



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2018-001684

The State,Respondent,

v.

Michael Cliff Eubanks,Appellant.

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, Michael Cliff Eubanks petitions the Court for rehearing because this Court overlooked or misapprehended set forth in the petition.

Question I

***State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993), and similar cases, should be overruled (or the holdings in *Schumpert* and similar cases limited) to the extent that those holdings allow a prosecution expert witness to offer an opinion about whether a complaining witness suffers from trauma, when that expert’s opinion is largely based on the hearsay statements of the complaining witness, because that type of opinion testimony is inconsistent with *State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566 (2018) and the *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) line of cases.**

This Court did not address this issue, likely because it “lacks the authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court.” *State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012), *affirmed as modified on other ground by State v. Cheeks*, 408 S.C. 198, 758 S.E.2d 715 (2014); *see also* S.C. Const. Art. V, § 9. Mr. Eubanks, however, reassert the arguments

on this issue contained in his Final Brief of Appellant and Final reply Brief of Appellant. Mr. Eubanks also takes this opportunity to point out to this Court that it could recognize limits the Supreme Court has already placed on the *Schumpert* line of cases in *Simmons* and the *Kromah* line of cases.

Question II

The trial judge erred by admitting evidence of J.L.’s Post-Traumatic Stress Disorder when the “probative value [of this evidence was] substantially outweighed by the danger of unfair prejudice,” pursuant to Rule 403, SCRE, and the prosecution used this evidence in its closing argument to bolster the credibility J.L.’s testimony, thereby denying Cliff Eubanks due process of law in contravention of the Fourteenth Amendment to the United States Constitution and Article I, § 3 of the South Carolina Constitution.

Although this Court recognized the applicability of the line of cases including *Briggs v. State*, 421 S.C. 316, 806 S.E.2d 713 (2017), *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013), and *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012) (Slip Opinion at 7), this Court misapplied the Supreme Court of South Carolina’s precedent in *State v. Makins*, by ignoring the Court’s limitation and warning to the bench and bar:

While we find no improper bolstering occurred in this case, we repeat our warning in *Anderson*¹ about dual experts. Using one witness as both a characteristics expert and the treatment witness is a risky undertaking. This issue might have been avoided completely had the State called a blind characteristics expert, a path the trial court repeatedly encouraged the State to follow. Instead, the State chose to proceed with Rich acting as a dual expert. While we rule in the State’s favor on these facts, this opinion should not be construed as a retreat from our warning in *Anderson*.

433 S.C. 494, 505, 860 S.E.2d 666, 672 (2021). Once this Court heeds that warning, the need to reverse the trial court is apparent.

¹ *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015).

Initially, this is not a case where the State chose to proceed without a blind expert. The State called Shauna Galloway-Williams as a blind expert. This Court's opinion does not acknowledge Ms. Galloway-Williams's testimony. Once this Court recognizes this is not a case where the State relied on a "dual expert," it becomes apparent that the State relied on Samantha Black and Dr. Eman Sharawy to bolster the child's testimony and vouch for her credibility. The testimony of Shauna Galloway-Williams complied with the constraints of the procedure approved of in *Anerson* and *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct.App.2015). Indeed, similar testimony by Ms. Galloway-Williams has been approved by our appellate courts. *E.g. State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018); *Brown, supra*. If the prosecution had limited its presentation of trauma evidence to the testimony of Ms. Galloway-Williams, then this question would not be before this Court in this appeal.

The testimony of Samantha Black and Dr. Eman Sharawy, however, crossed the line into impermissible bolstering and vouching for the credibility of J.L. This Court also overlooks significant aspects of the testimony of Ms. Black and Dr. Sharawy.

Regarding Ms. Black, this Court's opinion does not discuss that the child's "allegations" and "trauma narrative" solely focused on the child's allegations that Mr. Eubanks committed all three degrees of criminal sexual conduct with a minor. According to the testimony of the child and Ms. Black, the counseling was directly related to child's allegations that Cliff Eubanks sexually abused her. The child shared with Ms. Black the first, last, and worst incidents of the alleged sexual abuse in order to prepare a "trauma narrative," a redacted version of which was admitted into evidence. Although referencing the "trauma narrative" (Slip Opinion at 6), this Court's opinion does not acknowledge that

the “trauma narrative” specific referenced the allegations of sexual abuse. Ms. Black testified she made notes about J.L.’s statements about her allegations of abuse and claimed trauma symptoms.

