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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 5892 (S.C. Ct. App. filed 3/25/2022)
Lower Court Case No. 2016-GS-42-02201

THE STATE,

RESPONDENT,

V.

THOMAS STEPHEN ACKER,

PETITIONER

APPELLATE CASE NO. 2022-000497

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Thomas Stephen Acker, Appellant.

Appellate Case No. 2016-002368

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 5892
Heard October 10, 2019 – Filed January 19, 2022

AFFIRMED

Appellate Defenders Adam Sinclair Ruffin and Kathrine Haggard Hudgins, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General William M. Blitch, Jr., Assistant Attorney General Susan Ranee Saunders, and Assistant Attorney General Jonathan Scott Matthews, all of Columbia; and Solicitor Barry Joe Barnette, of Spartanburg; all for Respondent.

MCDONALD, J.: Thomas Stephen Acker appeals his convictions for first-degree criminal sexual conduct (CSC) with a minor and disseminating obscene material to a minor, arguing the circuit court abused its discretion in (1) admitting expert testimony addressing the behavioral characteristics of child sexual abuse victims and (2) admitting his statement regarding a pornography addiction. Acker further

contends the circuit court erroneously denied his motion for a directed verdict on the dissemination charge. We affirm.

Facts and Procedural History

During the summer of 2014, Child's parents sent her to a counselor in response to her depression and because she was intentionally cutting herself. During her counseling sessions, Child disclosed that Acker, her grandmother's (Grandmother) ex-husband, sexually abused her at Acker and Grandmother's home, which she visited often after school when she was five years old.[1] Her parents filed a police report, and Child was referred to the Children's Advocacy Center, where she underwent a forensic interview. During the interview, Child recounted that the sexual abuse at Grandmother's house began when she was in kindergarten and lasted until she was eight or nine years old.

Child testified at trial that while she was at Grandmother's house, Acker touched her inappropriately, made her touch his genitals, exposed himself, and masturbated in front of her.[2] Acker told Child he would kill Grandmother if she told anyone about the abuse and that no one would believe her. Additionally, Child testified Acker showed her pornography on his computer while holding her in a chokehold and telling her, "You need to grow up and be like that and people will love you if you're like that." Such conduct happened on more than one occasion and occurred until she was seven years old.

Grandmother and Acker were married for five years; they divorced in July 2008. The two remained in contact after their divorce, and Acker contacted Grandmother through emails and letters and by showing up at her job. Grandmother noted Acker mentioned pornography in one of his letters and admitted he had been addicted to pornography for fifty-two years.

After the State presented its case, Acker moved for a directed verdict, which the circuit court denied. Thereafter, Acker testified he and Grandmother lived at his house during their five-year marriage. Acker worked from home in an office at the front of the house while Grandmother worked in an office in the back. Acker denied abusing Child and testified he never showed her anything on his computer

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[1] Grandmother and Acker were married at the time of the alleged abuse but divorced several years before Child's disclosure.

[2] Child was seventeen years old at the time of trial.

nor put her in a chokehold. He admitted he told Grandmother he "had had some problems, but it [was] not entirely pornography" and claimed he never showed anyone else pornography in his home.

On cross-examination, when asked if he had an addiction to pornography, Acker responded that he "had some contact with pornography from early ages" and acknowledged he told Grandmother he had been addicted to pornography for fifty-two years, including the years of the alleged abuse. However, Acker testified there was no truth to Child's allegations of abuse, claiming, "[t]hey are all fantasy tales that she dreamed up."

The jury convicted Acker of first-degree CSC with a minor and disseminating obscene material to a minor twelve years of age or younger. The circuit court sentenced him to twenty years' imprisonment on the CSC conviction and a concurrent five years on the dissemination charge, with credit given for time served.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Therefore, appellate courts are "bound by the trial court's factual findings unless they are clearly erroneous." *Id.* 345 S.C. at 6, 545 S.E.2d at 829. "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 494-95 (2013) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)). "An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions." *State v. Chavis*, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015).

Law and Analysis

I. Expert Testimony

Acker argues the circuit court erred in admitting Shauna Galloway-Williams's testimony on risk factors, grooming, and the behaviors displayed by child sexual abuse victims because her testimony did not provide information outside the ordinary knowledge of the jury and did not assist the jury in understanding the evidence or determining a fact in question. Acker asserts that although Galloway-

Williams testified there was a unique set of characteristics associated with victims of child sexual abuse, she failed to identify these specific characteristics. We disagree.

During an in camera hearing, Galloway-Williams testified she is the executive director of the Julie Valentine Center, where she provides clinical supervision and interviewed child victims.[3] She is a licensed professional counselor who has provided counseling for children and adults for fifteen years, and has over 150 hours of skills-based training, specifically in the area of interviewing and assessing children regarding allegations of child maltreatment. Although she is a clinician and had not published articles at the time of her testimony, she was familiar with publications in the field as she attended trainings based on peer-reviewed articles and continues to read peer-reviewed material in her continuing education. At the time of this trial, Galloway-Williams had testified as an expert thirty-six times.

Galloway-Williams explained the field of child sex abuse dynamics includes issues common to child sexual abuse cases, such as delayed disclosure, grooming, false allegations, false denials, risk factors, and the behaviors children can demonstrate when they have been sexually abused. There are unique characteristics associated with how children disclose abuse, how they react to abuse, and how offenders abuse children, and these can be counterintuitive to what people believe normal reactions should be. Galloway-Williams testified that children delay disclosing abuse for several reasons, including: they are usually abused by someone they know, trust, and love; they fear what could happen to them and others if they report their abuse; they feel responsible, guilty, or ashamed about the abuse; they may be unable to articulate the abuse depending on their age; and they may have been threatened by their abuser. A majority of the cases Galloway-Williams had been associated with involved delayed disclosure, and there are common factors attributable to this phenomenon.

Regarding the reliability of her testimony, Galloway-Williams stated she would testify based on her experience, education, and training. Research in the field has been based on case studies involving known abuse in an ongoing effort to consider behavioral similarities among abused children. As to the question of scientific reliability, Galloway-Williams noted clinicians in her field cannot seek to replicate results because one cannot expose children to abuse conditions for testing purposes. Her field is a "soft science" based on "longitudinal studies, case studies,

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[3] The Julie Valentine Center is a child abuse and sexual assault recovery center, which provides education, intervention, and treatment.

actual cases and reviewing those and looking at the similarities or differences in those and based on that type of research." A study in this area might "look at a certain number of cases of children where there's known sexual abuse …, and they may look at all of those cases and determine if there is a specific condition that's similar among those cases, for instance." When asked if she was aware of any research or cases that had found a delayed disclosure unreliable, she acknowledged there had been times when a child made a delayed disclosure and then, following an interview or investigation, it was determined abuse did not occur. Upon further cross-examination, Galloway-Williams admitted that the Julie Valentine Center does not track those instances involving delayed disclosures later determined to be false.

At the end of her in camera testimony, the State declared it intended to offer Galloway-Williams as an expert in child maltreatment and child abuse dynamics, including grooming, risk factors, false disclosures and allegations, denials and delayed disclosures, and behaviors children can exhibit after abuse. Acker objected, arguing Galloway-Williams's testimony that children delay disclosure because they were abused by someone they loved or trusted or because they feared their abuser, as well as her testimony addressing the impact abuse can have on a child's life, were all topics within the ordinary knowledge of the jury. Acker further argued the testimony was unreliable as it was based on the witness's own personal experiences, rather than the literature or science. Additionally, Acker asserted the State's sole purpose in presenting the testimony was to bolster the victim's credibility, and the prejudicial effect of this testimony substantially outweighed its probative value.

The circuit court disagreed, finding Galloway-Williams's testimony was outside the ordinary knowledge of the jury. Regarding reliability, the circuit court found the testimony was based on both the witness's personal experiences and the literature, noting the impossibility of testing for behavioral characteristics. Citing *Brown*[4] and *Jones*,[5] the circuit court concluded Galloway-Williams's testimony was reliable based "upon the requisite education, training and experience" and did not constitute improper bolstering because she was testifying as a blind expert only as to matters within her area of expertise, which might or might not be applicable to

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[4] *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), *abrogated on other grounds by State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018).

[5] *State v. Jones*, 417 S.C. 319, 790 S.E.2d 17 (Ct. App. 2016), *aff'd as modified*, 423 S.C. at 631, 817 S.E.2d at 268.

the characteristics of this child's case. The circuit court explained:

> [T]he witness doesn't know anything about this case because she's not talked to anybody about it; she's not interviewed any witness; she's not interviewed the child; she's not interviewed the parents; she's not interviewed the police officers; she's not interviewed the counselors; she's not interviewed the Children's Advocacy interviewer. So she knows nothing about the case, and she didn't even hear the witness' testimony.
>
> So there's nothing that she could that would—nothing she could reasonably do to bolster the witness' testimony because she doesn't even know what it is.
>
> The fact that she testifies to things that might be similar to those things experienced by the witness is not considered bolstering.

Finally, the circuit court found the prejudicial effect of Galloway-Williams's testimony did not substantially outweigh its probative value for Rule 403 purposes. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

In the presence of the jury, Galloway-Williams testified generally about delayed disclosure, risk factors, grooming, and the behavioral characteristics of victims of abuse. She explained there are several risk factors that make children more vulnerable to abuse, including substance abuse in the home; a child's age—with younger children being more vulnerable to abuse because they depend on adults for caregiving; and a child's special needs or disabilities because such children need more assistance from adults. Finally, children with behavioral problems may be more vulnerable to abuse because "if they are troublemakers or seen as bad children and then they do make a disclosure, an outcry, sometimes they're not believed because they have a previous history of getting in trouble or making things up."

Galloway-Williams explained "grooming" referred to an adult developing a trusting relationship and might include giving a child special attention or gifts or

spending more time with the child in an effort to normalize sexual behavior. She opined that grooming could affect a child's disclosure because a child may have developed a trusting and close relationship with his or her abuser, have received special attention, or been abused by someone they loved, therefore, impacting their ability to disclose the abuse. A child might display an array of behaviors after being sexually abused, including depressive tendencies, nervousness, anxiety, self-harm, or no behavioral effect at all. Galloway-Williams discussed different disclosures, including partial disclosures, accidental disclosures, purposeful disclosures, and false disclosures—including false denials. When referencing false disclosures and false denials, Galloway-Williams explained a false denial occurs when there is known abuse yet the child denies being abused, while a false allegation occurs when a child makes a disclosure that is later determined to be unfounded. When asked if false denials or false disclosures were more common, Galloway-Williams responded, "What's more common would be the false denial where we—where a child denies that something has happened when, in fact, something did occur."

A. Subject Matter of the Testimony and Ordinary Knowledge of the Jury

In *Jones*, 423 S.C. at 636, 817 S.E.2d at 271, our supreme court stated, "the law in South Carolina is settled: behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized." *See also State v. Anderson*, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015); *Brown*, 411 S.C. at 342, 768 S.E.2d at 251 (concluding "the unique and often perplexing behavior exhibited by child sex abuse victims does not fall within the ordinary knowledge of a juror" and, thus, the general behavioral characteristics of child sex abuse victims "are more appropriate for an expert qualified in the field to explain to the jury, so long as the expert does not improperly bolster the victims' testimony"), *abrogated on other grounds by Jones*, 423 S.C. at 637-38, 817 S.E.2d at 271 (abrogating *Brown* to the extent the court indicated it was appropriate to consider *voir dire* responses when evaluating the need for expert testimony); *see generally State v. Weaverling*, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999) ("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible.").

