STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICHARD KENNETH GALLOWAY,

APPELLANT

APPELLATE CASE NO 2022-000914

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT IN REPLY

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.

Tellingly, the State does not attempt to rebut Petitioner's argument that the abuse of discretion is apparent here when testimony the State's "blind" expert was allowed to give on memory is contrasted with testimony the defense's "blind" expert was precluded from giving on memory. The exclusion was manifestly arbitrary, unfair, and unreasonable. *State v. Grubbs*, 353 S.C. 374, 577 S.E.2d 493, 496 (Ct. App. 2003). *See* BOP at 10. Nor does the State address Petitioner's argument that since the defense expert was permitted to testify about other symptoms of schizoaffective disorder despite being a "blind" expert, his status as a "blind" expert should not have precluded him from providing testimony on how memory can be affected by schizoaffective disorder. This testimony was admissible under Rules 401, 403, and 702, SCRE. *See* BOP at 8 – 9.

Instead, the State argues, without any citation to authority, that Petitioner was required to present evidence Complainant suffered from symptoms of schizoaffective disorder before it could offer expert testimony that schizoaffective disorder could cause false memories. *See* BOR at 8. That was not required—it was undisputed that Complainant had been diagnosed with schizoaffective disorder. It was also undisputed Complainant was diagnosed with schizoaffective disorder prior to Complainant, her mother, or anyone else coming forward with these allegations to law enforcement. (Complainant also had traumatic brain injury and post-traumatic stress disorder prior to coming forward to law enforcement with her claims of sexual abuse.) Moreover,

absent symptoms, a person could not be diagnosed with an illness. Complainant's mental illness consisted of a concurrent thought disorder (schizophrenia) and a mood disorder. This thought disorder is a severe mental illness. *See Overstreet v. Wilson*, 686 F.3d 404, 413 (7th Cir. 2012) (schizoaffective disorder is characterized by severe and persistent psychotic symptoms). Given Complainant's admitted schizoaffective disorder, she may have falsely believed she was sexually abused when she was not. The defense's expert was not permitted to testify that thought disorders could cause false memories. The jury should have been allowed to consider this information when determining Complainant's credibility. The erroneous exclusion of this testimony improperly denied Petitioner a meaningful opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).[1]

The prosecution argues *State v. Turner*, 373 S.C. 121, 644 S.E.2d 693 (2007), is controlling. BOR at 11-12. Its reliance on *Turner* is misplaced. Unlike this case, *Turner* did not involve the right to present a defense and there was no dispute over whether a crime occurred. There, the victim was a pizza delivery driver who was robbed in broad daylight, got a clear view of her assailant's face, immediately called law enforcement, and picked the defendant out of a lineup the same day. The defense was an identity defense, and the defendant moved that he be allowed to question the victim on the facts that she was diagnosed with schizophrenia, that she took the medications Prozac and Risperdal for the condition, and that she became confused, heard voices, and had problems with her memory if she did not take the medications. *Turner*, 373 S.C. at 125-30, 644 S.E.2d at 695-98. *In camera*, the victim testified that she had taken her medications on the day of the crime. The trial court ruled the victim could not be questioned about the names

[1] R. 363, ll. 2-8; R. 138, ll. 6-13; R. 185, l. 18 – 186, l. 5; R. 135, l. 24 – 136, l. 14; R. 445, l. 19 – 446, l. 17; R. 421, l. 16 – 424, l. 1.

of her medications. Ultimately, the victim testified to the jury that she took unspecified medication, had taken it the day of the robbery, and that if she did not take the medication she got confused, heard voices, and was forgetful. *Id.*, 373 S.C. at 129-30, 644 S.E.2d at 698.

This Court held the limitation on cross-examination of the victim was reasonable; because she had been taking her medication, her diagnosis and medication names were "irrelevant to her ability to truthfully recall the events. Further, appellant has not shown why the specific information was needed or any nexus between the medications the victim was taking and any alleged misidentification of appellant." *Id.*, 373 S.C. at 131, 644 S.E.2d at 698. In this case, the excluded testimony went directly to Complainant's ability to truthfully recall the events. Since the complainant could have false memories of being sexually abused when she had not been, cross-examination alone was inadequate to ascertain the truth of her claims. There was a nexus—the symptom of false memories went directly to the heart of the defense's case. Complainant had the illness, Complainant did not formally accuse Petitioner until many years later (after she had been diagnosed with the illness), and the illness could have caused false memories. *Turner* should be distinguished.

