moved out of his house. Mother confirmed Petitioner

kidnapped the brother and one time, Petitioner beat up Victim's biological father. She confirmed Victim's account of how they fled to Magistrate Cagle's office and sought a protective order. Tr. pp. 252-56. Importantly, Mother confirmed Victim's account of how she disclosed Petitioner's sexual abuse when Mother considered moving back in with Petitioner. Victim said, "No Mamma, we can't go back." Tr. p. 259, line 25 – p. 260, line 4. Mother reacted by bringing a gun to visit Petitioner, demanding if he needed to tell her something. Petitioner replied he needed to ask for forgiveness from Mother and Victim. Mother confirmed Petitioner 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. Tr. pp. 258-62.

Galloway-Williams testified as an expert in child abuse dynamics. She testified delayed disclosure of sexual abuse was common. 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 they will be heard. Tr. pp. 354-57. Galloway-Williams further testified 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. Tr. pp. 360-66.

The only witness for the defense was a psychologist, Dr. David Price who admitted he never met 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. 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. Tr. pp. 471-75. Dr. Price admitted he does not

actively work in the field of dynamics of child abuse. Tr. pp. 476-77. Dr. Price admitted 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. Tr. pp. 477-79. Dr. Price testified most people diagnosed with schizoaffective disorder are diagnosed with the disorder between the ages of eighteen to twenty-eight. Tr. p. 484. On redirect examination, Dr. Price admitted that flashbacks may be recounted exactly or the flashbacks may be an inaccurate recollection of events. Tr. p. 490.

STANDARD OF REVIEW

All four issues raised by Petitioner 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)).

ARGUMENT

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

Petitioner complains the trial court erred in limiting Dr. Price's testimony that a symptom of

schizoaffective disorder is the creation of false memories. However, no evidence was presented Victim suffered any symptoms of schizoaffective disorder, including the creation of any false memories. Also, no evidence was presented Victim suffered from any mental health issues during her childhood when she was sexually abused, at the time she reported abuse in 2016, or when she testified in 2018. Without proof 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 neither relevant nor probative.

Dr. Price was qualified as an expert on schizoaffective disorder and post-traumatic stress disorder. The trial court did not allow Dr. Price to testify 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, and was further permitted to testify someone suffering from PTSD may have distorted memories. Tr. pp. 477-79.

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). The fair opportunity to present a defense 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) (exclusion of expert testimony about defendant's antisocial personality disorder not error) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

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 she told the detective she was diagnosed with schizoaffective disorder and her admission she was hospitalized for schizoaffective disorder in 2012. Tr. pp. 213-14. 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 any testimony about the circumstances of her hospitalization. The defense did not present any evidence as to any symptoms of schizoaffective disorder Victim might have exhibited. Therefore, it is

speculative Victim produced false memories as a result of her suffering from schizoaffective disorder. Accordingly, the trial court did not err in excluding this testimony because insufficient foundation was presented to make Dr. Price's testimony relevant. The jury would need to rankly speculate, without evidence, that Victim suffered these symptoms in order to believe 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), Turner 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. This 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, this Court found Turner 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, Turner elicited testimony that if she does not take medication, over a period of time, she becomes confused, forgetful and may hear voices. Id.

In the present case, as in Turner, no evidence connects Dr. Price's excluded testimony with

the fact testimony presented. There was no evidence Victim incurred false memories as a result of schizoaffective disorder. No testimony was presented Victim suffered from schizoaffective disorder during her childhood in 1987 to 1990, or at any time prior to 2012. Moreover, no evidence was presented she suffered from symptoms of the disorder when she reported the sexual assaults in 2016. No evidence was presented that her treatment for the disorder in 2012 was unsuccessful or medication and treatment failed to contain any symptoms Victim might have otherwise suffered.

Petitioner 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 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) *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, Petitioner, the perpetrator, first disclosed the first occurrence of sexual abuse, telling Mother something occurred while he babysat, but claiming it was a mistake because he thought Victim was Mother when he woke up with his arm around Victim. Tr. p. 244, line 18 – p. 245, line 9. Further, Mother confronted Petitioner after Victim later disclosed the longstanding sexual abuse to Mother. Petitioner sought forgiveness

rather than deny the abuse. Tr. pp. 258-62. 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 Petitioner 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 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, eleventh-hour subpoena duces tecum to which the expert witness provided a good faith reply.

Petitioner claims Galloway-Williams should not have been allowed to testify based on what Petitioner's trial counsel unilaterally felt was an inadequate response to counsel's overly broad and harassing subpoena duces tecum. Note Petitioner'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, 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.

Tr. p. 381, 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.

Tr. p. 381, line 23 – p. 382, line 11. Trial counsel's cross-examination ended feebly with a repeat of the remonstration that Galloway-Williams brought only one article. Tr. p. 382, lines 9-11.

Trial counsel never explained 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 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 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.

Petitioner conflates the question of Galloway-Williams' response to the subpoena request with a question of the reliability of her testimony. The trial court did not abuse its discretion by because the reliability of Galloway-Williams' testimony is well-established by case law. 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).

Petitioner's argument falters because Petitioner 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 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.

"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).

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) (emphasis added).

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.

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, Petitioner makes a vitriolic attack on Galloway-

Williams, citing this case. But Galloway-Williams did in this case just what she said she could do in Jones – she provided citation to articles that would support her testimony.

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, eleventh-hour subpoena request.

III. The trial court did not err in allowing testimony that Petitioner 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 Petitioner 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.