We find Galloway-Williams's testimony on grooming, the behaviors children may display after abuse, false denials, and risk factors falls within this recognized area of expertise. *See Jones*, 423 S.C. at 636-37, 817 S.E.2d at 271 (determining an expert's testimony about delayed disclosure fell within the commonly recognized category of behavioral characteristics of sex abuse victims); *see generally Brown*,

411 S.C. at 337, 768 S.E.2d at 249 (noting the expert testified children delay disclosure for many reasons, including grooming by the perpetrator). Galloway-Williams's testimony provided context for the jury and assisted jurors in understanding how a change in a person's behavior might indicate abuse, why a child might delay disclosure, and how special attention and grooming affect a child's ability to disclose abuse. *See Weaverling*, 337 S.C. at 474-75, 523 S.E.2d at 794 (alteration by court) ("[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. . . . It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor." (citations omitted)). Thus, the circuit court properly concluded the subject matter of Galloway-Williams's testimony was beyond the ordinary knowledge of the jury. *See Jones*, 423 S.C. at 638, 817 S.E.2d at 271 ("Whether the subject matter of a proposed expert's testimony is outside the realm of lay knowledge is a determination left solely to the trial judge and his or her sense of what knowledge is commonly held by the average juror.").

B. Reliability

Acker next asserts the circuit court erred in finding Galloway-Williams's testimony reliable by erroneously relying on her education, training, and experience, which related to her qualifications, not the reliability of her testimony. He contends the State failed to establish the testimony itself was reliable and analogizes this case to those in which the circuit court failed to make any reliability determination at all. Additionally, he argues Galloway-Williams did not provide the necessary specific research, publications, training information, or case studies on which she relied to support her testimony and failed to identify the unique characteristics she testified were associated with child sexual abuse.

"All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). Rule 702 provides, "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. "There is no formulaic approach for determining the foundational requirements of qualifications and reliability in non-scientific evidence." *Chavis*, 412 S.C. at 108, 771 S.E.2d at 339.

In *Chavis*, the defendant appealed his convictions for multiple crimes involving unlawful sexual conduct with a minor, arguing the circuit court erred in allowing an expert witness to testify about a forensic interviewer's report because the State failed to demonstrate the expert's reliability. 412 S.C. at 104, 107, 771 S.E.2d at 337, 339. Our supreme court found that although the expert had "extensive experience and training," the State failed to show the expert's individual reliability because there was no evidence establishing the expert's conclusions were accurate. *Id.* at 107-08, 771 S.E.2d at 339. The court explained that "evidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies." *Id.* at 108, 771 S.E.2d at 339. Thus, the court concluded the circuit court erred in allowing the expert's testimony because the threshold reliability requirement of Rule 702 was not met. *Id.*

The *Jones* defendant appealed his convictions for first-degree CSC with a minor, second-degree CSC with a minor, and two counts of lewd act upon a child, arguing the circuit court erred in permitting the same child abuse dynamics expert involved in this case, Galloway-Williams, to testify because there was no evidence supporting the reliability of her opinions, including whether the opinions were subjected to peer review. 417 S.C. at 326, 331, 790 S.E.2d at 21, 23, *aff'd as modified by Jones*, 423 S.C. at 631, 817 S.E.2d at 268. However, this court distinguished *Chavis* because the *Jones* expert was not qualified as a forensic interviewer and did not discuss any conclusions garnered from the RATAC[6] method of interviewing victims; rather, the expert testified in general terms about child sex abuse dynamics, including delayed disclosure and the responses of non-offending caregivers. *Id.* at 332, 790 S.E.2d at 24. This court concluded the record supported the circuit court's reliability finding because the expert "testified that her methods were published in articles in professional journals and trade publications, subjected to peer review, uniformly accepted and recognized within the area of child sex abuse experts and professionals, and relied upon for sexual abuse counseling and treatment." *Id.* at 333, 790 S.E.2d at 24. The court further found the expert testified she had given multiple presentations on the role of non-offending caregivers and delayed disclosure, her employer applied the principles she described in her testimony, and other counselors used said principles. *Id.* at

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[6] RATAC stands for Rapport, Anatomy, Touch, Abuse Scenario, and Closure. Our supreme court acknowledged in *Kromah*, 401 S.C. at 357 n.5, 737 S.E.2d at 499 n.5, "that RATAC is not without its critics." *See Chavis*, 412 S.C. at 107 n.6, 771 S.E.2d at 339 n.6.

333, 790 S.E.2d at 24-25. Accordingly, the court concluded the circuit court did not abuse its discretion in performing its gatekeeping function as to reliability. *Id.* at 333, 790 S.E.2d at 25.

Our supreme court affirmed as modified in *Jones*, finding *Chavis* distinguishable because the *Jones* expert did not testify about the RATAC protocol or forensic interviewing methods. 423 S.C. at 639, 817 S.E.2d at 272. Rather, "her testimony focused on explaining the concept of delayed disclosure and the role of nonoffending caregivers in the dynamics of sexual abuse." *Id.* Regarding the reliability of the expert's testimony, the court noted the expert testified: (1) she could provide citations to the court identifying articles serving as the basis for her opinions; (2) "her opinions were supported by peer-reviewed professional journals and trade publications, all of which were uniformly accepted and recognized by child sexual abuse experts and professionals"; (3) "she participates in the peer review process and has given numerous presentations on the subject"; and (4) "she was unaware of any organizations that found her methods unreliable and that, out of all cases involving delayed disclosure of child abuse, statistically two to four percent are considered false allegations." *Id.* Thereafter, the court concluded the expert "met the threshold reliability requirement when she testified her methods were published in professional articles and trade publications, subject to peer review, and uniformly accepted and relied upon by other professionals in the field." *Id.* at 640, 817 S.E.2d at 272.

Similarly, we find the circuit court did not abuse its discretion in determining Galloway-Williams's testimony here satisfied the reliability threshold. As in *Jones*, *Chavis* is distinguishable because Galloway-Williams was not qualified as a forensic interviewer and did not testify as to the specifics of this child's disclosure. Instead, she testified as a blind expert on child sexual abuse dynamics, addressing general concepts and characteristics of victims in such cases. Her testimony was based on her experience and the research conducted in her field, and this research was based on case studies for which the researchers analyzed cases of known abuse to determine whether there were similarities among cases. Thus, the circuit court did not err in admitting Galloway-Williams's testimony after properly considering its reliability.

C. Bolstering

Acker contends Galloway-Williams indirectly bolstered Child's credibility when she testified that false denials are more common than false allegations because it "suggested that the jury should believe the minor witness because children are

more likely to deny that abuse occurred than make a false allegation of abuse." Acker further challenges the admission of Galloway-Williams's testimony that children with behavioral problems are more vulnerable to abuse because they are less likely to be believed.

Galloway-Williams's testimony did not constitute improper bolstering. She was a blind expert; she never met Child or her parents, and she had no information about the circumstances of Child's case. *See e.g., Anderson*, 413 S.C. at 218-19, 776 S.E.2d at 79 ("The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. 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.").

First, Galloway-Williams's testimony regarding disclosures by children with behavioral problems did not improperly bolster Child's credibility because the testimony was included in her general testimony addressing multiple risk factors that make certain children more vulnerable to abuse. *See State v. Barrett*, 416 S.C. 124, 131-33, 785 S.E.2d 387, 390-91 (Ct. App. 2016) (finding an expert's testimony regarding general behavioral characteristics did not improperly vouch for the victim's credibility because she never directly or indirectly commented on the victim's veracity and truthfulness or the credibility of the victim's claims and she did not limit her testimony to only those behavioral characteristics displayed by the victim). She did not comment on Child's credibility, and she did not seek to link her general characteristics testimony to any type of behavioral reaction Child may—or may not—have exhibited. *See id.*; *Brown*, 411 S.C. at 345, 768 S.E.2d at 253 (finding the expert did not improperly bolster the victim's credibility because she testified in broad terms about the reasons victims delay disclosing abuse and she never applied her testimony to the victims in the case).

Additionally, there was no evidence that Child had behavioral problems such that others would be less likely to credit her disclosures. Rather, the testimony indicated Child did not exhibit behavioral or emotional problems until she began cutting her arms. Thus, as in *Brown*, we do not believe Galloway-Williams's general testimony in this case about children with behavioral problems potentially not being believed bolstered Child's credibility. *See State v. Cartwright*, 425 S.C. 81, 96, 819 S.E.2d 756, 764 (2018) (concluding the independent expert did not improperly bolster the victims' credibility because she never testified she believed the victims; rather, her testimony generally explained the potential reasons why children recant and the behaviors common to sexually abused children).

Nor did Galloway-Williams's testimony about false denials being more common than false allegations improperly bolster Child's credibility. As stated previously, Galloway-Williams did not testify regarding Child; rather, she testified as to the general behavioral reactions of children who have been abused, risk factors, and the concepts of grooming and delayed disclosure. Although we acknowledge Galloway-Williams's testimony could be interpreted as having insinuated Child's testimony was credible because false allegations are not as common as false denials, Galloway-Williams's statement here is distinguishable from those in cases in which our courts have found there was no way to interpret the challenged statements *other than as* bolstering a victim's credibility. *Compare State v. Makins*, 433 S.C. 494, 505, 860 S.E.2d 666, 672 (2021) (holding dual expert's testimony served foundational purpose other than to vouch for minor's credibility but cautioning that the use of "one witness as both a characteristics expert and the treatment witness is a risky undertaking" and the better practice is to use a blind witness as *Anderson* urged), *with State v. McKerley*, 397 S.C. 461, 465-67, 725 S.E.2d 139, 142-43 (Ct. App. 2012) (finding although the expert never directly stated she believed the victim, the jury could not interpret the expert's testimony in any way other than that she believed the victim was telling the truth); *see also Chavis*, 412 S.C. at 109, 771 S.E.2d at 340 (finding the circuit court erred when allowing an expert witness to testify about her recommendation that the victim "not be around the [defendant] for any reason" because this testimony could only be interpreted as indicating the expert believed the victim's allegations).

Here, Galloway-Williams never treated Child and never testified she believed Child, nor did she provide any indication that she had considered Child's specific disclosures. *See State v. Jennings*, 394 S.C. 473, 479-80, 716 S.E.2d 91, 94 (2011) (first alteration by court) (concluding the circuit court erred in admitting a forensic interviewer's report stating the victims "provide[d] a compelling disclosure of abuse" by the defendant because "[t]here is no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful")). Galloway-Williams never linked her general statements to this case or Child's credibility. *See Brown*, 411 S.C. at 345, 768 S.E.2d at 253 (finding an expert did not improperly bolster the victim's credibility when she testified that seventy to eighty percent of children delay disclosing abuse because she never applied this statistic to the victims in that case); *see generally Weaverling*, 337 S.C. at 474-75, 523 S.E.2d at 794-95 (concluding an expert's testimony that it was very common for a victim of abuse to commit subsequent abuse on another person "simply explained the effect" of the prior abuse on the individual's subsequent conduct); *State v. Smith*, 411 S.C. 161, 172, 767 S.E.2d 212, 218 (Ct. App. 2014) (stating that although the State's question about whether

the length of the delay in the disclosure eroded the credibility of the disclosure invited vouching, there was no reversible error because the expert explained credibility and delayed reporting were unrelated and the expert did not provide an opinion about the victim's truthfulness). Because Galloway-Williams's testimony did not improperly bolster Child's credibility, the circuit court did not abuse its discretion in admitting it.

D. Rule 403, SCRE

Acker next argues the circuit court erred in declining to find the probative value of Galloway-Williams's testimony was substantially outweighed by its prejudicial effect. Acker contends the testimony about risk factors, grooming, and behaviors exhibited by victims of abuse was not relevant and lacked probative value because it did not assist the jury in determining any fact at issue or in understanding the evidence. According to Acker, this expert testimony did not prove or disprove anything but instead, "tended to suggest a decision based on unreliable testimony that improperly suggested to the jury that the expert believed the minor witness."

