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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2022-001626
State v. Eubanks, Ct. App. Opinion No. 5933 (filed August 10, 2022)

The State, ...Respondent,

v.

Michael Cliff Eubanks, ...Petitioner.

Petition for Writ of Certiorari

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On September 29, 2022, Michael Cliff Eubanks petitioned the Court of Appeals for rehearing. A. 1011-29. On October 20, 2022, the Court of Appeals denied the petition. A. 1030.

QUESTIONS PRESENTED

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.

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.

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.

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.

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.

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.

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.

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.

IX. 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.

X. 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.

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.

XII. 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.

STATEMENT OF CASE

On May 16, 2017, J.L. alleged her stepfather, Michael Cliff Eubanks,[1] sexually assaulted her. The next day, the Laurens County Sheriff's Office arrested Mr. Eubanks. The State ultimately charged Mr. Eubanks with first-degree criminal sexual conduct with

[1] Mr. Eubank's family and friends call him "Cliff," which is how he will be referred to in this petition.

a minor, second-degree criminal sexual conduct with a minor, and third-degree criminal sexual conduct with a minor. R. 7-14. From July 31, 2018 to August 3, 2018, the State tried Mr. Eubanks before the Honorable Frank R. Addy, Jr. and a jury. Deputy Solicitor C. Dale Scott and Assistant Solicitor Julie Kate Keeney, both of the Eighth Circuit Solicitor's Office, prosecuted the case. C. Rauch Wise represented Mr. Eubanks. The jurors convicted Mr. Eubanks as charged. R. 15, 789-91. Judge Addy sentenced Mr. Eubanks to twenty-five years imprisonment for first-degree criminal sexual conduct with a minor, a concurrent term of fifteen years imprisonment for third-degree criminal sexual conduct with a minor, and a consecutive term of fifteen years imprisonment, suspended with probation for five years, for second-degree criminal sexual conduct with a minor. R. 803-05, R. 1-3. On August 13, 2018, Mr. Eubanks moved for a new trial. R. 16-21. By written order dated September 11, 2018, Judge Addy denied the new trial motion. R. 4-6.

Mr. Eubanks appealed. On April 13, 2021, via WebEx, the Court of Appeals convened an oral argument. On August 10, 2022, the Court of Appeals affirmed the convictions and sentences. A. 990-1010. On September 9, 2022, Mr. Eubanks petitioned for rehearing. A. 1011-29. On October 20, 2022, the Court of Appeals denied the petition. A. 1030. This petition follows.

STATEMENT OF FACTS[2]

Cliff Eubanks and his first wife, Jennifer Newsome, had two children, A.E and P.E. After his divorce from Ms. Newsome, Mr. Eubanks contacted Deanie Lyons, who had two children from a prior relationship, L.L. and J.L. Cliff and Deanie married in 2010, moved

[2] A detailed statement of facts appears in Mr. Eubanks' Final Brief of Appellant. A. 845-66. Because of this Court's page limitations, Rule 242(d)(4), SCACR, this petition contains a more abbreviated statement of facts.

into Cliff's house, and had a child together, B.E. Both Cliff and Deanie worked, but they lived paycheck to paycheck. R. 580-86. In November 2013, Deanie brought Cliff breakfast at work. On the way home, she got into an automobile wreck and ultimately required back surgery. Deanie did not work from November 2013 to May 2016. Initially, Deanie received disability though the State of South Carolina, but the State eventually cancelled this support because the injury was not work related, meaning only Cliff was receiving a paycheck to support the family. They lost their house. Cliff, Deanie, L.L., J.L., and B.E. moved in with Deanie's extended family—her mother, father, and grandmother. A.E. and P.E. joined them every other weekend. R. 586-88.

After the automobile wreck, Cliff and Deanie's marriage "started going downhill a little." Deanie seemed depressed and "felt worthless" because she could not do her normal activities. They stated sleeping in separate beds in the same bedroom. R. 634-35. Cliff's parents, Elizabeth and Michael Eubanks, overheard a conversation in November or December 2016 involving their son. Deanie said, "I know how to get rid of somebody." Ms. Eubanks was "shocked." R. 569-71. Mr. Eubanks further recalled Deanie saying she knew how to get rid of Cliff. R. 574-75.

