

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**Feb 21 2023**

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

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S.C. SUPREME COURT

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

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The State, .....Respondent,

v.

Michael Cliff Eubanks, .....Petitioner.

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**Reply to State's Return to Petition for Writ of Certiorari**

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Cliff Eubanks replies to the State’s Return to his Petition for a writ of certiorari (hereinafter “Petition” or “Return”).

### ARGUMENTS IN REPLY

- 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.<sup>1</sup>**

Cliff Eubanks raises two questions regarding the admissibility of the complaining witness’ symptoms of Post-Traumatic Stress Disorder (“PTSD”). The State’s Return conflates these issues into one argument. This reply maintains the distinction of the two questions.

The State’s Return addresses this question—whether this Court should overrule the *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993) line of cases or clarify the limitations this Court already placed on the *Schumpert* line of case—in a single paragraph. Return, at 9-10. Mr. Eubanks and the State agree the *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) line of cases “applied the general rule that a witness cannot bolster the credibility of another witness because doing so invades the province of the jury” and *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) acknowledged the validity of *Schumpert*. *Id.* However, this Court should address lingering confusion recognized by the Court of

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<sup>1</sup> 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 *State v. Hudnall*, 293 S.C. 97, 359 S.E.2d 59 (1987). *Id.* Rather, he seeks a limitation *Schumpert* that excludes opinion testimony, based on hearsay, bolstering the credibility of a complaining witness. *Id.*

Appeals in *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997), that reoccurred in Mr. Eubanks' jury trial. *Morgan* observed:

The *Schumpert* court never expressly addressed the two other central concerns of *Hudnall*,<sup>[2]</sup> 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. This Court should grant the writ and address this confusion.

Mr. Eubank's Petition also pointed out the tension between the *Schumbert* line of cases and this Court's recent decision in *State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566 (2018),<sup>3</sup> noting that the testimony of Samantha Black and Dr. Eman Sharawy vouched for the credibility of the child complaining witness in the same manner as the doctor's testimony in *Simmons*. Petition, at 9-13. This Court should grant the writ and consider this issue.

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<sup>2</sup> *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).

<sup>3</sup> Although the State's Return, at 10, acknowledges *Simmons*, the pleading never addresses Mr. Eubanks argument regarding the application of *Simmons*.

Finally, Mr. Eubanks recognizes this Court allows the admissibility of rape trauma evidence in criminal sexual conduct cases. However, the bench and bar would benefit from this Court's clarification about the interaction between the *Schumpert* line of cases, the *Kromah* line of cases, and *Simmons*.

**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.**

The State argues this question is not preserved for appellate review. Return, at 8. Mr. Eubanks, however, objected to testimony about PTSD as "terribly more prejudicial than probative" during the testimony of Samantha Black. R. 307. The trial judge recognized the court must conduct a Rule 403, SCRE analysis,<sup>4</sup> R. 308, ruled the "probative value of this evidence outweighs any prejudicial effect," R. 311, instructed counsel for Mr. Eubanks, "You do not have to object contemporaneously when they testify," R. 312, and recognized the ongoing objection when qualifying Dr. Eman Sharawy as an expert witness, R. 323. This issue, accordingly, is preserved for appellate review. *See, e.g., State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) ("[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court."). *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court.").

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<sup>4</sup> *See also Schumpert*, 312 S.C. at 506, 435 S.E.2d at 862 ("[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect.").

On the merits, the State argues, “This testimony and diagnosis was not mere repetition of hearsay, but was instead the exact type of behavioral testimony described in *Schumpert* and *White* which directly refutes Petitioner’s claim that nothing traumatic happened to the child and instead supports the existence of sexual abuse.” Return, at 11. Crucial to the State’s position is its contention “the testimony by Ms. Black and Dr. Sharawy did not impermissibly bolster or vouch for the child victim’s allegation of sexual abuse” because “neither tied the symptoms of trauma or PTSD to sexual abuse.” *Id.* Neither the State nor the Court of Appeals have acknowledged that Dr. Sharawy relied on the “trauma narrative” created during the child’s counseling sessions with Ms. Black. This “trauma narrative” details the first, last, and worst allegations of abuse and pertained to all three crimes for which Mr. Eubanks was on trial. This testimony violated *Simmons* and the *Kromah* line of cases. This Court should grant the writ and consider the issue.

**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?**

The State continues to argue this issue is not preserved for appeal. Return, at 12. The Court of Appeals, however, 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.” A. 999.

