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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICHARD KENNETH GALLOWAY,

PETITIONER

APPELLATE CASE NO. 2022-000914

BRIEF OF PETITIONER

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2.

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

3.

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

STATEMENT OF THE CASE

On September 26, 2017, a Greenville County Grand Jury indicted Petitioner for criminal sexual conduct with a minor in the first degree and lewd act on a child, offenses alleged to have occurred from 1987 – 1990. Petitioner was also charged with two additional counts of criminal sexual conduct with a minor in the first degree.[1]

Petitioner was tried before the Honorable Perry H. Gravely and a jury, from May 14 – 16, 2018. John Christopher Shipman and Jacob Goldstein represented Petitioner. Justin Holloway represented the State. Petitioner was convicted on two of the four indictments: criminal sexual conduct with a minor in the first degree and lewd act on a minor. However, the jury found Petitioner not guilty of a second count of criminal sexual conduct with a minor in the first degree, and it hung on a third count of criminal sexual conduct with a minor in the first degree.[2]

Petitioner was sentenced to consecutive terms of thirty years for criminal sexual conduct with a minor in the first degree and ten years for lewd act on a minor. Defense counsel moved the court to reconsider its sentence and a hearing was held on the matter October 4, 2018. Petitioner was represented by John Christopher Shipman and the State was represented by Brandi Hinton. The court denied the motion.[3]

On October 4, 2018, Petitioner served his notice of intent to appeal. Oral argument was held on December 6, 2021. On April 20, 2022, the court of appeals affirmed in a published opinion, *State v. Galloway*, 436 S.C. 453, 872 S.E.2d 646 (Ct. App. 2022). A petition for

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[1] R. 577 – R. 580; R. 16, ll. 5-22.

[2] R. 1; R. 577, l. 5 – 578, l. 11.

[3] R. 562, ll. 18-22; R. 581 – 582; R. 565; R. 574, ll. 16-17.

rehearing was filed on May 5, 2022, and then denied on June 2, 2022.[4] The petition for writ of certiorari was filed July 5, 2022. The State made its return July 12, 2022. On January 12, 2023, this Court granted the petition for writ of certiorari as to Questions 1, 3, and 4, and denied certiorari as to Question 2.

This brief of petitioner follows.

[4] App. 83 – 93; App. 94 – 109; App. 110.

STANDARD OF REVIEW

The applicable standard of review for all three issues presented is abuse of discretion. "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id. See also State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013); *State v. Whitner*, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009).

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." *State v. Grubbs*, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing *Means v. Gates*, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001)).

ARGUMENT

1.

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

The trial court found Dr. Price was qualified as an expert in schizoaffective disorder, but forbade him from testifying that schizoaffective disorder may produce false memories. This limitation improperly denied Petitioner a meaningful opportunity to present a complete defense.

Relevant facts

In 2016, law enforcement officials in Greenville received a letter from the complainant in which she accused Petitioner of molesting her when she was a child in the 1980's. Petitioner was ultimately charged with three counts of criminal sexual conduct with a minor in the first degree and with one count of lewd act on a minor based on these allegations.[5]

The complainant testified that she began seeing a therapist in 2011 to treat her for post-traumatic stress disorder (PTSD). The complainant claimed she had PTSD as a result of childhood sexual abuse by Petitioner. According to the complainant, in 2012, she was diagnosed with schizoaffective disorder. Complainant admitted she was diagnosed with and hospitalized for this disorder prior to contacting law enforcement and prior to her trial testimony.[6]

After the State rested, defense counsel offered the testimony of Dr. David Price, who was ultimately qualified as an expert in psychology, PTSD, and schizoaffective disorder. Dr. Price

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[5] R. 45, ll. 21-24; R. 371, ll. 19-25.

[6] R. 135, l. 19 – R. 136, l. 14; R. 185, ll. 18-20; R. 185, l. 18 – 186, l. 2.

had not evaluated the complainant, and he was offered to testify as a "blind" expert. During a proffer, Dr. Price explained that schizoaffective disorder can cause false memories. Dr. Price also explained that some other causes can result in false memories.[7]

Specifically, Dr. Price explained that risk factors for the development of false memories included the "presence of mental disorders." R. 423, ll. 2-5. Dr. Price explained that "schizoaffective people have thought disorders. And it's the disruption of thought and recall a[nd] delusion and all that can cause false memories." R. 423, l. 24 – 424, l. 1. Dr. Price agreed that a person with schizoaffective disorder could "misrepresent something in their mind." R. 424, ll. 10-15.