Cliff and Deanie eventually settled the automobile wreck claim with the insurance company for $89,821.55 after medical expenses, attorney fees, and costs. On December 28, 2016, they deposited the proceeds in a joint checking account at the SunTrust Bank in Laurens. In January 2017, they transferred $25,000.00 to a money market account and withdrew $40,000.00 in cash. They placed the $40,000.00 in a safe in a storage shed on Deanie's mother's property. Cliff had the combination to the safe. Deanie did not. Financially, Cliff and Deanie should have been in good shape, but their bank account

balance kept decreasing and they began "bickering" about finances. In May 2016, they took several thousand dollars out of the safe for a family vacation. Cliff, Deanie, J.L., and B.E. were all present when they opened the safe.[3] R. 594-606.

After returning from the May 2017 vacation, Ms. Eubanks took L.L. to see Kimberly Little, a counselor, because of L.L.'s depression and grief secondary to several family deaths. Ms. Little "wanted to speak with [J.L.] as well to make sure she was okay." On May 16, 2017, J.L. made allegations of sexual abuse to Ms. Little. As a mandated reporter, Ms. Little "contacted law enforcement and DSS." R. 166-71.

The day after law enforcement arrested Cliff Eubanks, Michael Eubanks went to Cliff's house to get his medication and some clothing. He went to the storage building to get Cliff's winter clothing. He noticed the safe, which he understood contained $40,000.00 cash, was no longer there. R. 575-77.

On May 17, 2017, through trickery, Laurens County Sheriff's Office Investigator Jared Hunnicutt obtained a statement from Cliff:

> [A]s far as what went on in the barn was that myself and J.L. was working tearing apart pallets and cleaning up. I went to sit down and J.L. came up to me and sat in my lap and started wiggling on my leg and moving around. I knew it wasn't right, but I tried to push her away but she still did it to arouse me and I ended up ejaculating in my pants.

Investigator Hunnicutt arrested Mr. Eubanks. R. 333-49, 808-09.

On June 8, 2017, Dr. Lyle Pritchard, M.D. performed a sexual assault medical examination on J.L., including her genitals, using "forensic imaging" that provides extra lighting and magnification to look "for any evidence of any sort of injuries of scars." She

[3] J.L. confirmed she knew about the safe with money in the storage building and that she knew the combination to the safe. R. 261-62.

did not find any signs of trauma. The hymen was intact. J.L. did not have any sexually transmitted diseases. The medical exam was normal, meaning the exam was "not definitive that there was abuse or not abuse." R. 372-83.

During opening statements, counsel for Mr. Eubanks asserted Mr. Eubanks' innocence and addressed his statement to law enforcement "in which he admits to an act that he is not proud of. That he is frankly embarrassed about." Counsel noted the act was not a crime because it was "not done with the intent to satisfy that lust of a person." Counsel explained:

> [Mr. Eubanks] comes in the barn and he sits down. And [J.L] comes and sits in his lap and starts wiggling around and jumping up and down. And he puts in his statement, and I have to put it in the statement. Have to tell you because it's there, that frankly her jumping up and down on him caused him to ejaculate. That is an act. But you will find there was no intent on his part to have her sit on his lap to the point that he was satisfying his lustful desires. There was no intent. And if the intent is not there, the act is not illegal. It is, call it what you want to, but you can't call it illegal because of the lack of intent.

R. 131-33.

The State's case against Mr. Eubanks heavily relied on the expert testimony of Samantha Black, Dr. Eman Sharawy,[4] and Shauna Galloway-Williams.

Ms. Black, a licensed professional counselor, provided J.L. trauma focused cognitive behavior therapy. Mr. Eubanks objected becasue testimony by Ms. Black about the treatment "for the psychological ramifications of the abuse" constitutes vouching for the credibility of J.L., prohibited by *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). The trial judge convened a hearing outside the presence of the jurors. Counsel for Mr.