Finally, the error was not harmless. According to the State, "any error was harmless because Mother corroborated many of the events Victim described." BOR at 12. "Therefore, the evidence guaranteed the jury would not believe the allegations of abuse were driven by schizoaffective disorder-induced false memories." BOR at 13. Importantly, Mother only corroborated some of Complainant's claims roughly thirty years after the alleged abuse, after Mother and Complainant had been estranged for many years, and after they had just gotten back in touch in the year or so prior to trial. And, while Mother claimed Complainant disclosed sexual abuse at the University Inn back in the 1980's, Mother repeatedly denied that Complainant had

done so when Mother was asked about it by Investigator Perry. Mother's corroboration did not "guarantee" anything. Nor was the permitted testimony from Dr. Price that schizoaffective disorder could cause delusions and hallucinations the same as the prohibited testimony that it could cause false memories. Dr. Price testified *in camera* that delusions could cause false memories, but the jury was not allowed to hear that connection. Moreover, a person might realize a delusion or hallucination was not true, unlike a false memory.[2]

The age of the case, nature of the allegations, and the importance of the evidence that was excluded do not support finding harmless error. This jury deliberated for three hours. It received an *Allen* charge. *Allen v. United States*, 164 U.S. 492 (1896). It asked six questions. It hung on one charge, acquitted on another, and convicted Petitioner of the remaining two charges.[3]

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*.

The State argues in Issue 2 that the bad act evidence of physical abuse and threats against the mother was admissible as *res gestae* because it was needed to explain Complainant's lengthy delay in disclosure. *See* BOR at 16 – 17. Contrarily, the State argues in Issue 3 that the bad act evidence of physical abuse was not closely related to a controlling issue. *See* BOR at 19-20. The State cannot have it both ways—either prior bad act evidence was probative and necessary, or it was not.

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[2] R. 237, l. 6 – 241, l. 13; R. 423, l. 24 – 424, l. 1.

[3] R. 526, ll. 1-2; R. 549, ll. 2-9; R. 546, l. 5 – 548, l. 2; R. 526, l. 1 – 550, l. 12.

"The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred." *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). Notably, the prosecution did not mention *res gestae* at trial. Complainant claimed at trial that she did disclose the abuse at the time to family members, but that she decided to formally accuse Petitioner after sessions with a counselor in 2016. Mother claimed at trial that Complainant disclosed but Mother wanted to give Petitioner "the benefit of the doubt[.]" This was not *res gestae* evidence.[4]

The admission of evidence Petitioner had physically abused Complainant's mother was not harmless as cumulative. "Cumulative evidence has repeatedly been defined to be additional evidence of the same kind to the same point." *State v. Funderburke*, 251 S.C. 536, 540, 164 S.E.2d 309, 311 (1968). The other alleged instances of bad conduct which were not objected to were unsubstantiated, outlandish claims by Complainant—claims which impugned Complainant's credibility rather than Petitioner's character because they were so outlandish.

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.

The State argues in Issue 3 the letter was not closely related to a controlling issue since it was "an apology for violence directed at Mother and [Complainant]." *See* BOR at 20. In contrast,

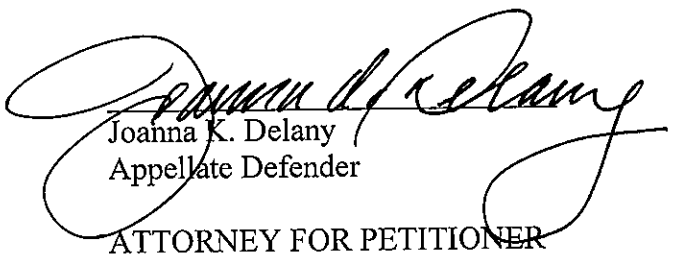
[4] R. 136, l. 7 – 138, l. 13; R. 147, l. 17 – 149, l. 25; R. 241, ll. 4-13.

as seen, the State argues in Issue 2 the physical abuse was necessary to explain the delay in disclosure. Both things cannot be true.

Finally, the evidence was not cumulative. Cumulative evidence is additional evidence of the same kind to the same point. *State v. Funderburke*, 251 S.C. at 540, 164 S.E.2d at 311. The evidence of other separate and specific bad acts, which made Complainant seem unhinged, was not evidence of the same kind to the same point.

CONCLUSION

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



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This 24th day of March, 2023.