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

Dr. Price testified before the jury that schizoaffective disorder was a "thought disorder. It's sort of a mixture of schizophrenia and a mood disorder." Dr. Price explained that delusions and hallucinations may be symptoms of schizoaffective disorder.[8] Critically, Dr. Price was not permitted to testify before the jury to the important information he provided *in camera*: that persons with schizoaffective disorder have thought disorders which can cause false memories. The court did permit the testimony of another education witness—Shauna Galloway-Williams—

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[7] R. 403, ll. 2-3; R. 440, ll. 6-23; R. 430, ll. 6-13; R. 425, ll. 12-22; R., 423, l. 22 – 424, l. 1; R. 421, l. 16 – 422, l. 16.

[8] R. 445, ll. 19-21; R. 446, l. 9 – 447, l. 5.

who was a "blind" expert, when the evidence was offered by the State. Galloway-Williams's testimony covered a number of topics including the impact of trauma on memory.[9]

The jury deliberated for three hours and asked several questions. It received a charge pursuant to *Allen v. United States*, 164 U.S. 492 (1896). Ultimately, the jury only convicted Petitioner of two of the four charges.[10]

The court of appeals concluded that the limitation on Dr. Price's testimony was proper, although it did not address Petitioner's argument that the ruling impermissibly restricted him from presenting a complete defense.

> We find the trial court considered the evidence for reliability. Although Dr. Price indicated schizoaffective disorder could result in false memories, he also acknowledged false memories could occur in the absence of the disorder, which casted doubt on a causal link. Furthermore, Dr. Price stated he would need to evaluate Victim, or at least review her records, to opine on whether Victim's memories of the alleged abuse were false. In addition, because of the absence of any evidence that Victim fabricated or otherwise imagined her recollections of her past abuse, its probative value would have been substantially outweighed by the possibility that it would confuse the issues or mislead the jury.

State v. Galloway, 436 S.C. 453, 462–63, 872 S.E.2d 646, 651 (Ct. App. 2022); App. 88.

Discussion

The trial court's decision that Dr. Price was qualified to testify, just not about what would be particularly helpful to the jury, was error. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967); U.S. CONST. amend.

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[9] R. 421, l. 17 – 424, l. 1; R. 308, ll. 10-14; R. 316, l. 18 – 354, l. 11; R. 331, l. 5 – 332, l. 4.

[10] R. 526, l. 1 – R. 549, l. 19; R. 549, l. 5 – 550, l. 11.

VI; U.S. CONST. amend. XIV. "An accused's "right to present his own witnesses to establish a defense . . . is a fundamental element of due process of law." *Id.* The opportunity to present a complete defense must be "meaningful." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citing *California v. Trombetta,* 467 U.S. 479, 485 (1984)). "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Petitioner was improperly precluded from presenting a complete defense by the trial court's exclusion of probative evidence offered by a qualified expert. *Washington v. Texas*, 388 U.S. at 19.

The court of appeals' conclusion that Dr. Price's testimony on this matter was properly excluded under Rule 403, SCRE was incorrect. As an initial matter, Rule 403 was not the basis of the trial judge's ruling. The evidence Petitioner sought to introduce—that schizoaffective disorder could cause false memories—was relevant under Rule 401, SCRE, given the age of the case, nature of the allegations, and because the complainant admitted that she suffered from this disorder. The admission of this testimony was critical to Petitioner's defense because the normal tools cannot ferret out false testimony if the witness believes it is true. Dr. Price's testimony would have aided the jury by providing information it could use to determine whether the allegations were proven beyond a reasonable doubt. Although Dr. Price stated that other causes besides schizoaffective disorder could result in false memories, that information went to weight, not admissibility. Additionally, there was no requirement that other evidence be offered that the complainant "fabricated or otherwise imagined" her recollections of her past abuse in order for Dr. Price's testimony to be probative. It was probative because the complainant had schizoaffective disorder and this case came down to credibility.

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

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

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

Also, the trial court allowed the testimony of another education witness who was a "blind" expert, when the evidence was offered by the State. The court's exclusion of Dr. Price's testimony here was manifestly arbitrary, unreasonable, and unfair. *See State v. Grubbs*, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (court's ruling on the admissibility of an expert's testimony is an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair). That is particularly so, since the State's witness was allowed to give expert testimony about the impact of trauma on memory. R. 331, l. 14 – 332, l. 4.

To show prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing *Means v. Gates*, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001)). As seen, the jury deliberated for several hours and ultimately acquitted Petitioner of one of the charges and hung on another. The case involved thirty-year-old child sexual abuse allegations with no physical evidence. It came down to credibility.

Complainant admittedly was diagnosed with schizoaffective disorder before she contacted law enforcement and reported these allegations. The jury did not hear that schizoaffective disorder could cause false memories. Notably, hallucinations and delusions are not the same as false memories. *In camera*, Dr. Price explained that delusions can cause false memories, but he was not permitted to make that critical link for the jury. This error was not harmless on these unusual facts. *See State v. Mizzell*, 349 S.C. 326, 333–34, 563 S.E.2d 315, 319 (2002) (finding error is harmless beyond a reasonable doubt if the "reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt").