[4] This witness' name is sometimes spelled "Sharway" in the transcript. *E.g*. R. 27, 729. This pleading uses the spelling "Sharawy" because that is how the South Carolina Department of Labor, Licensing, and Regulations lists her name for her medical license.

Eubanks explained this evidence does not have any probative value to Ms. Black's testimony if she planned to opine she "determined there to be a problem because [J.L.] was, in fact, abused." The prosecution indicated another witness would testify about a diagnosis of Post-Traumatic Stress Disorder ("PTSD"). Mr. Eubanks then objected to any testimony about PTSD. R. 300-04. Mr. Eubanks pointed out that PTSD does not appear in any of Ms. Black's therapy notes. The prosecution responded Ms. Black would "testify about the trauma-based cognitive therapy that she offered the minor" and Dr. Sharawy would testify about "the actual diagnosis of PTSD." Dr. Sharawy saw J.L. for "one counseling session," reviewed Ms. Black's notes," and "diagnosed her with PTSD." The prosecution relied on *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993), *overruled on other grounds by State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016), *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997), *overruled on other grounds by State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), and *State v. Barrett*, 416 S.C. 124, 785 S.E.2d 387 (Ct. App. 2016). R. 304-08.

The trial judge reviewed *Barrett*, noted that case cited to *Schumpert* and *State v. White*, 361 S.C. 407, 605 S.E.2d 540 (2004), and ruled testimony about PTSD to be admissible. The trial judge conducted a Rule 403, SCRE analysis. Mr. Eubanks argued that an expert testifying J.L. suffers from PTSD "is doing nothing but vouching for the credibility" of her testimony and "is terribly more prejudicial than probative." The trial judge reasoned this testimony would not be precluded by *Kromah* if the prosecution did not elicit testimony that the PTSD was caused by the child sexual abuse. R. 308-312.

Over objection, Ms. Black testified the goals of trauma-focused cognitive behavioral therapy are to "learn coping skills," "change any thought distortions," and

"complete a trauma narrative"[5] about the first, last, and worst incidents of sexual abuse, which "takes care of the symptoms the way that the therapy is researched." The trauma narrative focuses on a child's thoughts about the trauma "to get rid of any distortions they have," such as thinking the abuse was their fault. Ms. Black testified "the purpose really isn't for Court" and is "not investigative at all." R. 312-315.

Dr. Eman Sharawy is the Medical Director at the Beckman Mental Health Center. Over objection, the trial judge qualified Dr. Sharawy as an expert in child and adolescent psychiatry. Dr. Sharawy explained PTSD and its symptoms. R. 318-23. Dr. Sharawy interviewed J.L. on August 31, 2017 for one hour, reviewed Ms. Black's notes, diagnosed PTSD, prescribed an antidepressant, and ordered continued trauma focused cognitive behavioral therapy. Dr. Sharawy testified about J.L.'s PTSD symptoms and "*the history she was providing*." She based the PTSD diagnosis on "her interview, [her] professional observations, [and] Samantha Black's notes." R. 323-27 (emphasis added).

Ms. Galloway-Williams, a licensed professional counselor and the executive director of the Julie Valentine Center, testified as a "blind expert" about the emotional or behavior characteristics of a child that has been sexually abused. R. 394-98.

STANDARD OF REVIEW

"In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." *State v. Blackwell*, 420 S.C. 127, 136, 801 S.E.2d 713, 718 (2017) (internal citations and quotations omitted).

[5] J.L. testified about her trauma narrative. R. 237, 239, 256-58, 262, 269, 273, 275-76, 288-90; State's Exhibit 10.

"An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." *Id.*

Under Rule 242, SCACR, this Court has "discretionary authority . . . to review decisions of the court of appeals . . . when there are special and important reasons, such as when there are novel questions of law . . . [and] the decision of the court of appeals is in conflict with a prior decision of this Court." *S.C. Dep't of Soc. Servs. v. Benjamin*, 430 S.C. 235, 236, 844 S.E.2d 373 (2020).