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE. "'Relevant evidence' means evidence having any tendency to 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." Rule 401, SCRE. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993)). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)).

Galloway-Williams's testimony was relevant and assisted the jury in understanding child sexual abuse victims' behavior and how children react differently to abuse: some demonstrate self-harm, depression, or anxiety, while others exhibit no outward change in behavior at all. *See Jones*, 417 S.C. at 336-37, 790 S.E.2d at 26-27 (finding the probative value of the expert's testimony outweighed its prejudicial effect because it helped the jury understand the victim's behavior and demeanor and was "crucial" in explaining why child victims "are often unable to effectively relay incidents of criminal sexual abuse"); *Brown*, 411 S.C. at 347-48,

768 S.E.2d at 254 (concluding the expert's testimony was highly probative and helped the jury understand sex abuse victims' behavior and did not unfairly prejudice the defendant); *Weaverling*, 337 S.C. at 475, 523 S.E.2d at 794 (stating behavioral evidence "assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor"). This testimony further assisted the jury in understanding why victims delay disclosure, how close relationships can affect disclosure, and how certain factors may increase the risk of abuse. Therefore, we agree with the circuit court that this testimony was relevant and probative.

Significantly, Galloway-Williams did not testify that *Child* displayed behaviors associated with abuse or that she harmed herself and suffered depression. In fact, she did not—and as observed by the circuit court, could not—speak to Child's behavior at all. Rather, she generally explained behaviors commonly exhibited by sex abuse victims, risk factors, and grooming. Thus, we find no abuse of discretion in the circuit court's admission of this testimony. *See* Rule 403, SCRE (stating relevant evidence is inadmissible if the unfair prejudice substantially outweighs its probative value); *Brown*, 411 S.C. at 347-48, 768 S.E.2d at 254; *Gilchrist*, 329 S.C. at 630, 496 S.E.2d at 429 ("All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided." (quoting *United States v. Rodriguez-Estrada*, 877 F.2d 153, 156 (1st Cir. 1989))).

II. Directed Verdict

Acker argues the circuit court erred in denying his motion for a directed verdict on the charge of dissemination of obscene material to a minor because the State failed to prove the videos he allegedly forced Child to watch were obscene and Child's testimony alone was insufficient to prove obscenity. We disagree.

Section 16-15-355 of the South Carolina Code (2015) provides a person "eighteen years of age or older who knowingly disseminates to a minor twelve years of age or younger material which he knows or reasonably should know to be obscene within the meaning of Section 16-15-305 is guilty of a felony . . . ." Material is obscene pursuant to section 16-15-305(B) if:

> (1) to the average person applying contemporary community standards, the material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (C) of this section;
> (2) the average person applying contemporary

> community standards relating to the depiction or description of sexual conduct would find that the material taken as a whole appeals to the prurient interest in sex;
> (3) to a reasonable person, the material taken as a whole lacks serious literary, artistic, political, or scientific value; and
> (4) the material as used is not otherwise protected or privileged under the Constitutions of the United States or of this State.

S.C. Code Ann. § 16-15-305(B) (2015). Patently offensive is defined as "obviously and clearly disagreeable, objectionable, repugnant, displeasing, distasteful, or obnoxious to contemporary standards of decency and propriety within the community." S.C. Code Ann. § 16-15-305(C)(2) (2015). Prurient interest is defined as "a shameful or morbid interest in nudity, sex, or excretion and is reflective of an arousal of lewd or lascivious desires and thoughts." S.C. Code Ann. § 16-15-305(C)(3) (2015). "Obscenity must be judged with reference to ordinary adults except that it must be judged with reference to children or other especially susceptible audiences or clearly defined deviant sexual groups if it appears from the character of the material or the circumstances of its dissemination to be especially for or directed to children or such audiences or grounds." S.C. Code Ann. § 16-15-305(D) (2015).

"On appeal from the denial of a directed verdict, [the appellate court] views the evidence and all reasonable inferences in the light most favorable to the State." *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). "The Court's review is limited to considering the existence or nonexistence of evidence, not its weight." *State v. Bennett*, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016). The case should be submitted to the jury if the State provides "direct or substantial circumstantial evidence reasonably tending to prove the defendant's guilt, or from which the defendant's guilt can be fairly and logically deduced." *State v. Reid*, 408 S.C. 461, 472, 758 S.E.2d 904, 910 (2014).

Child testified Acker showed her pornography on his computer in his home office, specifically "videos of people having sex." Viewing this evidence in the light most favorable to the State, we find the circuit court properly denied Acker's motion for a directed verdict. *See generally Weaverling*, 337 S.C. at 465-67, 523 S.E.2d at 789-90 (noting the victim stated the defendant showed him "dirty" magazines, a pornographic movie, and nude photographs and the defendant was convicted of disseminating harmful material to a minor).

III. Rule 404, SCRE

Acker next contends the circuit court erred in allowing Grandmother to testify about a letter he wrote to her in which he admitted to having a fifty-two-year pornography addiction. On appeal, he asserts the substance of the letter constituted evidence of a prior bad act not subject to an exception to the inadmissibility mandated by Rule 404, SCRE.

Grandmother testified she and Acker remained in contact after they divorced in July 2008 and began to testify as to their correspondence. Acker objected to her testimony as irrelevant, and the circuit court indicated it would sustain the objection unless the State could "show some relevance." Grandmother then testified Acker contacted her by email and through letters or by coming to her workplace. When asked whether Acker mentioned viewing pornography in his letters, Grandmother answered, "Yes," and Acker again objected to the testimony as lacking relevance. The circuit court held a bench conference before allowing the State to proceed. The State then asked Grandmother if Acker ever mentioned viewing pornography in his letters, and Acker again objected. The circuit court overruled the objection. Grandmother responded that Acker "admitted to [her] in that letter that he had been addicted to pornography for [fifty-two] years."

At the end of Grandmother's testimony and outside the presence of the jury, the circuit court allowed Acker to state his objections more fully on the record. Acker first objected based on Rule 401, arguing any pornography addiction was irrelevant because the time period of his addiction included the majority of his life and the letter did not describe the medium of the pornography, i.e., whether it involved magazines, television, computer images, or videotapes. Acker asserted the testimony left "too much room" for speculation by the jury about the nature and extent of his addiction and the form it could take. Acker also argued that even if the testimony were relevant, it was inadmissible under Rule 403 because the testimony was "too prejudicial" since it covered a large period of time and there was no testimony as to the form of the addiction. Acker contended the testimony did not "necessarily go toward the fact that he had a propensity for showing this as a person in his mid [sixties] to a young child that is five years old." Finally, Acker argued the testimony was inadmissible under Rule 404 because the testimony constituted improper character evidence and did not satisfy any exception set forth in Rule 404. Acker requested a mistrial if the circuit court maintained its admissibility ruling.

In response, the State argued Acker's admission in the letter included the 2004-2005 timeframe during which Child claimed Acker showed her pornography and it was necessary for the State to establish the presence of obscene material to prove the dissemination charge. The State elaborated, "I think the jury can decide whether or not he showed it to that child. Him just having the pornography is not illegal. It's him showing it to the child." Thus, the State continued, his admission as to the length of his addiction was relevant to show Acker's possession of pornography during the timeframe he allegedly showed obscene material to Child.

The circuit court found the testimony admissible because it was "clearly relevant" to the dissemination charge and the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. The circuit court admitted the testimony under Rule 401 and Rule 403. The circuit court did not separately address Rule 404.

The State argues Acker's Rule 404 argument is not preserved for review because the circuit court did not rule on this ground of his argument. Although the circuit court did not expressly rule on Acker's Rule 404 argument, the circuit court addressed it by implication in overruling Acker's objection and admitting the evidence. The grounds for the objection, however, are more problematic. At trial, Acker objected to the admission of the statement in the letter to Grandmother as improper character evidence under Rule 404(a). *See* Rule 404(a), SCRE ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . " other than as set forth in certain exceptions.). Before this court, however, Acker asserts the testimony was improperly admitted under Rule 404(b) as inadmissible evidence of other crimes, wrongs, or acts. *See* Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."). As the Rule 404(b) argument was not made to the circuit court, we find it unpreserved for our review. *See State v. Adams*, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("Arguments not raised to or ruled upon by the trial court are not preserved for appellate review. Moreover, a defendant may not argue one ground below and another on appeal." (citation omitted)).[7]

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[7] Because our ruling on preservation resolves this issue, we decline to address the State's additional argument that Acker's own testimony on this point rendered Grandmother's testimony merely cumulative and therefore harmless.

For these reasons, we affirm Acker's convictions.

AFFIRMED.

WILLIAMS, A.C.J., and HUFF, A.J., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

THOMAS STEPHEN ACKER,

APPELLANT

APPELLATE CASE NO. 2016-002368

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 5892

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, counsel for Appellant, Thomas Stephen Acker, respectfully petitions this Court for rehearing. In May of 2016, the Spartanburg County Grand Jury indicted Appellant for criminal sexual conduct with a minor first degree and disseminating obscene material to a minor twelve years of age or younger, indictments #2016-GS-42-2201, 2202. On November 16, 2016, Appellant proceeded to jury trial before the Honorable J. Derham Cole. The jury returned verdicts of guilty and Judge Cole sentenced Appellant to twenty years for criminal sexual conduct with a minor and five years concurrent for the disseminating charge. A timely notice of intent to appeal was served and the direct appeal perfected. On October 10, 2019, a three

judge panel of this Court heard oral argument. On January 19, 2022, this Court affirmed the convictions.

First, counsel respectfully submits that this Court overlooked the fact that the trial court in the present case failed to perform its gatekeeping function when the State failed to establish the foundational reliability requirement for the admission of the expert testimony. At trial the judge, over objection, found the witness qualified in the field of child maltreatment and child abuse dynamics. (R. p. 106, line 25 – p. 107, lines 1-3). During the pre-trial hearing, when asked about the scope of the expert testimony, the State answered, "Your Honor, we intend to have her testify regarding some risk factors, grooming, delayed disclosure and some behaviors that children may exhibit." (R. p. 92, lines 14-16). The trial court found the subject matter of the testimony reliable stating, "And I do find that the testimony is sufficiently reliable to be admitted because it is based upon the requisite education, training and experience." (R. p. 100, lines 7-9). This goes to qualification of the witness rather than the reliability of the subject matter. The fact that this particular witness had been qualified as an expert 36 times (R. p. 76, lines 9-12) did not relieve the trial court from its duty as a gatekeeper to require the State to establish the reliability of the expert testimony. While the witness testified that she read peer reviewed articles, she failed to name one of these articles. The witness failed to identify any research, case study, publication or treatise to support the substance of her testimony. In the present case the State failed to establish the reliability of the expert testimony.

Second, counsel respectfully submits that this Court overlooked the fact that, if reliable, the expert witness's testimony went beyond the scope of her expertise of discussing risk factors, grooming, delayed disclosure and general behavioral characteristics when the State asked her on direct examination about false denials and false disclosures. (R. p. 111, lines 6-7). The witness discussed false denials and false disclosures and testified that it was more common for children to

deny abuse when something happened than to make a false allegation of abuse when it did not happen. (R. p. 111, line 8 – p. 112, lines 1-10). The testimony went beyond explaining that children may deny abuse as a behavioral characteristic of child sex abuse victims. Instead, the testimony improperly reflected the expert's opinion about the credibility of sex abuse allegations made by children, and, by inference, the credibility of the child witness in the present case.