Regarding Dr. Sharawy, this Court overlooks the significance of the connection of her testimony with the testimony of Ms. Black. Although acknowledging Dr. Sharawy reviewed Ms. Black’s notes (Slip Opinion at 7), this Court does not acknowledge that those notes included the allegations of sexual abuse. Nor does this Court acknowledge that the jurors were aware the “trauma narrative” and the child’s allegations to Ms. Black were allegations that Mr. Eubanks sexually abused the child. Because Ms. Black’s notes referenced the sexual abuse, Dr. Sharawy’s reliance on those notes was a direct reference to the allegations of sexual abuse. This Court, accordingly, erred by holding Dr. Sharawy “did not reference sexual abuse” and “did not testify as to any specific traumatic event as precepting Child’s PTSD.” Slip Opinion at 8. The prosecution cannot use two witnesses to do what the State cannot do with one witnesses

This Court did not acknowledge *State v. Simmons*, where the Supreme Court held the “hearsay testimony [of a medical doctor] ventured far beyond the parameters of Rule 803(4), SCRE,^[2] for much of the testimony was unrelated to medical diagnosis or treatment.” 423 S.C. 552, 567, 816 S.E.2d 566, 574 (2018). The Supreme Court expressly declined to “sanction the State’s use of Dr. Simmons as a conduit for this glaringly

² Rule 803(4), SCRE, providing an exception to the hearsay rule, provides, “Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court’s discretion.”

inadmissible hearsay to be brought before the jury.” 423 S.C. at 565, 816 S.E.2d at 573. The Court noted, “If this tactic were permitted, the legitimate use of the Rule 803(4), SCRE, medical diagnosis and treatment exception would be undermined and the general approach of Rule 801(d)(1)(D), SCRE,^[3] would be thwarted.” *Id.* (footnote added). Stated another way, an expert witness “recounting” of a complaining witness’ “statements amounted to nothing more than ‘hearsay shrouded in a doctor’s white coat.’” *Id.*

Once this Court acknowledges the substance of the testimony of Ms. Black and Dr. Sharawy, then this Court must reject statement: “In their testimonies before the jury, neither Black nor Dr. Sharawy connected Child’s PTSD to sexual abuse.” Slip Opinion at 7. The combined testimonies of Ms. Black and Dr. Sharawy’s “amounted to nothing more than ‘hearsay shrouded in a doctor’s white coat.’” *Simmons*, 423 S.C. at 565, 816 S.E.2d at 573.

This Court’s Rule 403, SCRE analysis is disingenuous and inconsistent with the vouching analysis. As seen above, the vouching analysis pretends the testimonies of Ms. Black and Dr. Sharawy did not connect the child’s PTSD to sexual abuse. Yet, this Court’s Rule 403 analysis states, “The testimony of each was probative to show Child suffered some trauma and to refute Eubanks's contention that nothing happened, or that if anything inappropriate happened, it happened while both were asleep.” Slip Opinion at 10. When the Court considers the testimonies of Ms. Black and Dr. Sharawy as a whole, it is impossible to reach the conclusion that “neither Black nor Sharawy testified about the specific trauma that caused Child's PTSD or precipitated her need for therapy.” *Id.*

³ 801(d)(1)(D), SCRE provides, “A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is consistent with the declarant’s testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident.”

Question III

The trial judge erred by allowing the prosecution to question J.L. on re-direct examination about her knowledge of an “enormous tub of pornography” in response to defense counsel asking J.L. limited questions about the titles of two iPhone internet searches when this testimony was not relevant, pursuant to Rule 401, SCRE, improper character evidence pursuant to Rule 404(b), SCRE, and the prejudicial effect of the testimony substantially outweighed its probative value, pursuant to Rule 403, SCRE?

This Court held, “[T]he circuit court erred in finding Eubanks opened the door to Child’s testimony on redirect about the pornography Eubanks kept in the storage building.” This Court concluded the arguments raised on appeal under Rules 401 and 404, SCRW were not raised in the trial court. This Court, however, never addressed the Rule 403, SCRE objection that was clearly raised at trial. R. 280.

This Court ultimately held, Mr.