Petitioner contends the trial court erred in overruling Petitioner's objection to testimony that Petitioner was physically violent with Mother. The testimony was probative to help explain why Victim and Mother did not disclose Petitioner's sexual abuse to law enforcement. It also is not prejudicial because the prosecution elicited testimony on a number of other bad acts Petitioner committed plus Petitioner's counsel elicited some further violent events in a clear exercise of strategy. The essence of Petitioner's argument is both error and prejudice occurred because Petitioner should have been able to cherry pick which of the bad acts he wanted the jury to hear. So Petitioner's argument is it was okay for the jury to hear that he assaulted both the biological father and Mother's boss, he forced Mother's vehicle off the road, shot at both a gas station and a duplex, stalked the family, and kidnapped Victim's brother, but the additional act of assaulting Mother

rendered the trial unfair. This argument is an untenable claim for reversible error.

How the issue arose

Victim testified Petitioner's relationship with Mother started out okay, but then things "got bad fast," with physical fights. Tr. p. 142, line 19 – p. 143, line 2. At this point, Petitioner 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. Tr. p. 143, lines 3-14.

Victim continued to testify that when Petitioner 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 Petitioner 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. Tr. p. 143, line 16 – p. 144, 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.

Tr. p. 144, lines 2-10.

In addition to testimony about the domestic violence visited upon Mother, Victim testified

Petitioner 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 Petitioner from shoulders to knees to the extent sometimes that blood was drawn. Tr. pp. 144-45. **Counsel did not object to this testimony.**

Victim testified, **without an on-record objection**, that Mother and the children stayed at University Inn where Petitioner broke in, kicked in the door, and kidnapped Victim's younger brother. Tr. pp. 148-49.

Victim testified after she moved into a nearby duplex with Mother and her brother, Petitioner would drive his truck through the back yard, "doing doughnuts." Tr. p. 152, lines 10-21. Petitioner also would tailgate Mother's car and try to run her car off the road. Tr. p. 152, line 24- p. 153, line 3. Victim testified another time, Petitioner chased their car, and Mother drove to the Magistrate's Office to seek protection. Tr. pp. 153-54. **Defense counsel did not object to any of this testimony.**

Victim testified one time, Petitioner 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. Tr. pp. 154-55. **Defense counsel did not object to any of this testimony.**

Petitioner's defense counsel elicited testimony from Victim on cross-examination that Petitioner shot at the Texaco station and exhorted, "But you didn't tell us anything about that yesterday." Tr. p. 195, lines 8-18. Therefore, contrarily, defense counsel was complaining Victim did not testify about prior bad acts. Defense counsel also elicited testimony that Petitioner shot at Victim's grandparent's house and had a fight with Victim's uncle. Tr. p. 196.

Mother confirmed these bad acts occurred, and added additional events: She confirmed

Petitioner 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." Tr. p. 251, lines 8-15. Mother confirmed Petitioner kidnapped Victim's brother. Tr. p. 253. Mother also confirmed Petitioner tried to run Mother's car off the road and she fled with her children to the Magistrate's Office to seek protection. Tr. pp. 254-55. Mother confirmed Petitioner beat Victim's father severely, and she needed to take the father to the hospital that night. Tr. pp. 255-56. Mother testified Petitioner harassed her at the Texaco station and he beat up her boss. Officers responded to that incident. Tr. pp. 256-57. Mother further testified, without objection, that the gun she used to confront Petitioner 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 [Petitioner], you know." Tr. p. 259, lines 2-9.

The testimony about the physical confrontations between Petitioner were probative because the testimony explains a reason why Victim would be reluctant to disclose the sexual abuse visited upon her by Petitioner. "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. Tr. pp. 365-66.

Further, Petitioner 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 Petitioner made Victim strip and he whipped her with a switch until she bled; (2) Petitioner hit and kicked Victim's biological father; (3) Petitioner attempted to force Mother's vehicle off the road; (4) Petitioner assaulted Mother's boss at the Texaco and law enforcement was called; (5) Petitioner shot at the duplex; (6) Petitioner shot at the Texaco station; (7) Petitioner stalked the family; and (8) Petitioner 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.

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

Mother testified she confronted Petitioner after Victim disclosed Petitioner was sexually abusing her. A couple of days after confronting Petitioner, Petitioner came to her parents' house where Mother and Victim stayed. Mother and Victim approached Petitioner at the fence in the front

of the yard. Tr. pp. 260-61. 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?" Tr. p. 261, lines 9-10. Mother then testified Petitioner 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." Tr. p. 261, 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, Petitioner objected based on hearsay and the best evidence rule. Tr. p. 261. 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." Tr. pp. 261-62. The trial court ruled, "Well, I'm going to allow it, I think based on state of mind." Tr. p. 262, lines 7-8. Mother testified Petitioner "apologized for being mean to us and he said he wouldn't do it anymore and he really wanted us to come back." Tr. p. 262, lines 11-14.

The question of whether to admit evidence under the best evidence rule is addressed to the discretion of the trial court. State v. Halcomb, 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 roughly twenty-five years 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 Petitioner 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 Petitioner'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, Petitioner was not prejudiced by Mother's testimony about the letter. It was an apology and the other bad acts that were elicited evidenced a lot of things which might compel Petitioner to apologize. As discussed in Issue III, Petitioner did not object to other evidence of Petitioner'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 Petitioner 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 petition for writ of certiorari should be denied. If this Court should see fit to grant the petition, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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July 12, 2022

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

Appellate Case No: 2022-000914

THE STATE, Respondent,

v.

RICHARD KENNETH GALLOWAY, Petitioner.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Return To Petition for Writ Of Certiorari on Joanna K. Delany, Esquire, counsel of record for the Petitioner by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 12th day of July, 2022.

Anne Mueller

Anne A. Mueller
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