Additionally, counsel respectfully submits that this Court overlooked the fact that the expert witness's testimony went beyond discussing risk factors when she testified that, "They are more vulnerable to it for many reasons, one of them being that if they are troublemakers or seen as bad children and then they make a disclosure, an outcry, sometimes they're not believed because they have a previous history of getting in trouble or making things up." (R. p. 100, lines 6-10). Again, as with the testimony that false denials are more common than false accusations, the testimony that children with behavioral problems are more vulnerable because they are not believed when they make a disclosure improperly reflected the expert's opinion about the credibility of sex abuse allegations made by children in general, including the witness in the present case. Believability and credibility of witnesses is a determination to be made by the jury, not an expert witness.

Third, counsel respectfully submits that, alternatively, if the expert testimony is reliable and that portion of the expert testimony that went to credibility of the witness is admissible, the probative value of the credibility testimony is substantially outweighed by the danger of unfair prejudice.

Fourth, counsel respectfully submits that in finding the Rule 404(b) issue unpreserved this Court misapprehended the Rule 404, SCRE, objection made at trial with regard to the trial court allowing a witness to testify that Appellant admitted in a letter that he had been addicted to pornography for fifty-two years. In addition to objecting to the testimony based on Rule 401, and Rule 403, Appellant also objected to the testimony stating, "Additionally, under Rule 404 I don't see

any type of exception. It's character evidence, and character evidence, of course as the Court knows, is generally inadmissible. And based on that I would respectfully submit to the Court that the testimony should not have been admitted." (R. p. 68, lines 6-11). The objection did not specify Rule 404(a) as opposed to Rule 404(b). Appellant specifically stated that the addiction to pornography testimony did not meet an exception. While Rule 404(a)(1)(2) and (3) provide exceptions, none are applicable to the pornography testimony. The only exceptions that could possibly be applicable to the pornography testimony are found in Rule 404(b). The testimony does not meet any of the exceptions provided in Rule 404(b). Respectfully, the issue is preserved for appellate review.

Fifth and finally, counsel respectfully submits that this Court overlooked the lack of evidence to prove dissemination of obscene material in finding that the trial court correctly denied the motion for a directed verdict on that charge. The witness testified that Appellant showed her pornography. (R. p. 34, line 7). When asked about the pornography, the minor testified, "On his computer he showed me videos of people having sex." (R. p. 34, lines 9-10). No videos were introduced in evidence. The State failed to prove that the videos "of people having sex" were obscene as required pursuant to S.C. Code §16-15-305. The trial judge erred in refusing to direct a verdict of acquittal for the dissemination charge.

Based on these five specific points, as outlined in more detail below, counsel for Appellant respectfully requests rehearing.

1. **The trial judge erred in allowing a witness to testify as an expert in the field of child maltreatment and child abuse dynamics when the State failed to prove the reliability of the substance of the expert's testimony.**

Appellant objected to allowing the State's witness, Shauna Galloway-Williams, to testify as an expert in the field of child maltreatment and child abuse dynamics arguing that the subject matter of the testimony was not reliable. (R. p. 96, lines 1-5). The judge overruled the objection stating, "And I do find the testimony is sufficiently reliable to be admitted because it is based upon the requisite education, training and experience." (R. p. 100, lines 7-9). Appellant renewed the objection immediately following the judge's ruling and again when the State moved to qualify the witness as an expert in front of the jury. (R. p. 100, lines 12-14; p. 107, line 3). Appellant renewed the objection at the close of the State's case, the close of the Defense case and after the jury returned the verdict. (R. p. 123, lines 17-19; p.152, line 23 – p. 153, lines 1-2; p. 193, lines 15-19). The judge denied all of the renewed motions. The judge erred in allowing the witness to testify as an expert when the State failed to prove that the subject matter of the witness's testimony was reliable.

Pursuant to Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), prior to admitting expert testimony the judge must determine that the testimony is reliable. "Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable. See State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (evaluating whether expert testimony on DNA analysis met the reliability requirements)." Id. 389 S.C. at 445-447, 699 S.E.2d at 175. In State v. Chavis, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015) the South Carolina Supreme Court wrote, "Both parties argue, and we agree, that State v. White should apply in qualifying child abuse assessment experts because their testimony is non-scientific." In the present case the judge allowed the witness to testify as an expert in child maltreatment and child abuse dynamics. (R. p.

107, lines 1-4). Pursuant to Chavis, the witness testimony in the present case is non-scientific expert testimony. Non-scientific expert testimony must still satisfy the reliability requirement of Rule 702, SCRE, and Watson. State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). In White the South Carolina Supreme Court set forth foundational requirements for the admission of non-scientific expert testimony in regard to dog tracking, recognizing that the standard reliability factors set forth for scientific expert testimony in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) may not be useful when evaluating non-scientific expert testimony. In a footnote in White the Court wrote:

> The State v. Council factors for scientific expert testimony are: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.

382 S.C. 265, 274, 676 S.E.2d 684, 688 fn# 7.

> The factors for expert dog tracking testimony set forth in White are:
>
> (1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) by experience the dog is found to be reliable; (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and (6) the trail was not otherwise contaminated.

382 S.C. at 272, 676 S.E.2d at 687. In the present case the trial judge found the expert testimony reliable "based upon the requisite education, training and experience." (R. p. 100, lines 7-9). These factors go to the qualification of the witness not the reliability of the subject of the testimony. The judge abused his discretion in allowing the witness to testify as an expert when the State failed to prove that the substance of the testimony was reliable.

The challenge to reliability goes to the subject of the testimony rather than the individual qualification of the witness. Based on the ruling by the trial judge in the present case, expert

testimony in regard to any matter - scientific, non-scientific, or "junk science" - would be reliable if the witness had the requisite education, training and experience. The qualification of the witness and the reliability of the subject of the witness' testimony are two different findings the trial judge must make before admitting expert testimony. In White, the South Carolina Supreme Court wrote:

> We hold that the trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.

382 S.C. at 274, 676 S.E.2d at 689. The trial judge must make a determination on the reliability of the non-scientific expert testimony based on factors other than the qualification of the witness. In the present case the State failed to provide the judge with any factors upon which he could base a reliability finding.

During the in-camera proffer Appellant asked the witness, "The information that you have reviewed on your own in preparation for giving testimony, do you have any specific examples of studies that have looked at the evidence in those particular cases as being reliable?" (R. p. 79, lines 2-5). The witness answered, "So my testimony will be based on my experience in the field, as well and my education and training. And in our field the research that's been done has primarily been done based on information that's gathered from actual clients, case studies." (R. p. 79, lines 6-10). The witness, however, did not identify any research, case study or publication to support the substance of her testimony. The witness testified that although she was not published she was familiar with publications in the field. She testified "Well, as part of the – in most of the trainings that I go to there—the training itself is based on peer-reviewed articles, information. Just as part

of my general education I continue to read peer-reviewed articles and information related to the field." (R. p. 75, lines 3-7). The witness, however, did not provide any specific information about the publications or trainings. The judge asked the witness, "And has your experience revealed common factors that attribute to a delayed disclosure?" (R. p. 90, lines 17-18). The witness responded yes but offered no other source to support her testimony. The witness offered no statistics to demonstrate how often disclosure was delayed in allegations of child sexual abuse. The witness offered no support for her testimony in regard to grooming or behaviors. The State failed to demonstrate that the subject matter of the expert testimony was reliable.

In State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), the South Carolina Supreme Court found that the State failed to show the individual reliability of one of the witnesses sufficient to allow her to testify as a child abuse assessment expert. The Court in Chavis wrote:

> There is no formulaic approach for determining the foundational requirements of qualifications and reliability in non-scientific evidence. *Id.* at 274, 676 S.E.2d at 688. However, evidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies. We find no evidence in this record as to Mrs. Elliott's ability to draw reliable results from the RATAC procedures she consistently follows, and thus find that the threshold reliability requirement of Rule 702 is not met. Accordingly, we hold that the circuit court abused its discretion in allowing Mrs. Elliot to testify as an expert regarding the report by Mrs. Gist.

412 S.C. at 108, 771 S.E.2d at 339. As in Chavis, the State in the present case failed to establish that the witness's testimony was reliable. Unlike Chavis, the error in the present case was not harmless.

While the witness testified that she read peer-reviewed articles and information related to the field, she failed to name one of these articles. The witness failed to identify any research, case study, publication or treatise to support the substance of her testimony. In this Court's decision in State v. Jones, 417 S.C. 319, 333, 790 S.E.2d 17, 25 (Ct. App. 2016), aff'd as modified, 423 S.C.

631, 817 S.E.2d 268 (2018), decided prior to the trial in this case, this same witness was able to reference a textbook titled *Child Maltreatment* that included information about delayed disclosure and non-offending caregivers. The witness made no such reference in the present case.

In distinguishing Chavis the South Carolina Supreme Court in Jones wrote:

> Unlike the proposed expert in Chavis, Galloway-Williams did not testify about forensic interviewing methods nor the use of the RATAC protocol. Instead, her testimony focused on explaining the concept of delayed disclosure and the role of nonoffending caregivers in the dynamics of sexual abuse. Although Galloway-Williams did not identify by name the articles serving as the basis for her opinions, she indicated she could provide citations if given an opportunity to gather them. Additionally, she explained her opinions were supported by peer-reviewed professional journals and trade publications, all of which were uniformly accepted and recognized by child sexual abuse experts and professionals. Galloway-Williams also testified she participates in the peer review process and has given numerous presentations on the subject. When questioned on cross, she testified she was unaware of any organizations that found her methods unreliable and that, out of all cases involving delayed disclosure of child abuse, statistically two to four percent are considered false allegations.

State v. Jones, 423 S.C. 631, 639, 817 S.E.2d 268, 272 (2018). In contrast, in the present case this same witness failed to explain that her opinions were supported by peer-reviewed professional journals and trade publications, all of which were uniformly accepted and recognized by child abuse experts and professionals. This same witness failed to testify in the present case that she participates in the peer review process. The false allegation, discussed in this case in issue two, does not appear to have been challenged in Jones. The fact that this particular witness had been previously qualified as an expert 36 times (R. p. 76, lines 9-12) did not relieve the trial court from its duty as a gatekeeper to require the State to establish the reliability of the expert testimony in this case.

The trial court in the present case failed to perform its gatekeeping role pursuant to Rule 702, SCRE. The State failed to establish the foundational reliability requirement for the admission of the expert testimony. The trial judge's reliability determination was based on the education, training and experience of the witness. These factors go to the qualification of the witness, not the

reliability of the testimony. The present case is analogous to cases in which the trial judge failed to make a reliability determination prior to admission of the testimony. In State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) the South Carolina Supreme Court found that the trial judge erred in admitting expert testimony before vetting it for reliability but found the error harmless. In the present case the trial judge erred in admitting expert testimony before vetting it for reliability. The error, however, was not harmless.

"To deem an error harmless, this court must determine 'beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.' " State v. Fonseca, 383 S.C. 640, 650, 681 S.E.2d 1, 6 (Ct.App.2009) (quoting Taylor v. State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993)), *aff'd,* 393 S.C. 229, 711 S.E.2d 906 (2011); see also State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006) ("When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside a conviction for insubstantial errors not affecting the result."); 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"); State v. Pradubsri, 403 S.C. 270, 281, 743 S.E.2d 98, 104 (Ct.App. 2013) (explaining the requirement that a reviewing court must review the entire record to determine the effect of an error on the verdict in determining whether an error is harmless). Reviewing the entire record in the present case, guilt was not conclusively proven such that no other rational conclusion could be reached. The State presented no physical evidence. The State's case was based on the testimony of the minor. The State called as witnesses the minor's mother, father and grandmother, the minor, a police officer, a forensic interviewer, a pastoral counselor and Galloway-Williams. There were no eye-witnesses. The unreliable testimony given by Galloway-Williams, as an expert, was not harmless.