Eubanks was not prejudiced by the admission of this testimony because Child testified Eubanks never showed her the videos from the storage building. Child had already testified Eubanks showed her “dirty” videos on his iPhone and on the television in his bedroom, and the jury already knew Eubanks watched pornography on his own and in the presence of Child. Thus, any error in admitting the references to the videos Eubanks kept in the storage building was harmless.

Slip Opinion at 11-12. This holding implies the evidence was inadmissible. This Court should have analyzed whether the probative value of the evidence was substantially outweighed but the prejudicial effect of the evidence. Rule 403, SCRE. *See, e.g., State v. Spears*, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013).

The evidence was not admissible because the prejudicial effect substantially outweighed its probative value pursuant to Rule 403, SCRE. Rule 403 protects an accused from “unfair prejudice” which is an “undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” *State v. Alexander*, 303 S.C.

377, 382, 401 S.E.2d 146, 149 (1991). Although arguing the evidence was admissible for a limited purpose, the prosecution used it to launch an emotional and merciless attack on Cliff Eubanks' character. The evidence should have been excluded, and this Court should order a new trial.

This Court also applied an incorrect harmless error analysis. "The key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (internal quotations omitted). This Court did not make a finding that the error was harmless beyond a reasonable doubt. Nor could it because of the manner in which the State used the evidence during the prosecutor's closing argument.

During closing arguments, the prosecution emphasized the container of pornography and the internet searches. The prosecutor argued Deanie Eubanks "didn't know about the enormous collection of pornography" or what her husband "was up to on the internet." R. 713. The prosecutor referred to the container as "that giant green tub of some of the most obscene pornography you've ever seen."⁴ And, the prosecutor argued:

I asked him about the porn. This was a classic response. Well, Mr. Scott, I just like the articles. I'm kind of a collector. Really, that's why I have them. I said well, what about all those DVDs in there. There's a bunch of them. Listen, I'm not some puritan, okay? I'm not saying there's anything wrong with pornography, but if on one hand you're saying I think hip-hop dancing is vulgar. I think this little girl is provocative. I think these dances are disgusting. How do you reconcile that with his interests? How do you do it? You can't. It makes no sense. Mr. Scott, I like the story lines in those movies. I said tell me about your favorite story lines. Oh, well that's personal.

⁴ The jurors, of course, had not "seen" the pornography because the trial judge did not allow the container and its contents to be introduced into evidence because of the trial court's concerns about unfair prejudice under Rule 403, SCORE. R. 354-57.

R. 724-25.

And:

I suspect if you're looking at that much pornography and you're making it that much a part of your life, because I think pornography is progressing. If you start off with Playboy it can begin and end there, or you can choose to up it a notch and get into more hardcore stuff. And then you can go into other rabbit holes. Into that genre or that genre. And you can look at all kinds of stuff until it's an unhealthy addiction. And you're looking on the internet and your sexual desires become such that you can't control them. *I don't know what makes somebody become like a Cliff Eubanks.*

R. 736 (emphasis added).

After defense counsel responded to the prosecutor's argument about pornography

(R. 748, 752-53, 755-56), the prosecutor replied:

Isn't it funny though that the same people who find hip hop dancing – and the lawyer said it was his opinion too that hip hop dancing was offensive. For some reason, they are just unoffended by an enormous collection of pornography. Of all kinds of depraved acts. They are unoffended by internet searches. They're unoffended by a Defendant that admits he is attracted to very young appearing girls.

I'm sorry, y'all. I don't mean to – I've got to cover everything. I'm so scared that something he just said that makes absolutely no sense will gain traction. I hope it doesn't, and maybe I'm just arguing too hard. Some of the things I hear just blow my mind.

R. 767-68.

Question IV

The trial judge erred by allowing the prosecution to cross-examine Cliff Eubanks about his internet searches of legal adult pornography when such evidence did not “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,” pursuant to Rule 401, SCRE, was inadmissible character and propensity evidence pursuant to Rule 404(b), SCRCP, and the “probative value [of this evidence was] substantially outweighed by the danger of unfair prejudice,” pursuant to Rule 403, SCRE.

This Court held, “We find Eubanks’s testimony that he did not intend to become aroused by Child's wiggling on his lap did not open the door to the State's questioning about his internet searches related to ‘younger looking girls’ because these acts do not arise from the same fact or transaction.” Slip Opinion at 12. This Court, however, concluded the evidence was harmless. Once again, this Court did not make a finding “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Tapp*, 398 S.C. at 389, 728 S.E.2d at 475. Nor could it because of the manner in which the State used this evidence during the prosecution’s closing argument. The discussion of the State’s closing argument in Section III above is incorporated by reference.