2.

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

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

Relevant facts

Complainant claimed at trial that she did disclose sexual abuse by Petitioner to her mother at the time it occurred. Mother claimed she did not contact law enforcement because she was trying to give Petitioner "the benefit of the doubt." Complainant further alleged that she wanted to contact the police when Mother broke up with Petitioner in 1991, but that Mother would not permit it.[11]

The complainant also claimed Petitioner and her mother had physical fights, and defense counsel objected pursuant to Rule 404(b), SCRE. The solicitor admitted the evidence did not fit a 404(b) exception: "Your Honor, this is not—the State does not seek to admit this evidence under 404(b). This is not common scheme or plan evidence, Your Honor. This is relevant evidence." These bad acts were different incidents from the charged misconduct for which Petitioner was on trial. R. 114, l. 19 – 115, l. 10.

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[11] R. 123, ll. 6-8; R. 240, l. 23 – 241, l. 13; R. 149, l. 14 – 150, l. 23.

The court ruled the testimony admissible. The complainant testified that Petitioner was an "angry" and "violent" person, and during one "really bad" incident Petitioner threatened to kill her mother. The complainant said Petitioner frequently had "violent event[s]" and "violent outburst[s]." Complainant alleged she did not contact police about this physical abuse of her mother because Petitioner threatened to kill mother if she did so.[12]

Admittedly, evidence of other bad acts came in without objection. The complainant claimed that among other things, Petitioner shot at her mother's house, shot at a Texaco station where her mother worked, shot at her grandparents' house, forced a car chase down the road to a judge's office, and broke in and kidnapped her brother from a motel. Although the complainant claimed some of these events "made the news" or involved law enforcement, no police reports or news reports were found by law enforcement to corroborate these claims. Defense counsel strategically used the "outlandish details" of these other bad acts to support his position that the complainant was "storytelling." The jury heard Investigator Perry, an experienced police detective who was assigned to the case, observe that he "had seen a lot of statements," and that Complainant's original statement "was reading more to me like she was, you know, writing a short story . . ."[13]

The court of appeals concluded that the evidence was both admissible and cumulative.

> [A]lthough we agree with the trial court [sic] admission of the evidence because we find it was relevant to Victim's delayed disclosure, we find the trial court erroneously failed to conduct a balancing test. However, we find the court's error was harmless because many other instances of Galloway's violence were admitted without objection . . . we find any error in failing to

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[12] R. 115, l. 17 – 116, l. 8.

[13] R. 167, l. 8 – 168, l. 11; R. 188, l. 4 – 193, l. 18; R. 374, ll. 20-23; R. 388, l. 6 – 390, l. 10; R. 501, l. 25 – 504, l. 8; R. 364, ll. 2-13.

> conduct a Rule 404(b) analysis when admitting Victim's initial testimony about Galloway's violence was harmless.

State v. Galloway, 436 S.C. 453, 466, 872 S.E.2d 646, 653 (Ct. App. 2022); App. 91.

Discussion

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

In order to admit evidence of bad acts not resulting in conviction, the trial court must, "[a]s a threshold matter . . . determine whether the proffered evidence is relevant." *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence is admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE. Once bad act evidence is found admissible under Rule 404(b), the court must then conduct the prejudice analysis required by Rule 403, SCRE. *State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013); *State v. Perry*, 430 S.C. 24, 31, 842 S.E.2d 654, 657-58 (2020). The court must determine "whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *King*, 424 S.C. at 200, 818 S.E.2d at 210. "Under Rule 403, the danger of the evidence being used only for the improper purpose of propensity must not substantially outweigh the probative value of any legitimate use." *Perry*, 430

S.C. at 41, 842 S.E.2d at 663. The trial court's failure to conduct any analyses under Rules 404(b) or 403 was error.

In *Spears*, this Court held where it was not implicit or apparent from the record that the trial court considered whether the probative value of a prior bad act was substantially outweighed by unfair prejudice, "the trial court erred by failing to conduct an on-the-record balancing test." *Spears*, 403 S.C. at 254, 742 S.E.2d at 881. The court of appeals concluded here that the evidence was "relevant to Victim's delayed disclosure," but that does not mean the evidence would pass a 403 balancing test. Abuse of Mother was not part of this crime. Neither Complainant nor Mother claimed they failed to disclose sexual abuse because of fear, although that is the State's argument on appeal. *See* State's Return to Petition for Writ of Certiorari at 20. Instead, at trial, Complainant claimed she did disclose the sexual abuse to her mother at the time, but Mother testified that she did not contact law enforcement because she was trying to give Petitioner "the benefit of the doubt." The bad act evidence predisposed the jury to favor guilt and would not have passed the balancing test. *See State v. Johnson*, 293 S.C. 321, 326, 360 S.E.2d 317, 320 (1987) (much of prior bad act testimony "established no material fact or element of the crime for which appellant was on trial; instead, it served to prejudice the jury by focusing its attention on appellant's propensity to commit criminal acts").