ARGUMENTS

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.[6]

Cliff Eubanks raised this question before the Court of Appeals in his Final Brief of Appellant (A. 886-73) and Final Reply Brief of Appellant (A. 964-69). The State did not directly address this question, but rather conflated this question with its argument regarding Question II. A. 918-22. The Court of Appeals did not address this issue, presumably because it "lacks the authority to rule against prior published precedent from [this Court], but is bound by the decisions of [this 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,

[6] As seen, Mr. Eubanks does not advocate for a rule excluding testimony about the presence or absence of trauma symptoms. A. 886, n. 20. Nor does he seek the reinstatement of *Hudnall*. *Id*. Rather, he seeks a limitation *Schumpert* that excludes opinion testimony, based on hearsay, bolstering the credibility of a complaining witness. *Id*.

nevertheless, renewed this question in his petition for rehearing and noted the Court of Appeals could have recognized limits this Court already placed on the *Schumpert* line of cases in *Simmons* and the *Kromah* line of cases. A. 994-98.

At trial, the State relied on the *Schumpert* line of cases to present trauma evidence, but the trial judge allowed the State to present evidence exceeding post-*Schumpert* limitations set by this Court. In *State v. Anderson,* this Court acknowledged it is proper to allow an expert to "testify to the behavioral characteristics of sex abuse victims." 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015) (citing *Schumpert,* 312 S.C. 502, 435 S.E.2d 859 (1993); *State v. Weaverling,* 337 S.C. 460, 523 S.E.2d 787 (Ct.App. 1999); and *State v. White,* 361 S.C. 407, 605 S.E.2d 540 (2004)). This Court then explained the "better practice" is "not to have the individual who examined the alleged victim testify, but rather to call an independent expert." 413 S.C. at 218-19, 776 S.E.2d at 79. "To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility." *Id.* This Court adopted the procedure followed in *State v. Brown,* 411 S.C. 332, 768 S.E.2d 246 (Ct.App. 2015) (distinguishing improper bolstering cases because in *Brown* the behavioral expert did not examine the victim). *Id*. The *Anderson-Brown* procedure allowing an independent "blind expert" to testify about the characteristics of child abuse victims is now the common practice in criminal-sexual-conduct-with-a minor trials in our state.

Here, the testimony of Ms. Galloway-Williams complied with the constraints of the *Anderson-Brown* procedure. The testimony of Ms. Black and Dr. Sharawy, however, crossed the line into impermissible bolstering and vouching for the credibility of J.L., which is prohibited by the *Kromah* line of cases. According to the testimony of J.L. and

Ms. Black, the counseling directly related to J.L.'s allegations that Mr. Eubanks sexually abused her. J.L. prepared a trauma narrative, a redacted version of which was admitted into evidence. Ms. Black testified she made notes about J.L.'s statements about her allegations of abuse and claimed trauma symptoms. Dr. Sharawy reviewed Ms. Black's notes, met with J.L. only once, and opined J.L. suffers from PTSD.

This Court also limited this type of evidence in *State v. Simmons*, 423 S.C. 552, 567, 816 S.E.2d 566, 574 (2018) by holding the "hearsay testimony [of a medical doctor] ventured far beyond the parameters of Rule 803(4), SCRE, for much of the testimony was unrelated to medical diagnosis or treatment." 423 S.C. 552, 567, 816 S.E.2d 566, 574 (2018). This Court expressly declined to "sanction the State's use of Dr. Simmons as a conduit for this glaringly inadmissible hearsay to be brought before the jury." 423 S.C. at 565, 816 S.E.2d at 573. This 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, would be thwarted." *Id*. Here, the jurors were very aware that Dr. Sharawy's opinion was based on the hearsay statements of J.L. Dr. Sharawy's opinion "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 should grant this petition and consider this question because it presents an important question that only this Court can address—overruling the *Schumpert* line of cases or clarifying the limitation this Court already placed on the *Schumpert* line of case. This Court should also address some lingering confusion recognized by the Court of Appeals in *Morgan, supra*. *Morgan* observed:

> The *Schumpert* court never expressly addressed the two other central concerns of *Hudnall,*[7] however. Although *Schumpert* briefly mentioned *Hudnall*'s limitation to rebuttal purposes, the *Schumpert* court never truly confronted the bolstering issue, but apparently equated character evidence with substantive evidence of sexual abuse. Moreover, *Schumpert* was silent as to another crucial aspect of *Hudnall:* whether behavioral science could reliably ascertain whether a victim was telling the truth or whether some event did in fact occur in the past. While we are reluctant to read *Schumpert*'s silence on these two linchpins of *Hudnall* too broadly, it is difficult to avoid the conclusion that the court implicitly overruled these two aspects of *Hudnall* as well as the relevancy aspect. Accordingly, Morgan's arguments that the opinions were admitted as improper bolstering evidence and were not sufficiently reliable cannot stand in light of *Schumpert.*

326 S.C. at 511-12, 485 S.E.2d at 117. This Court overruled *Morgan* in *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009) (holding the trial court's gatekeeping function in assuring reliability of expert testimony applies to nonscientific evidence), but it did not address the bolstering question.

Despite *Schumpert* not addressing "the bolstering issue" and "whether behavioral science could reliably ascertain whether a victim was telling the truth or whether some event did in fact occur in the past," our appellate courts steadfastly maintained the prohibition of a witness improperly bolstering the credibility of a child witness in a child abuse case. *E.g. State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (error in admitting portions of forensic interviewer's written reports that contained improper vouching was not harmless); *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989) (psychiatrist's testimony that alleged victim's "symptoms are genuine" improperly vouched for credibility); *State v. McKerley,* 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012) (testimony of forensic interviewer who conducted interviews with complainant indicated belief in

[7] *State v. Hudnall*, 293 S.C. 97, 359 S.E.2d 59 (1987), *overruled by State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993).

complainant's truthfulness and was thus inadmissible); *South Carolina Dept. of Social Services v. Lisa C.,* 380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2008) (testimony of therapist indicating "Child gave a consistent disclosure and that as a result of that conclusion she recommended therapy" improperly bolstered Child's credibility); *State v. Dempsey,* 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000) (testimony from a child abuse counselor that child tells the truth 95% to 99% percent of time abuse is alleged improperly vouches for child's credibility). In *Kromah*, this Court held testimony by forensic interviewer of victim that victim had given a "compelling finding" of child abuse was inadmissible and identified categories of admissible and inadmissible testimony. 401 S.C. at 359-60, 737 S.E.2d at 538.

The prosecution and trial judge relied on *Schumpert* when admitting the testimony of Ms. Black and Dr. Sharawy. Because this testimony crossed the line into the bolstering and vouching for the credibility of J.L. that is prohibited by *Simmons* and the *Kromah* line of cases, *Schumpert* should be overruled (or the holding in *Schumpert* limited) to the extent that the holding is *Schumpert* allows 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.

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 the Court of Appeals recognized the applicability of the line of cases including *Briggs v. State,* 421 S.C. 316, 806 S.E.2d 713 (2017*), Kromah, supra*, *and*

McKerley, supra (A. 995), the court below misapplied this Court's precedent in *State v. Makins*, by ignoring this 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*[8] 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).

This case is not a case where the State chose to proceed without a blind expert. The State called Ms. Galloway-Williams as a blind expert. The opinion below does not acknowledge Ms. Galloway-Williams's testimony. This case also is not a case involving a "dual expert." The State relied on Ms. Black and Dr. Sharawy, as treatment experts, but also to bolster the child's testimony and vouch for her credibility which violated the *Kromah* line of cases.