Question V

The trial judge erred by allowing the prosecutor to call Cliff Eubanks down from the witness stand to demonstrate to the jurors how J.L. was “wiggling” when she sat on his lap, when the only purpose for the demonstration was to humiliate Mr. Eubanks and to obtain fodder for the prosecution’s closing argument that repeatedly mocked Mr. Eubanks.

This court held:

Eubanks did not argue before the circuit court that this demonstration was “inflammatory and prejudicial,” as he now asserts on appeal, and we find this general objection at trial was insufficient to put the circuit court on notice of the grounds for his argument. *See State v. Jennings*, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011) (“An objection must be made on a specific ground.”).

Slip Opinion at 13. Trial counsel’s objection stated, “Your Honor, I don’t know if this is a proper demonstration even because it’s – have never heard of it before.” R. 671-71. This objection was sufficient to preserve this issue for appellate review.

Question VI

This Court should grant Cliff Eubanks a new trial based on the Deputy Solicitor’s highly inflammatory closing arguments that were a direct and dehumanizing attack on the character of Cliff Eubanks and his cousin Mitchell Eubanks.

This Court found this issue not preserved for appellate review. Slip Opinion at 14. During this appeal, Mr. Eubanks always acknowledged his trial counsel did not object to the Solicitor’s highly inflammatory arguments. Final Brief of Appellant at 39-41. Rather, he argued, “even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice.” *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) (citing *South Carolina Highway Dept. v. Nasim*, 255 S.C. 406, 179 S.E.2d 211 (1977)); *cf. Major v. Alverson*, 183 S.C. 123, 190 S.E. 449, 450 (1937) (“referring to defendant as a ‘bare faced liar’” during closing argument required new trial). This narrow exception “excuses the failure to make a contemporaneous objection only where the challenged argument constitutes abuse of a party or witness,” as it did in this case. *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 259, 509 S.E.2d 269, 272 (1998). *And see Bennett v. Stirling*, 842 F.3d 319 (4th Cir. 2016) (held that state courts unreasonably determined that prosecutor’s references to defendant during closing arguments were not appeals to racial prejudice and that his right to due process was not violated); *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (Solicitor’s closing argument “dehumanizing Appellant” required remand for new trial).

This court erred by not applying this narrow exception to our state’s error preservation rules.

Question VII

The trial judge erred by not continuing the trial to allow time for examination of Cliff Eubanks' iPhone 5, thereby denying Mr. Eubanks his due process right to a fair trial and his Sixth Amendment rights to present a complete defense and confront and cross-examine J.L. about observing sexually explicit movies on this phone.

This Court held “[T]he circuit court did not abuse its discretion in denying Eubanks a continuance to retain an expert to access a damaged device he possessed during the months prior to trial.” Slip Opinion at 15. Trial counsel explained he did not appreciate the significance of the evidentiary value of the cell phone prior to trial:

[The child] did say in the forensic interview it was an iPhone. And maybe I didn't pay close enough attention to what phones they were analyzing. But it wasn't until I talked to my client a couple of weeks ago when I realized they did not have the phone that he actually had at about the time that this allegation was made.

R. 104. And, “I did not know they didn't get this phone from him.” R. 106. This Court overlooked this portion of Mr. Eubank's motion.

This Court also concluded, “Eubanks could not identify any specific information on the iPhone that might be helpful to him, other than the purported absence of pornographic internet searches.” Slip Opinion at 15. This reason is sufficient in order to allow time for the examination. The trial courts have a due process obligation “to control the order of its business to safeguard the rights of litigants.” *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012). When a defendant feels that his rights are prejudiced by reason of the calling of his case at any particular time, he may apply to the judge for a continuance.” *State v. Mikell*, 257 S.C. 315, 322, 185 S.E.2d 814, 817 (1971); *and see* Rule 7, SCRCrimP.

Question VIII

The trial judge erred by not continuing the remainder of the trial until the following Monday so that Cliff Eubanks could call Dr. Joanne Brownlee as a witness to reply to Deanie Eubanks' testimony and corroborate Mr. Eubanks' medical condition.