In affirming the convictions this Court wrote:

> Similarly, we find the circuit court did not abuse its discretion in determining Galloway-Williams's testimony here satisfied the reliability threshold. As in Jones, Chavis is distinguishable because Galloway-Williams was not qualified as a forensic interviewer and did not testify as to the specifics of this child's disclosure. Instead, she testified as a blind expert on child sexual abuse dynamics, addressing general concepts and characteristics of victims in such cases. Her testimony was based on her experience and the research conducted in her field, and this research was based on case studies for which the researchers analyzed cases of known abuse to determine whether there were similarities among cases. Thus, the circuit court did not err in admitting Galloway-Williams's testimony after properly considering its reliability.

State v. Acker, No. 2016-002368, 2022 WL 164518, at *6 (S.C. Ct. App. Jan. 19, 2022).

Counsel respectfully submits that this Court overlooked the fact that the trial court in the present case failed to perform its gatekeeping function when the State failed to establish the foundational reliability requirement for the admission of the expert testimony. Counsel respectfully submits that this case is distinguished from Jones where at least there was a bare minimal reference to a textbook as a basis for which to support the reliability of the expert's opinion. There was no basis for which the trial judge to base his reliability determination in the present case. The witness failed to name any specific research, book or case study upon which the expert based her opinion. Respectfully, the fact that the witness was not qualified as a forensic interviewer and did not testify as to the specifics of the disclosure does not render her testimony reliable. The State failed to prove the reliability of the expert's testimony.

2. **The trial judge erred in allowing a witness to testify as an expert in the field of child maltreatment and child abuse dynamics when the witness improperly vouched for and bolstered the credibility of the minor witness by testifying that false denials were more common than false accusations and that children with behavioral problems are more vulnerable because they are not believed when they make a disclosure of abuse.**

In addition to lacking reliability, Galloway-Williams's testimony went beyond discussing risk factors, grooming, delayed disclosure and general behavioral characteristics when the State asked her on direct examination about false denials and false disclosures. (R. p. 111, lines 6-7). The witness discussed false denials and false disclosures and testified that it was more common for children to deny abuse when something happened than to make a false allegation of abuse when it did not happen. (R. p. 111, line 8 – p. 112, lines 1-10). Appellant objected arguing that the testimony bolstered the credibility of the complaining minor witness as prohibited by State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). (R. p. 95, lines 10-12). The judge replied, "She's not addressing Minor's credibility. She's never met Minor. She couldn't possibly address her credibility. She's just going to discuss from what her experience has provided why people delay in disclosing sexual abuse. She's not going to talk about Minor because she's never met her and she doesn't know her and knows nothing about her case. So she can't be bolstering her credibility." (R. p. 95, lines 16-25). The judge then overruled the objection and stated:

> It's not bolstering because the witness is simply testifying about things within her expertise. They may or may not specifically apply in this case, but the witness doesn't know anything about this case because she's not talked to anybody about it; she's not interviewed any witness; she's not interviewed the child; she's not interviewed the parents; she's not interviewed the police officers; she's not interviewed the counselors; she's not interviewed the Children's Advocacy interviewer. She knows nothing about the case, and she didn't even hear the witness' testimony.
>
> So there's nothing that she could do that would – nothing she could reasonably do to bolster the witness' testimony because she doesn't even know what it is. The fact that she testifies to things that might be similar to those things experienced by the witness is not considered bolstering. It's simply an expert's explanation as to

> certain behavior perhaps. But to that extent it might be supported. But it's not improper bolstering. So I still find the testimony to be admissible.

(R. p. 100, line 20 – p. 101, lines 1-15). The trial judge erred. The witness improperly vouched for the credibility of the minor witness even though she never met the minor witness. Appellant renewed the objection immediately following the judge's ruling and again when the State moved to qualify the witness as an expert in front of the jury. (R. p. 100, lines 12-14; p. 107, line 3). Appellant renewed the objection at the close of the State's case, the close of the Defense case and after the jury returned the verdict. (R. p. 123, lines 17-19; p. 152, line 23 – p. 153, lines 1-2; p. 193, lines 15-19). The judge denied all of the renewed motions.

During the direct examination of Galloway-Williams the State asked, "Okay. I want to talk to you about false denials and false disclosures. Can you explain to us what those are?" (R. p. 111, lines 6-7). The witness explained. "Well, a false denial or a – would be when there's actually knowledge or something to support that a child has actually been abused, and yet they're denying that it happened." (R. p. 111, lines 8-11). The witness then testified, "So what we see more often than false allegations of abuse with child disclosure, we see – tend to see more false denials, meaning that children are denying that something happened when, in fact, there may be something that did happen." (R. p. 111, lines 18-22). The State then asked the witness, "And what's a false disclosure?" (R. p. 111, line 23). The witness answered. "A false disclosure? That would be when the child has made a disclosure that didn't really happen." (R. p. 111, lines 24-25). The State then asked the witness which was more common and the witness again testified, "What's more common would be the false denial where we – where a child denies that something happened when, in fact, something did occur." (R. p. 112, lines 8-10). The witness' testimony improperly implied that the witness in the present case was credible because false denials are more common than false allegations.

Additionally, when discussing the fact that children with behavioral problems are at risk for abuse the witness testified, "They are more vulnerable to it for many reasons, one of them being that if they are troublemakers or seen as bad children and then they make a disclosure, an outcry, sometimes they're not believed because they have a previous history of getting in trouble or making things up." (R. p. 100, lines 6-10). This testimony improperly implied that children with behavioral problems who make allegations of sexual abuse, like the witness in this case, are credible and should be believed. The witness should not have been allowed to testify about other children not being believed, false denials and false accusations. These matters go to the credibility of the minor witness. The trial judge abused his discretion in admitting the testimony.

Witness credibility is to be determined by the jury. Witnesses are prohibited from testifying about the credibility of other witnesses. In State v. Makins, 433 S.C. 494, 860 S.E.2d 666, 670 (2021), the South Carolina Supreme Court wrote:

> "The assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). While experts can testify to their opinion, they are precluded from offering an opinion about the credibility of other witnesses. State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). "Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." Id. at 358-59, 737 S.E.2d at 500. "A witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." Briggs v. State, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017).

In State v. Barrett, 416 S.C. 124, 131, 785 S.E.2d 387, 390 (Ct. App. 2016), this Court wrote:

> The assessment of witness credibility is within the exclusive province of the jury. State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977). Therefore, witnesses are generally not allowed to testify whether another witness is telling the truth. See Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (stating it is improper for a solicitor to ask a defendant "to comment on the truthfulness or explain the testimony of an adverse witness" and "the defendant is in effect being pitted against the adverse witness"). Similarly, witnesses may not improperly bolster the testimony of other witnesses. See *Smith v. State,* 386 S.C. 562, 564, 569, 689 S.E.2d 629, 631, 633 (2010) (stating a forensic interviewer's opinion that she found the victim's statement believable "improperly bolstered the [v]ictim's

> credibility"). "For an expert to comment on the veracity of a child's accusations of sexual abuse is improper." State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011).

Galloway-Williams's testimony in the present case indirectly commented on the child witness's credibility and improperly bolstered her testimony.

In finding that Galloway-Williams's testimony did not constitute improper bolstering this Court again emphasized that she was a "blind expert" and then wrote:

> First, Galloway-Williams's testimony regarding disclosures by children with behavioral problems did not improperly bolster Child's credibility because the testimony was included in her general testimony addressing multiple risk factors that make certain children more vulnerable to abuse. See State v. Barrett, 416 S.C. 124, 131-33, 785 S.E.2d 387, 390-91 (Ct. App. 2016) (finding an expert's testimony regarding general behavioral characteristics did not improperly vouch for the victim's credibility because she never directly or indirectly commented on the victim's veracity and truthfulness or the credibility of the victim's claims and she did not limit her testimony to only those behavioral characteristics displayed by the victim). She did not comment on Child's credibility, and she did not seek to link her general characteristics testimony to any type of behavioral reaction Child may—or may not—have exhibited. See id.; Brown, 411 S.C. at 345, 768 S.E.2d at 253 (finding the expert did not improperly bolster the victim's credibility because she testified in broad terms about the reasons victims delay disclosing abuse and she never applied her testimony to the victims in the case).

State v. Acker, No. 2016-002368, 2022 WL 164518, at *6 (S.C. Ct. App. Jan. 19, 2022).

Counsel respectfully submits that this Court overlooked the fact that the witness's status as a "blind expert" did not prevent the witness from indirectly commenting on the child witness's credibility when the expert testified that children with behavioral problems are more vulnerable because they are **not believed** when they make a disclosure. The expert witness's testimony in the present case went beyond generally addressing risk factors that make certain children more vulnerable to abuse. The expert's testimony in the present case improperly reflected her opinion about the credibility of sex abuse allegations made by children with behavioral problems. The clear implication

from the testimony is that children with behavioral problems, like the witness in the present case, are credible and should be believed when they make an allegation of abuse.

The expert testimony in the present case went beyond the general behavioral characteristics discussed in State v. Barrett, 416 S.C. 124, 131, 785 S.E.2d 387, 390 (Ct. App. 2016) and State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), abrogated by State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018).

In Barrett this Court wrote:

> Barrett argues Twitty's testimony circumvented the mandates outlined in Kromah. We disagree. Although Twitty conducted Victim's forensic interview, she was not qualified as an expert forensic interviewer and her testimony fell within the parameters of Kromah. Regarding the forensic interview Twitty conducted, she testified as to the date, time, and place of the interview and her personal observations of Victim's demeanor. In fact, Twitty never directly or indirectly commented on the credibility of Victim's accounts of the alleged sexual assault. Moreover, she never addressed the veracity of Victim or opined whether Victim was being truthful. Conversely, on cross-examination, Twitty admitted children lie, she could not give a diagnosis, and she was "certainly not a human lie detector." She elaborated that the focus of her interview was to assess overall child safety and she was "not going in there looking for fact details to prove or not prove child sexual abuse."
>
> Importantly, Twitty did not limit her testimony to explaining the exact behavioral characteristics Victim exhibited. Cf. Anderson, 413 S.C. at 219, 776 S.E.2d at 79 (holding the forensic interviewer "vouched for the minor when she testified only to those characteristics [that] she observed in the minor"). Although Twitty explained some of the behavioral patterns Victim exhibited—i.e., delayed reporting and sequence of reporting to peers before adults—she also explained additional characteristics that Victim did not display.

State v. Barrett, 416 S.C. 124, 132–33, 785 S.E.2d 387, 391 (Ct. App. 2016)(n. 2 omitted). The expert in Barrett never directly or indirectly expressed an opinion on the credibility of the witness, as the expert did in the present case.

In Brown this Court wrote:

> Subsequently, Galloway–Williams testified she did not review any incident reports or statements associated with this case, never met with or interviewed the minor

> victims prior to trial, and was not present for their testimony during trial. In fact, her only knowledge about the case came from discussions with the Solicitor's Office. According to Galloway–Williams, research indicates that between seventy and eighty percent of abused children delay disclosing the abuse into adulthood. Further, she stated children delay disclosing abuse for a number of reasons, including: (1) fear of consequences to themselves, the perpetrator, or someone the child loves; (2) the child's age; (3) the child's relationship to the perpetrator; (4) a lack of vocabulary or language to describe what has happened to them; (5) threats by the perpetrator; (6) grooming by the perpetrator; and (7) the perpetrator's normalization of the abusive conduct. Galloway–Williams further explained that most disclosures happen accidentally, and children generally reveal more details over time throughout the disclosure process. When children suffer chronic abuse, she stated it is more difficult for them to sort out the timing of individual incidents and the order in which they occurred. Galloway–Williams also explained that having a close and trusting relationship with the perpetrator can have a very strong impact on whether a child feels like he or she can disclose the abuse. Finally, she testified that child abuse victims will sometimes tolerate sexual abuse to maintain a relationship, particularly if the perpetrator is someone they love and trust.