This Court of Appeals also overlooked significant aspects of the testimony of Ms. Black and Dr. Sharawy. Regarding Ms. Black, the opinion below 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 Mr. Eubanks sexually abused her. The child shared with Ms. Black the first, last, and worst incidents of the alleged sexual abuse to prepare a "trauma narrative," a redacted version of which was admitted into evidence. Although referencing

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

the "trauma narrative" (A. 994, 996), the opinion below does not acknowledge that the "trauma narrative" specifical 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, the Court of Appeals overlooked the significance of the connection of her testimony with the testimony of Ms. Black. Although acknowledging Dr. Sharawy reviewed Ms. Black's notes (A. 995), the opinion does not acknowledge that those notes included the allegations of sexual abuse. Nor does the opinion 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. The Court of Appeals, 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." A. 996. The prosecution cannot use two witnesses to do what the State cannot do with one witness.

The Court of Appeals did not acknowledge *Simmons,* where this Court held the "hearsay testimony [of a medical doctor] ventured far beyond the parameters of Rule 803(4), SCRE. 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.

Additionally, the Court of Appeals' 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, the opinion'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." A. 997-98. Considering the testimonies of Ms. Black and Dr. Sharawy together, it is impossible to conclude that "neither Black nor Sharawy testified about the specific trauma that caused Child's PTSD or precipitated her need for therapy." *Id*.

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 of Appeals held, "[T]he circuit court erred in finding Eubanks opened the door to Child's testimony on redirect about the [adult] pornography Eubanks kept in the storage building." The Opinion, however, concluded the arguments raised on appeal under Rules 401 and 404, SCRE were not raised in the trial court. A. 999. The court below never addressed the Rule 403, SCRE objection that was clearly raised at trial. R. 280.

This Court of Appeals 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" and "any error in admitting the references to the videos Eubanks kept in the storage building was harmless." A. 999-1000. This holding implies the evidence was inadmissible under 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. 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, as will be discussed below, the prosecution used it to launch an emotional and merciless attack on Cliff Eubanks' character.

The Court of Appeals 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 below 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."[9] 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.

[9] 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, SCRE. 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.

This Court should grant the writ and consider the 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.

The Court of Appeals held, "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." A. 1000. The opinion, however, concluded the evidence was harmless. Once again, the Court of Appeals 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 way the State used this evidence during the prosecution's closing argument, as see above in the discussion of the State's closing argument in Section III. This Court should grant the writ and consider whether the error was harmless.

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 of Appeals held Mr. "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. A. 1001 (citing *State v. Jennings*, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011) ("An objection must be made on a specific ground.")). 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 Court should grant the writ and consider the question because this objection was sufficient to preserve this issue for appellate review.

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.

The Court of Appeals found this issue not preserved for appellate review. A. 1002. During this appeal, Mr. Eubanks always acknowledged his trial counsel did not object to the Solicitor's highly inflammatory arguments. A. 879-81. 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 should grant the petition and provide guidance about when to apply this narrow exception to the error preservation rules.

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]the 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." A. 1003. 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. The court below overlooked this portion of Mr. Eubank's motion.

The court below 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." A. 1003. 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). "If 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.

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 of Appeals held "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" and "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." A. 1004. The court below overlooked the fact that the trial court could have

addressed this concern with additional voir dire. S.C. Code Ann. § 14-7-1020; see also *Langford, supra*. This Court should grant the writ and consider the issue.

IX. 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 Court of Appeals 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," placing significance on the fact that "Bailey told the circuit court he could be fair and impartial in adjudicating Eubanks's innocence or guilt." A. 1007.

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 asked 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 should grant the writ and consider the question.

X. 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 of Appeals 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.

A. 1007-08.

The Court of Appeals 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). This Court should grant the writ and consider the 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) (A. 1008-09), 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.

A. 1009. 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).

XII. 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 of Appeals held, "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." A. 1010, n. 4. The court below overlooked the 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. A. 858-59 (citing R. 388-93). The State's Brief countered by arguing "Contrary to [Mr. Eubanks'] assertion, it clearly appears Ms. Galloway-Williams misspoke or ***the transcript was inaccurate***." A. 917, n. 2 (emphasis added).

CONCLUSION

For the foregoing reasons, this Court should grant the petition and consider the questions.

Respectfully Submitted,

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