This Court held:

We find the circuit court did not abuse its discretion in denying Eubanks's motion to continue the remainder of the trial so that Eubanks could attempt to obtain Dr. Brownlee's testimony. Despite Eubanks's claim that he was unaware his medical condition would be relevant, he was prepared to use Dr. Brownlee's medical report at trial. And, as the circuit court noted, because Eubanks did not provide Dr. Brownlee's name as a potential witness, there was a risk that the jury could have contained some of her patients. Therefore, we find the circuit court acted within its discretion in declining to postpone the remainder of the trial.

Slip Opinion at 16. This Court overlooked the fact that the trial court could have addressed this concern with additional voir dire.

Questions IX and X

The trial judge erred by not excluding juror Tony Bailey from the jury panel after Mr. Bailey, a real estate agent, revealed he had sold a house to a relative of J.L, who was present in the courtroom for the trial, when this information was not available to Cliff Eubanks prior to jury selection and would have been the basis of a peremptory strike had this information been disclosed timely.

The trial judge erred by denying Cliff Eubank's motion for a new trial, without convening a hearing and taking testimony, after Cliff Eubanks learned that juror Tony Bailey is friends on Facebook with Darlene Newsome and Jared Hunnicutt when Mr. Bailey did not disclose this information in response to the voir dire questions by the trial court.

This Court held:

Bailey's ex-wife's relation to the Lyons family and the fact that Bailey sold a home to a Lyons aunt does not suggest he had a "close business or social relationship" with a potential witness—particularly when the person to whom he sold the home was not a witness at trial. Significantly, Bailey told the circuit court he could be fair and impartial in adjudicating Eubanks's innocence or guilt.

Slip Opinion at 19.

Pursuant to the Sixth Amendment of the United States Constitution, Article I, Section 14 of the South Carolina Constitution, and S.C. Code Ann. § 14-7-1020, the trial court has an obligation to place potential jurors on their oath and ask questions to determine whether any potential juror “has any interest in the cause, has expressed or formed any opinion, or is sensible to any bias or prejudice.” Courts have long recognized the tricky nature of analyzing jurors’ bias. *See Smith v. Phillips*, 455 U.S. 209, 221-2 (1982) (O’Connor, J., concurring) (recognizing that jurors may be incapable of acknowledging their own bias); *Crawford v. United States*, 212 U.S. 183, 196 (1909) (“Bias or prejudice is . . . an elusive condition of the mind . . . and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence”); *United States v. Burr*, 25 F. Cas. 49, 50 (D.Va.1807) (a person under the influence of personal prejudice “is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony” for such person may declare that “notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him”).

The possibility that a juror might not recognize his own bias is one of the reasons our General Assembly allows an accused ten preemptory challenges in a criminal sexual conduct with a minor case. S.C. Code Ann. § 14-7-1110. Even the unintentional withholding of this type of information warrants removal of the juror once it is discovered. *E.g. State v. Coaxum*, 410 S.C. 320, 764 S.E.2d 242 (2014) (juror’s unintentional concealment of information regarding possible familial relationship with defendant warranted mid-trial removal).

This Court also held:

[T]he fact that Bailey was a Facebook friend of Investigator Hunnicutt and the grandmother of a witness is not problematic under the circumstances presented here. In response to Eubanks's new trial motion, the State notified the circuit court of Investigator Hunnicutt's statements that Bailey requested to be his Facebook friend after the trial concluded and that "he had no idea who the guy was." Moreover, the fact that Bailey was a Facebook friend of an individual who did not testify does not indicate he had a "close business or social relationship" with a witness. As there is no suggestion that Bailey deliberately concealed information during voir dire and the social media connections are tangential, we find the circuit court did not abuse its discretion in declining to replace him on the jury or in denying the motion for a new trial without convening a hearing to further question the juror.

Slip Opinion at 19-20.

This Court erred by relying on the email from the Deputy Solicitor was error because "[a] court cannot consider facts appearing only in argument of counsel." *Shinn v. Kreul*, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) (citing *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct.App.1986). *Cf. McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."). A hearing was necessary before the trial court could rule on this matter. *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013) ("evaluating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing"). R. 6. *And see, e.g., Remmer v. U.S.*, 350 U.S. 377 (1956); *Remmer v. U.S.*, 347 U.S. 227 (1954); *State v. Bryant*, 354 S.C. 390, 581 S.E.2d 157 (2003).