The State further argues the arguments raised on appeal under Rule 404, SCRE were not raised in the trial court, as concluded by the trial court. Return, at 12 and A. 999. Mr. Eubanks’ petition, however, does not focus on Rule 404. Rather, Mr. Eubanks’ petition

focuses on 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).

Mr. Eubank’s Petition complains the Court of Appeals also applied an incorrect harmless error analysis and explained why the evidence was prejudicial. Petition, at 16-18. The State’s Return never addressed this argument, 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 State argues this question and Questions V, VIII, X, VI, and XII “are raised in a conclusory manner and should be deemed abandoned.” Return, at 23. Granted these Questions are presented in a focused manner because of this Court’s page limitations for petitions for writs of certiorari. Rule 242, SCACR.<sup>5</sup> However, all of these issues were fully

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<sup>5</sup> Undesigned counsel moved to exceed the page limit for a petition for a writ of certiorari in two noncapital cases, and this Court denied the request. *Liverman v. State*, Appellate Case No. 2019-000839; *Crocker v. State*, Appellate Case No. 2014-001774. If this Court grants the writ on any of these issues, the parties will have an opportunity to brief these issues with more generous page limits.

briefed and ruled upon by the Court of Appeals. Additionally, the relief requested in Mr. Eubanks' Petition is narrowly focused.

Regarding this Question, 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," but held the evidence harmless. A. 1000. Mr. Eubanks' Petition is focused and explained 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." *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012). Mr. Eubanks pointed to the prejudice resulting from the prosecution's use of this evidence in its closing argument and incorporated the argument on this issue contained in Question III. Mr. Eubanks did not abandon this issue, and 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.**

The State contends this issue is abandoned. Return, at 23. Once again, this issue was fully briefed before the Court of Appeals, which 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.")). Mr. Eubanks' disagreed in his Petition and argued 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. Mr. Eubanks did not abandon this issue, and this Court should grant the writ and consider whether this objection preserved this question for 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.**

The State argues Mr. Eubanks “had possession of the cell phone until several days before trial” and “never indicated his expert would be able to examine the phone, which was damaged.” Return, at 19. Trial counsel did explain that Mr. Eubanks’ expert could be able to examine the cell phone. R. 99. In addition, 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 State and the court below overlooked this portion of Mr. Eubank’s motion. This Court should grant the writ and consider the 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.**

The State contends this issue is abandoned. Return, at 23. Once again, this issue was fully briefed before the Court of Appeals, which 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. Once again, the question raised in Mr. Eubank’s petition is very focused—whether the court below overlooked the fact that the trial court could have addressed this concern with additional voir dire under S.C. Code Ann. § 14-7-1020. Mr. Eubanks did not abandon this issue, and this Court should grant the writ and consider the question.

**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.**

Initially, the State argues this issue is not preserved for appeal. Return, at 20. The Court of Appeals, however, addressed the issue on the merits.

On the merits, the State argues the failure to disclose the connection to the State’s witnesses was unintentional; however, 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.**

The State contends this issue is abandoned. Return, at 23. Once again, this issue was fully briefed before the Court of Appeals, which held “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 question

presented to this Court is very narrow—whether the trial court should have convened a hearing on Mr. Eubanks’ motion rather than relying on the unsworn representations of counsel. This Court has long held “[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.”). This Court recently reaffirmed this rule in *Owens v. Stirling*, Howard Adv. Sheet. No. 5, (Op. No. 28132) (Jan. 26, 2023), at 19 (“[W]e cannot rely on the arguments of counsel to fill in the record. The arguments of counsel are not evidence, and this information should be passed upon by the circuit court in the first instance because that court is the proper fact-finder in this matter.”). Mr. Eubanks did not abandon this issue, and 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.**

The State contends this issue is abandoned. *Return*, at 23. Once again, this issue was fully briefed before the Court of Appeals, which relied on *State v. Hernandez*, 428 S.C. 257, 259, 834 S.E.2d 462, 463 (2019) (A. 1008-09), even though 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. Mr. Eubanks did not abandon this issue, and this Court should grant the writ and consider the question.

**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.**

The State contends this issue is abandoned. Return, at 23. Once again, this issue was fully briefed before the Court of Appeals, which declined to address the issue to provide “an advisory opinion that does not affect the outcome of the case.” A. 1010, n. 4. As pointed out in Mr. Eubanks’ Petition, questions remain regarding the accuracy of the transcript in this appeal. Mr. Eubanks did not abandon this issue, and this Court should grant the writ and consider the question.

**CONCLUSION**

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

Respectfully Submitted,

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February 21, 2023