State v. Brown, 411 S.C. 332, 337–38, 768 S.E.2d 246, 248–49 (Ct. App. 2015), abrogated by State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018). The general behavioral characteristic testimony from the same witness in Brown is distinguished from the testimony in the present case that children with behavioral problems are more vulnerable because they are not believed when they make a disclosure, improperly implying that children with behavioral problems, like the witness in the present case, should be believed when they make an allegation of abuse.

In distinguishing State v. Jennings, 394 S.C. 473, 716 S.E.2d 91, (2011); State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989); and State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct.App. 2000), this Court in Brown wrote:

> In Jennings, our supreme court held the written report prepared by a forensic interviewer regarding her interviews with the victims was inadmissible hearsay and impermissibly vouched for the victims' credibility because the expert concluded the victims "provided a compelling disclosure of abuse." 394 S.C. at 480, 716 S.E.2d at 94. Both Dawkins and Dempsey involved therapists who actually treated the victims and offered testimony clearly indicating they believed the victims were telling the truth about the allegations of sexual abuse. Dawkins, 297 S.C. at 393–94, 377 S.E.2d at 302; Dempsey, 340 S.C. at 571, 532 S.E.2d at 309–10. Contrary to the experts in those cases, Galloway–Williams (1) was not testifying as a forensic

> interviewer, (2) never interviewed the victims, (3) did not prepare a report for her testimony, (4) did not express an opinion or belief regarding the credibility of child sex abuse victims' allegations, and (5) did not express an opinion regarding the credibility of the minor victims in this case. Thus, we agree with the State's argument that the cases cited by Appellant are factually and legally distinguishable from this case.

State v. Brown, 411 S.C. 332, 344–45, 768 S.E.2d 246, 252–53 (Ct. App. 2015), abrogated by State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018). In the present case, however, Galloway-Williams expressed an opinion or belief regarding the credibility of child sex abuse victims' allegations. Her testimony indicated that children with behavioral problems who make allegations of sexual abuse should be believed.

Additionally, with regard to the testimony about children with behavioral problems not being believed, this Court wrote:

> Additionally, there was no evidence that Child had behavioral problems such that others would be less likely to credit her disclosures. Rather, the testimony indicated Child did not exhibit behavioral or emotional problems until she began cutting her arms. Thus, as in Brown, we do not believe Galloway-Williams's general testimony in this case about children with behavioral problems potentially not being believed bolstered Child's credibility. See State v. Cartwright, 425 S.C. 81, 96, 819 S.E.2d 756, 764 (2018) (concluding the independent expert did not improperly bolster the victims' credibility because she never testified she believed the victims; rather, her testimony generally explained the potential reasons why children recant and the behaviors common to sexually abused children).

State v. Acker, No. 2016-002368, 2022 WL 164518, at *7 (S.C. Ct. App. Jan. 19, 2022). The child witness in the present case began cutting herself in the summer of 2014, seven years after Appellant separated from the child's grandmother. (R. p. 12, line 25 – p. 13, lines 1-2). The child was first seen by a pastoral counselor at New Day Counseling Ministries in July of 2014. (R. p. 51, lines 10-22). According to the pastoral counselor, on September 11, 2014, the child alleged abuse that took place at her grandmother's house beginning when she was five years old. (R. p. 52, lines 1-13). At the time of trial in November of 2016, child witness was seventeen years old. (R. p. 27,

lines 1-2). Again, the clear implication from the expert's testimony is that children with behavioral problems, like the witness in this case, should be believed when they make an allegation of abuse.

The expert testimony in the present case went beyond the general behavioral characteristics discussed in Cartwright and Brown. In Cartwright the South Carolina Supreme Court wrote:

> As part of its case, the State called Dr. Alicia Benedetto, a clinical psychologist, as an expert in "child sexual abuse dynamics." Over defense counsel's objection, the trial court qualified Dr. Benedetto as an expert in clinical psychology. Dr. Benedetto acknowledged that she had not talked to any witnesses or victims in the case. She explained that "Child Sexual Abuse Accommodation Syndrome" involved patterns of behavior that children engage in that may not make sense to adults. She stated that children often respond to sexual abuse in a different manner than adults. She acknowledged that a child's response, although different from an adult's, is not necessarily indicative of abuse or untruthfulness. She explained that, to maintain the secrecy of the abuse, it was common for an abuser to bribe or buy gifts for the abused children. Dr. Benedetto asserted that manipulation and fear also play roles in maintaining secrecy. Specifically, she testified "[children] may be afraid for their own safety or the safety of siblings or the safety of the other parent in the home." Additionally, she noted that sexual abuse may cause children to "act out" and abuse alcohol or drugs.
>
> When asked about recantations, Dr. Benedetto maintained that "children routinely delay reporting" and any delay was not indicative of whether or not sexual abuse occurred. Dr. Benedetto added "[c]ertainly we're open to the possibility that it is a true recantation, but we also know that many times a child recants because of what happens after they tell. And, so, we want to be sure not to miss those cases."

State v. Cartwright, 425 S.C. 81, 88, 819 S.E.2d 756, 759–60 (2018). Again, the testimony from the expert witness in Cartwright was limited to general behavioral characteristic. The witness in Cartwright did not testify that children with behavioral problems are more vulnerable because they are not believed when they make a disclosure, improperly implying that children with behavioral problems who make allegations of sexual abuse should be believed.

With regard to Galloway-Williams's testimony that false denials are more common than false allegations, this Court wrote:

> Nor did Galloway-Williams's testimony about false denials being more common than false allegations improperly bolster Child's credibility. As stated previously,

> Galloway-Williams did not testify regarding Child; rather, she testified as to the general behavioral reactions of children who have been abused, risk factors, and the concepts of grooming and delayed disclosure. Although we acknowledge Galloway-Williams's testimony could be interpreted as having insinuated Child's testimony was credible because false allegations are not as common as false denials, Galloway-Williams's statement here is distinguishable from those in cases in which our courts have found there was no way to interpret the challenged statements *other than as* bolstering a victim's credibility. Compare State v. Makins, 433 S.C. 494, 505, 860 S.E.2d 666, 672 (2021) (holding dual expert's testimony served foundational purpose other than to vouch for minor's credibility but cautioning that the use of "one witness as both a characteristics expert and the treatment witness is a risky undertaking" and the better practice is to use a blind witness as Anderson urged), *with* State v. McKerley, 397 S.C. 461, 465-67, 725 S.E.2d 139, 142-43 (Ct. App. 2012) (finding although the expert never directly stated she believed the victim, the jury could not interpret the expert's testimony in any way other than that she believed the victim was telling the truth); see also Chavis, 412 S.C. at 109, 771 S.E.2d at 340 (finding the circuit court erred when allowing an expert witness to testify about her recommendation that the victim "not be around the [defendant] for any reason" because this testimony could only be interpreted as indicating the expert believed the victim's allegations).

State v. Acker, No. 2016-002368, 2022 WL 164518, at *7 (S.C. Ct. App. Jan. 19, 2022).

Counsel respectfully submits that this Court overlooked the fact that the expert witness's testimony went beyond discussing risk factors, grooming, delayed disclosure and general behavioral characteristics when the State asked her on direct examination about false denials and false disclosures. Counsel respectfully submits that there is no way to interpret Galloway-Williams's testimony in any way other than children who make allegations of sexual abuse, like the witness in this case, are credible because false allegations are not as common as false denials. The testimony went beyond explaining that children may deny abuse as a behavioral characteristic of child sex abuse victims. Instead, the testimony improperly reflected the expert's opinion about the credibility of sex abuse allegations made by children, and, by inference, the credibility of the child witness in the present case.

Counsel respectfully submits that this Court's reliance on Makins is misplaced. Makins did not address improper credibility testimony from a "blind expert." Instead, as the Court wrote,

"We address one primary issue in this appeal: by testifying both as an expert in characteristics of child trauma and child sexual abuse dynamics and as Minor's treating therapist, did Rich imply she thought Minor was truthful, thereby improperly bolstering Minor's credibility?" State v. Makins, 433 S.C. 494, 860 S.E.2d 666, 668 (2021). In finding that, under the specific facts of the case, the dual expert's testimony did not improperly bolster the Minor's credibility, the Court wrote:

> Rich's simple affirmation that she provided therapy to Minor also differs from previous indirect vouching cases in which expert witness testimony was more extensive. See Briggs, 421 S.C. at 329, 806 S.E.2d at 720 (ruling forensic interviewer's testimony she made the determination the child understood the difference between the truth and a lie "indirectly revealed she believed the subsequent disclosure ... was the truth"); State v. Chavis, 412 S.C. 101, 108, 771 S.E.2d 336, 340 (2015) (holding forensic interviewer's testimony that child victim should "not be around [Appellant] for any reason" improperly bolstered the child victim's credibility); Kromah, 401 S.C. at 359, 737 S.E.2d at 500 (ruling forensic interviewer's testimony about "a compelling finding of child abuse" was the equivalent of her stating the child was being truthful); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (concluding there was no other way to interpret the language in the forensic interviewer's reports that each child had "provide[d] a compelling disclosure of abuse by [Appellant]" than to mean she believed the children were truthful).

State v. Makins, 433 S.C. 494, 860 S.E.2d 666, 671 (2021). The Court in Makins noted that the dual expert's testimony did not contain direct or indirect bolstering writing, "The trial court's limitations on Rich's testimony achieved their purpose—her testimony contained no direct or indirect bolstering discernible to this Court. The trial court deftly navigated the issue and protected the proceeding from improper bolstering. We find no abuse of discretion in the trial court's decisions to deny Makins's motion for mistrial or to admit Rich's limited testimony." 433 S.C. at 860 S.E.2d at 672 (n. 2 oitted).

In contrast, in the present case the blind expert's testimony was not limited and indirectly implied that she believed the child witness because false denials are more common than false

allegations. Importantly, the improper testimony took place during the direct examination by the State and not in response to cross-examination. The essence of Galloway-Williams's testimony about false denials being more common that false allegations and children with behavioral problems who make allegations of sexual abuse being vulnerable because they are not believed is to say that children do not lie about sexual abuse. This is improper.

In State v. Kromah, 401 S.C. 340, 359, 737 S.E.2d 490, 500 (2013), the South Carolina Supreme Court found that the forensic interviewer should not have been allowed to testify about a compelling finding of child abuse because that was the equivalent of Smith [the forensic interviewer] stating the Child was telling the truth. The fact that the witness in the present case did not interview the minor does not render her testimony admissible. A witness can improperly vouch for the credibility of another witness without having had any direct contact with that witness. In the present case expert's testimony was the equivalent of stating that the witness was telling the truth because false denials are more common than false allegations and children with behavioral problems should be believed.

While the witness in the present case was not the forensic interviewer, she was qualified as an expert in the field of child maltreatment and child abuse dynamics. As noted by the Court in Kromah, "Smith was qualified as an expert and, although an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts. The label of expert should be jealously guarded by the court and never loosely bandied about." 401 S.C. at 357, 737 S.E.2d at 499 (fn #5 omitted). As an expert witness, the jury would tend to attach more significance to Galloway-Williams's credibility determinations, making the error more prejudicial. Galloway-Williams, testifying as an expert, improperly suggested that the jury should believe the minor

witness because children are more likely to deny that abuse occurred than make a false allegation of abuse.