Moreover, the court of appeals erred in concluding the evidence was cumulative. The challenged bad acts and the unchallenged misconduct were not cumulative because they were separate incidents. It is not a waiver to object to some things and not to others. Counsel is expected to make strategic decisions about which items of evidence to lodge an objection

against. Evidence of other bad acts admitted without objection was of "outlandish" claims that defense counsel used to support his position that the complainant was "storytelling."[14]

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

[14] R. 167, l. 8 – 168, l. 11; R. 188, l. 4 – 193, l. 18; R. 374, ll. 20-23; R. 388, l. 6 – 390, l. 10; R. 501, l. 25 – 504, l. 8.

3.

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

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

Relevant facts

The complainant's mother claimed that after she broke up with Petitioner, he wrote her a letter in which he apologized for being abusive and tried to rekindle their relationship. Defense counsel objected to hearsay and pursuant to "the best evidence rule." The State did not make any proffer about what happened to the letter. The solicitor simply said, "Your Honor, there is no letter, so there's no way to have better evidence—". The court ruled the evidence was admissible based on "state of mind." The complainant's mother went on to testify that in the letter, Petitioner "apologized for being mean to us and he said he wouldn't do it anymore and he really wanted us to come back."[15]

The court of appeals determined that the letter was admissible and cumulative.

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

[15] R. 229, ll. 21-24; R. 233, ll. 12-18; R. 233, ll. 19-22; R. 234, ll. 1-2; R. 234, ll. 7-8; R. 262, ll. 12-14.

> where it is merely cumulative to other evidence that is admitted without objection).

State v. Galloway, 436 S.C. 453, 467–68, 872 S.E.2d 646, 654 (Ct. App. 2022); App. 92 – 93.

Discussion

"To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Rule 1002, SCRE. The best evidence rule provides that when the contents of a writing are sought to be proved, the original document must be produced unless some reason can be shown for its unavailability. *Penton v. J.F. Cleckley & Co.*, 326 S.C. 275, 282, 486 S.E.2d 742, 746 (1997).

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

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

To admit evidence of the contents of a letter without an original or copy, the proponent of the evidence, the prosecutor, was required to show that the original was lost or destroyed, that the loss or destruction was not in bad faith, and that the original could not be obtained by any available judicial process or procedure. It did not do so. Instead, the solicitor only said, "there is no letter," before the court ruled. This was error. *See Riggs v. Royal Beauty Supply, Inc.*, 879

S.W.2d 848, 850-51 (Ct. App. Tenn. E.S. 1994) (where witness simply stated "I'm sorry. I don't have the letter," the proponent of other evidence of contents of the letter failed to establish foundation under Tenn. R. Evid. 1004 and the witness's testimony about the letter's contents was properly excluded). Assuming *arguendo* that the evidence fell within the hearsay exception of a then-existing mental or emotional condition, the evidence was still admitted in violation of the best evidence rule. The proponent of the evidence did not meet its burden to show what happened to the letter and explain why it could not be obtained by judicial process.

The court of appeals' conclusion that the letter related to a collateral matter rather than being closely related to a controlling issue was erroneous. *See Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 580 (D. Md. 2007) (illustrating difference between controlling issue and collateral matter under Fed. R. Evid. 1004: a doctor testifying as an expert in a personal injury case can testify she is licensed to practice medicine without having to produce the license itself, but where a defendant is charged with practicing medicine without a license, his testimony alone that he has a license will not be accepted, as the license is closely related to a controlling issue).

The controlling issue in this case was whether Petitioner molested Complainant, and propensity evidence was closely related to this controlling issue. Propensity evidence is generally inadmissible given its efficacy in convincing a factfinder the defendant is guilty of the crime charged since he has committed other bad acts. *See generally Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime because the evidence would "weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge").

The court of appeals also erroneously determined the evidence was cumulative. The admitted evidence was not cumulative to other, separate bad acts because counsel made the strategic decision not to object to the separate bad acts. R. 501, l. 25 – 504, l. 8. Testimony that Petitioner apologized for abusing the complainant's mother, however, was not outlandish and it painted Petitioner as an abusive man. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. King*, 424 S.C. at 201, 818 S.E.2d at 211 (quoting *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). Here, given the age of the case, the lack of physical evidence, and given the jury's struggle to reach a verdict, the admission of propensity evidence of Petitioner's abusive nature cannot be considered harmless beyond a reasonable doubt.

CONCLUSION

Petitioner respectfully requests this Court reverse his convictions and remand for a new trial.

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This 25th day of January, 2023.