Question XI

The trial judge erred by declining to charge second degree-assault and battery as a lesser-included offense of third-degree criminal sexual conduct with a minor.

This Court erred by relying on *State v. Hernandez*, 428 S.C. 257, 259, 834 S.E.2d 462, 463 (2019) (Slip Opinion at 20-21), as that case did not address the issue of whether second-degree assault and battery is a lesser included of third-degree criminal sexual conduct with a minor.

This Court also erred by holding

[T]he circuit court properly denied Eubanks's request to charge second-degree assault and battery as a lesser included offense of third-degree CSC with a minor because the plain language of the statute does not list third-degree CSC with a minor as one of the offenses of which second-degree assault and battery is a lesser included offense. See S.C. Code Ann. § 16-3-600(D)(3). As the court stated in *Hernandez*, if the Legislature had intended to classify second-degree assault and battery as a lesser included offense of CSC third with a minor, it would have provided such in the statute.

Slip Opinion at 21. A statutory offense can be a lesser included offense of another statutory offense without the General Assembly expressly making that designation. *See, e.g.* S.C. Code Ann. § 16-11-311, 312, and 313 (General Assembly not designating burglary offenses as lesser included offenses)

Question XII

This Court should reverse Cliff Eubanks' convictions and sentences and order a new trial based on the cumulative error doctrine.

This Court erred by holding the cumulative error doctrine must be raised at trial. Slip Opinion at 22. It is sufficient that each of the issues considered under the cumulative error doctrine be raised at trial.

As discussed above, once the Court reconsiders the issues, Mr. Eubanks has demonstrated multiple trial errors. This Court should reconsider the cumulative error doctrine after reconsidering the other issues raised in this appeal.

Question XIII

This Court should clarify the procedure to be followed when the court reporter assigned to record a trial accepts employment with one of the parties that participated in that trial prior to completing the trial transcript.

This Court erred by holding, “This court can provide no further relief regarding the court reporter or the transcript, and it would be inappropriate to issue an advisory opinion that does not affect the outcome of the case.” Slip Opinion at 22, n. 4. This Court overlooks that fact that the State questioned the reliability of the transcript in the Final Brief of Respondent. In his Statement of Facts, Mr. Eubanks called this Court’s attention to inconsistent testimony by State’s Expert Shauna Galloway-Williams:

Ms. Galloway-Williams initially testified, “[W]e would expect that a child or an adult is going to tell every single detail or every single event that they’ve experienced related to child abuse at one time.” Tr. 378. Later she testified disclosure can be tentative, “which is where most children’s disclosures fall, where they share some pieces of information but not all of it.” She does not “expect a child to report every single detail of his or her abuse in one interview.” Age, frequency of abuse, comfort level with the interviewer, knowledge of anatomy, and sexual knowledge could be factors. Children might delay disclosure of sexual abuse because of fear or relationship with the alleged perpetrator. Tr. 379-83.

Brief of Appellant, at 18-19.

The State’s Brief counters:

Contrary to [Mr. Eubanks’] assertion, it clearly appears Ms. Galloway-Williams misspoke or *the transcript was inaccurate* when she testified “So we refer to disclosure as a process, meaning that we would expect that a child or an adult is going to tell every single detail or every single even that they’ve experienced related to child abuse at one time.”

Brief of Respondent, at 9 (fn. 2) (emphasis added).

CONCLUSION

For the reasons set forth in Mr. Eubanks Final Brief of Appellant, Final reply Brief of Appellant, and this petition, this Court should rehear this matter, reverse the trial court, and order a new trial.

IT IS SO MOVED.

Respectfully Submitted,

By s/E. Charles Grose, Jr.

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September 9, 2022
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Certificate of Service

I certify that I served this pleading on the State of South Carolina, by email, using counsel's primary email address listed in the Attorney Information System (AIS), as reflected below, on the date reflected below:

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September 9, 2022.

Subject: State v. Eubanks, Appellate Case No. 2018-001684
Date: Friday, September 9, 2022 at 1:56:46 PM Eastern Daylight Time
From: Charles Grose
To: William Blich
Attachments: 2022 09 09 - Petition for Rehearing.pdf

Attached please find Mr. Eubank Petition for Rehearing that I am about to file electronically with the SC Court of Appeals, along with a copy of this email. Please let me know if you have any questions.

Hope you have a good weekend.

Best,
Charles

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