In Chavis the Court found that the testimony of the second forensic interviewer improperly bolstered the credibility of the minor witness. The Court wrote, "Mrs. Griggs's recommendation that Appellant not be around Victim for any reason, can only be interpreted as Mrs. Griggs believing Victim's claim that Appellant sexually abused her." State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015). As noted by the Court in Chavis, testimony indicating that the witness believed the minor witness is improper as it invades the province of the jury to determine credibility. See State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding error where there was "no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful"); State v. Dawkins, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989) (finding admission of therapist's testimony indicating he believed victim's allegations were genuine was improper). The bolstering is especially damaging when given by a witness imbued with imprimatur of an expert. State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977) ("It is axiomatic that the credibility of the testimony of these witnesses is for the jury."); State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). In the present case the witness' testimony about believability and false denials being more common than false accusations indicates to the jury that she, as an expert, believes the minor witness. Her testimony was improper.

The error in admitting the testimony was not harmless. The State's case was based on the testimony of the minor and her credibility was a critical factor to be determined by the jury. The State presented no physical evidence. The improper bolstering requires reversal.

3. **The trial judge erred in allowing a witness to testify as an expert in the field of child maltreatment and child abuse dynamics when the credibility testimony went beyond explaining delayed disclosure and general characteristics and the probative value of the credibility testimony was substantially outweighed by the danger of unfair prejudice.**

Without conceding the challenge to the reliability of Galloway-Williams's testimony and the challenge to the portions of her testimony commenting on the credibility of the witness, alternatively, the probative value of the credibility portion of her testimony is substantially outweighed by the danger of unfair prejudice. Appellant also objected to the witness testimony as being more prejudicial than probative. Appellant argued, "The probative value of her testimony is substantially outweighed by its prejudicial effect under 403." (R. p. 95, lines 2-4). The judge immediately ruled, "All right. Well, I believe it to be relevant to the issues in this case, and I do not find that the probative value is substantially outweighed by the danger of unfair prejudice." (R. p. 95, lines 6-9). Appellant renewed the objection immediately following the judge's ruling and again when the State moved to qualify the witness as an expert in front of the jury. (R. p. 100, lines 12-14; p. 107, line 3). Appellant renewed the objection at the close of the State's case, the close of the Defense case and after the jury returned the verdict. (R. p. 123, lines 17-19; p. 152, line 23 – p. 153, lines 1-2; p. 193, lines 15-19). The judge denied all of the renewed motions. The judge erred.

The State failed to establish that Galloway-Williams's testimony was reliable and, as discussed above, the judge, as gatekeeper, should have excluded the testimony. Additionally, Galloway-Williams's improper testimony about the credibility of the child witness should have been excluded. Alternatively, the probative value of Galloway-Williams's testimony that false denials were more common than false allegations and that children with behavior problems were

vulnerable because they were not believed when they made an allegation of sexual abuse is substantially outweighed by the danger of unfair prejudice.

In State v. Gray, 408 S.C. 601, 609–10, 759 S.E.2d 160, 165 (Ct. App. 2014) this Court wrote:

> Rule 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "Probative" means "[t]ending to prove or disprove." *Black's Law Dictionary* 1323 (9th ed.2009). "Probative value" is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. "[T]he more essential the evidence, the greater its probative value." United States v. Stout, 509 F.3d 796, 804 (6th Cir.2007) (internal quotation marks omitted). Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates.

The improper bolstering testimony was not probative of anything other than that the expert witness believed the allegations. The probative value of the testimony was substantially outweighed by the danger of unfair prejudice. In State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) this Court wrote:

> "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993); United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir.1989) ("[A]ll evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided.").

The testimony resulted in unfair prejudice because it tended to suggest a decision on an improper basis. Specifically, the testimony implied that the child witness was credible.

In finding no error in the trial judge's Rule 403, SCRE analysis this Court wrote:

> Galloway-Williams's testimony was relevant and assisted the jury in understanding child sexual abuse victims' behavior and how children react differently to abuse: some demonstrate self-harm, depression, or anxiety, while others exhibit no outward change in behavior at all. See Jones, 417 S.C. at 336-37, 790 S.E.2d at 26-27 (finding the probative value of the expert's testimony outweighed its prejudicial effect because it helped the jury understand the victim's behavior and demeanor and

> was "crucial" in explaining why child victims "are often unable to effectively relay incidents of criminal sexual abuse"); Brown, 411 S.C. at 347-48, 768 S.E.2d at 254 (concluding the expert's testimony was highly probative and helped the jury understand sex abuse victims' behavior and did not unfairly prejudice the defendant); Weaverling, 337 S.C. at 475, 523 S.E.2d at 794 (stating behavioral evidence "assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor"). This testimony further assisted the jury in understanding why victims delay disclosure, how close relationships can affect disclosure, and how certain factors may increase the risk of abuse. Therefore, we agree with the circuit court that this testimony was relevant and probative.
>
> Significantly, Galloway-Williams did not testify that *Child* displayed behaviors associated with abuse or that she harmed herself and suffered depression. In fact, she did not—and as observed by the circuit court, could not—speak to Child's behavior at all. Rather, she generally explained behaviors commonly exhibited by sex abuse victims, risk factors, and grooming. Thus, we find no abuse of discretion in the circuit court's admission of this testimony. *See* Rule 403, SCRE (stating relevant evidence is inadmissible if the unfair prejudice substantially outweighs its probative value); *Brown*, 411 S.C. at 347-48, 768 S.E.2d at 254; *Gilchrist*, 329 S.C. at 630, 496 S.E.2d at 429 ("All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided." (quoting United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir. 1989))).

State v. Acker, No. 2016-002368, 2022 WL 164518, at *8 (S.C. Ct. App. Jan. 19, 2022).

Counsel respectfully submits that this Court overlooked the fact that Galloway-Williams's testimony went beyond generally explaining behaviors commonly exhibited by sex abuse victims, risk factors, and grooming. The improper credibility testimony was not relevant or probative and resulted in unfair prejudice. The testimony should have been excluded pursuant to Rule 403, SCRE.

4. **The trial judge erred in admitting improper character evidence by allowing a witness to testify that Appellant admitted in a letter that he had been addicted to pornography for fifty two years.**

During the direct examination of the minor's grandmother, the State asked, "Okay. You mentioned letters. In those letters did he ever mention viewing pornography to you?" (R. p. 59, lines 9-10). Appellant objected as irrelevant and a bench conference was held. (R. p. 59, lines 13-15). The State again asked if Appellant ever mentioned viewing pornography. (R. p. 59, lines 18-19). Appellant again objected. (R. p. 59, lines 21-22). The judge overruled the objection. (R. p. 59, line 23). The witness then testified, "He admitted to me in that letter that he had been addicted to pornography for 52 years." (R. p. 60, lines 1-2).

Later, the trial judge allowed Appellant to state the grounds for his objection on the record. (R. p. 66, line 24 – p. 67, lines 1-2). Appellant objected based on Rule 401, SCRE, arguing the testimony was irrelevant. Appellant argued:

> My objection is based on this. The testimony that the defendant, Mr. Acker, communicated to Ms. Jett in a written form, I believe, that he had been addicted to pornography for a period of 52 years. I reject - - I object based upon Rule 40, state in my belief that it is not relevant. It does not - - we're talking about a period of time that goes back all the way to when he would be a teenager, an early teenager, and the majority of his life if, in fact, that statement was true. It does not even go toward how this pornography was viewed in the content of computer, television, V.C.R. or magazines or printed forms. There's just too much room left for speculation by the jury and as to what the nature of the addiction is and to what extent and what form it would take.

(R. p. 67, lines 5-19).

Appellant also objected based on Rule 403, SCRE, arguing that the prejudicial effect outweighed the probative value. Appellant argued:

> Furthermore, if the Court finds that it is relevant because it would tend to make more probable - - to make a determination of a particular fact in this case, we would say that under Rule 403 that the - - the prejudicial effect outweighs the probative effect, value rather, because basically, the same reason I just stated. It's too long a period of time. We don't know what from that the so-called addiction took, and it

> does not necessarily go toward the fact that he had a propensity for showing this as a person in his mid 60s to a young child that is five years old. It's too prejudicial.

(R. p. 67, lines 20 – p. 68, lines 1-5).

Finally, Appellant objected based on Rule 404, SCRE, arguing the testimony constituted improper character evidence and did not meet an exception. Appellant argued, "Additionally, under 404 I don't see any type of exception. It's character evidence, and character evidence, of course as the Court knows, is generally inadmissible. And based on that I would respectfully submit to the Court that the testimony should not have been submitted. (R. p. 68, lines 6-11). Appellant then moved for a mistrial. (R. p. 68, lines 12-19).

The judge ruled, "Well, I think it's clearly relevant to the charge of dissemination of obscene material, and I do find that the probative value is not substantially outweighed by the danger of unfair prejudice, and therefore that's why I admitted it pursuant to Rule 401 and 403." (R. p. 69, lines 12-17). The trial judge erred. The testimony consisted of improper character evidence and did not meet an exception pursuant to Rule 404(b).

This Court found the Rule 404(b) objection was not preserved for appellate review writing:

> The State argues Acker's Rule 404 argument is not preserved for review because the circuit court did not rule on this ground of his argument. Although the circuit court did not expressly rule on Acker's Rule 404 argument, the circuit court addressed it by implication in overruling Acker's objection and admitting the evidence. The grounds for the objection, however, are more problematic. At trial, Acker objected to the admission of the statement in the letter to Grandmother as improper character evidence under Rule 404(a). *See* Rule 404(a), SCRE ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion ..." other than as set forth in certain exceptions.). Before this court, however, Acker asserts the testimony was improperly admitted under Rule 404(b) as inadmissible evidence of other crimes, wrongs, or acts. *See* Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."). As the Rule 404(b) argument was not made to the circuit court, we find it unpreserved for our review. See State v. Adams, 354 S.C. 361,

> 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("Arguments not raised to or ruled upon by the trial court are not preserved for appellate review. Moreover, a defendant may not argue one ground below and another on appeal." (citation omitted)).

State v. Acker, No. 2016-002368, 2022 WL 164518, at *11 (S.C. Ct. App. Jan. 19, 2022)(n. 7 omitted).

Counsel respectfully submits that in finding the issue unpreserved this Court misapprehended the Rule 404, SCRE, objection made at trial. The objection to the testimony that Appellant admitted in a letter that he had been addicted to pornography for fifty-two years was made generally pursuant to Rule 404 and did not specify Rule 404(a) or (b). (R. p. 68, line 6). Appellant specifically stated that the addiction to pornography testimony did not meet an exception. (R. p. 68, lines 6-7). In the Rule 403 argument, counsel specifically uses the word "propensity." (R. p. 68, lines 1-5). While Rule 404(a)(1)(2) and (3) provide exceptions, none are applicable to the pornography addiction testimony. In Johnson v. State, 433 S.C. 550, 860 S.E.2d 696, 699 (Ct. App. 2021), this Court wrote:

> We start with the familiar rule that, in general, evidence of a person's character is not admissible to prove the person acted "in conformity therewith on a particular occasion." Rule 404(a), SCRE. We say in general because Rule 404(a) sets forth three exceptions that tell us when character evidence of an accused, a victim, or a witness is allowed. None of the three exceptions are in play here. Rule 404(b) commands that just as a person's general character is off limits unless it fits one of Rule 404(a)'s exceptions, evidence of a person's "other crimes, wrongs, or acts" is likewise inadmissible "to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. Such evidence—commonly referred to in our state as "prior bad act" or *Lyle* evidence—is not admissible unless its proponent can demonstrate it has a legitimate purpose, i.e. the evidence does something more than prove a person has a propensity to commit crimes. Rule 404(b), SCRE, recognizes only five legitimate purposes for prior bad act evidence: to prove "motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

As in Johnson, the only exceptions that could possibly be applicable to the pornography testimony in the present case are found in Rule 404(b).

Rule 404, SCRE provides:

> **(a) Character Evidence Generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) *Character of Accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
> (2) *Character of Victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
> (3) *Character of Witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.
>
> **(b) Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

As this Court correctly noted, "Although the circuit court did not expressly rule on Acker's Rule 404 argument, the circuit court addressed it by implication in overruling Acker's objection and admitting the evidence." The only possible ground for the objection is the applicable portion of Rule 404, Rule 404(b). Respectfully, the issue is preserved. "Preservation rules are intended to ensure that appellate courts review considered decisions of our trial courts and that issues are not being raised for the first time on appeal. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)." State v. Jones, No. 2020-000653, 2021 WL 5823847, at *3 (S.C. Dec. 8, 2021). The pornography addiction testimony was properly objected to as "prior bad act" or Lyle evidence not meeting an exception pursuant to Rule 404(b). Respectfully, the 404(b) issue is preserved for appellate review.

As to the merits, the testimony that Appellant admitted being addicted to pornography for fifty-two years is inadmissible propensity evidence that should have been excluded pursuant to

Rule 404(b), State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020). As discussed by this Court in Johnson v. State, 433 S.C. 550, 860 S.E.2d 696, 699 (Ct. App. 2021):

> Our supreme court addressed the proper approach to Rule 404(b) admissibility in State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020). In a criminal case, the State must convince the trial court that the prior bad act evidence is logically relevant to a material fact at issue in the case: "If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime." Lyle, 125 S.C. at 417, 118 S.E. at 807. If, after applying the logical relevancy test with "rigid scrutiny," the trial court concludes the prior bad act evidence serves some purpose other than to show the defendant's proclivity for criminal conduct (and that purpose is one of the five listed in Rule 404(b)), then the evidence is admissible unless its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE; see Perry, 430 S.C. at 44, 842 S.E.2d at 665. If the prior bad act did not result in a criminal conviction, the State also bears the burden of proving the prior bad act by clear and convincing evidence. State v. Smith, 300 S.C. 216, 218, 387 S.E.2d 245, 247 (1989).

The State failed to prove that the bad act testimony that Appellant admitted an addiction to pornography was logically relevant to a material fact at issue in the case. The State argued:

> Your Honor, I believe the fact that it's not just the pornography statement, is the fact that pornography was encompassed over – admission by the defendant was that it was over a 52-year span, which included the timeframe of the 2004 and 2005 where the Minor disclosed that he showed her child pornography. I think it is relevant in that, and I think it's more probative than it is prejudicial. An element of that is that there was pornography, you know, present in that home. You know, I think the jury can decide whether or not he showed it to that child. Him just having the pornography is not illegal. It's him showing it to the child. So his admission that he had been addicted to it for 52 years is something relevant to the fact that he had it during that timeframe. And I think it's more probative than it is prejudicial.

(R. p. 68, line 21 – p. 69, lines 1-11). An alleged addiction to pornography does not establish that Appellant showed pornography to the Minor. The State failed to show that pornography was present in the house. The grandmother only testified about the letter and did not testify about

seeing pornography at the house. Additionally, the State failed to prove that the testimony met an exception pursuant to Rule 404(b). The State failed to make any argument in response to the Rule 404 objection. The trial judge erred in admitting the propensity evidence. The error was not harmless.

5. **The trial judge erred in refusing to direct a verdict of acquittal for the dissemination of obscene material to a minor when the State failed to prove that the material was obscene.**

At the close of the State's case Appellant moved for a directed verdict of acquittal. (R. p. 122, lines 4-7). The State argued that the motion should be denied because the witness testified that Appellant subjected "her to watching child porno – pornography" and that would satisfy proof of dissemination of obscene material to a person under the age of twelve. (R. p. 122, lines 17-19). The judge denied the motion for a directed verdict of acquittal. (R. p. 123, line 20). The trial judge erred.

The minor testified, "He showed me pornography." (R. p. 34, line 7). When asked about the pornography, the minor testified, "On his computer he showed me videos of people having sex." (R. p. 34, lines 9-10). No videos were introduced in evidence. The State failed to prove that the videos were obscene.

Appellant was indicted for disseminating obscene material to minor twelve years of age or younger pursuant to S.C. Code §16-15-355. (R. pp. 204-205). S.C. Code §16-15-305 provides:

> For purposes of this article any material is obscene if:
>
> (1) to the average person applying contemporary community standards, the material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (C) of this section;
>
> (2) the average person applying contemporary community standards relating to the depiction or description of sexual conduct would find that the material taken as a whole appeals to the prurient interest in sex;
>
> (3) to a reasonable person, the material taken as a whole lacks serious literary, artistic, political, or scientific value; and
>
> (4) the material as used is not otherwise protected or privileged under the Constitutions of the United States or of this State.

While the statute does not require the State to introduce into evidence at trial the actual alleged obscene material, the State still bears the burden of proving that the material is obscene pursuant to the statute. The testimony of the minor in the present case did not establish that the material was obscene. The testimony failed to establish that the material depicted sexual conduct in a patently offensive way, failed to establish that the material appealed to a prurient interest in sex and failed to prove that the material lacked literary, artistic, political or artistic value. The State failed to meet its burden of proving that the material was obscene. The judge erred in refusing to direct a verdict of acquittal for the dissemination of obscene material charges.

The testimony of the minor does not establish that the material shown constituted obscene material pursuant to S.C. Code §16-15-305. In State v. Brouwer, 346 S.C. 375, 379, 550 S.E.2d 915, 917 (Ct. App. 2001), the South Carolina Court of Appeals wrote, "In considering a directed verdict motion, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998). On appeal of a criminal case, the reviewing court considers the evidence in the light most favorable to the State. State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000). If any direct or substantial circumstantial evidence exists which reasonably tends to prove the defendant's guilt, or from which his guilt may be fairly and logically deduced, this Court must find the trial court properly submitted the case to the jury. State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000). Viewing the evidence in the light most favorable to the State, the testimony of the minor is simply not sufficient to establish that the video she testified to seeing was obscene pursuant to the statute. The trial judge erred in refusing to direct a verdict of acquittal for the dissemination charges.

In finding that the trial judge correctly denied the motion for directed verdict on the dissemination of obscene material charge this Court wrote:

> Child testified Acker showed her pornography on his computer in his home office, specifically "videos of people having sex." Viewing this evidence in the light most favorable to the State, we find the circuit court properly denied Acker's motion for a directed verdict. See generally Weaverling, 337 S.C. at 465-67, 523 S.E.2d at 789-90 (noting the victim stated the defendant showed him "dirty" magazines, a pornographic movie, and nude photographs and the defendant was convicted of disseminating harmful material to a minor).

State v. Acker, No. 2016-002368, 2022 WL 164518, at *9 (S.C. Ct. App. Jan. 19, 2022).

In finding that the trial court correctly denied the motion for a directed verdict on the charge of dissemination of obscene material, counsel respectfully submits that this Court overlooked the lack of evidence of obscenity presented by the State. Counsel respectfully submits that this Court's reliance on State v. Weaverling, 337 S.C. 460, 466, 523 S.E.2d 787, 790 (Ct. App. 1999), is misplaced because in Weaverling, "Doe remembered Weaverling kept the pornographic magazine under his bed, the movie in his dresser, and the photographs of his wife in her makeup drawer. With this information the police obtained and executed a search warrant on Weaverling's home. Officers discovered the pornographic magazine and an x-rated movie, but did not find nude photographs of Weaverling's wife, although she helped in the search for them. Doe identified a pornographic magazine police seized from Weaverling's home as the magazine Weaverling showed him."

In contrast, no video was recovered by the police in the present case. No videos were introduced in evidence. The State relied solely on the witness's testimony that Appellant showed her "videos of people having sex" to prove dissemination of obscene material. The State failed to prove that the purported videos "of people having sex" were obscene as required pursuant to S.C. Code §16-15-305. The trial judge erred in refusing to direct a verdict of acquittal for the dissemination charge.

Counsel respectfully seeks rehearing on the five issues discussed above. Based on the arguments, counsel respectfully asks this Court to reverse the convictions and remand for a new trial for the criminal sexual conduct with a minor charge and for a directed verdict of acquittal for the dissemination charge.

Respectfully Submitted,

KATHRINE H. HUDGINS
ADAM SINCLAIR RUFFIN
Appellate Defenders

This 3rd day of February, 2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS STEPHEN ACKER,

APPELLANT

APPELLATE CASE NO. 2016-002368

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon Scott Matthews, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Thomas Stephen Acker, #370575, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 3rd day of February, 2022.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2016-002368

THE STATE, Respondent,

vs.

THOMAS STEPHEN ACKER, Appellant.

RETURN TO PETITION FOR REHEARING

On January 19, 2022, this Court affirmed Appellant's convictions and sentences in a published opinion. On February 3, 2022, Appellant filed a petition for rehearing in the above referenced case. By letter dated February 4, 2022, this Court requested the State provide a return to Appellant's petition. The State's return to Appellant's petition for rehearing follows.

Appellant begins his petition by arguing this Court erred in affirming the trial judge's decision to allow Shauna Galloway-Williams to testify as an expert in the field of child maltreatment and child abuse dynamics because the State failed to prove the reliability of Galloway-Williams' testimony. In support of his argument, Appellant asserts this Court and the trial court erred because Galloway-Williams did not "name any specific research, book or case study upon which the expert based her opinion." (Petition for Rehearing 11). Respectfully, Appellant misunderstands the nature of Galloway-Williams testimony and the holding of our

Supreme Court's opinion in State v. Jones[1]. Appellant misreads Jones to require an expert witness in the field of child abuse dynamics to provide specific citations to research to be tendered as an expert. Contrary to Appellant's assertion, Jones merely noted that Galloway-Williams could have offered specific citations if she were given an opportunity to gather them. Jones 423 S.C. at 639, 817 S.E.2d at 272. Galloway-Williams' ability to gather citations was not the only factor in the court's decision. The court also noted that Galloway-Williams' testimony was supported by peer-reviewed professional journals and publications that were uniformly accepted and recognized by child sexual abuse experts. Id. Like the defendant in Jones, Appellant conflates reliability with perfection. As Galloway-Williams explained, child abuse dynamics is "soft science, meaning that we can't expose children to conditions and then test them against abuse conditions." (R. 79, lines 15-17). Because scientists cannot expose children repeatedly to abusive conditions, Galloway-William's research cannot be quantified numerically as Appellant insists. As our Supreme Court noted in Jones: "There is always a possibility that an expert witness's opinions are incorrect. However, whether to accept the expert's opinions or not is a matter for the jury to decide. Trial courts are tasked only with determining whether the basis for the expert's opinions is sufficiently reliable such that it may be offered into evidence." State v. Jones, 423 S.C. at 639-640, 817 S.E.2d at 272. Here, the trial court properly determined that Galloway-Williams' testimony was reliable based on her training and experience and this Court properly affirmed the trial judge's decision.

Appellant next argues this Court erred in affirming the trial judge's decision to allow Shauna Galloway-Williams to testify as an expert in the field of child maltreatment and child abuse dynamics because she improperly vouched for and bolstered Victim's credibility.

---

[1] State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018).

Specifically, Appellant complains of Galloway-Williams' testimony that false denials were more common than false accusations. Further, Appellant complains about Galloway-William's testimony regarding children with behavioral problems being more vulnerable to abuse. As an initial matter, Appellant's complaint about Galloway-Williams' specific testimony was not preserved for appellate review, because Appellant never objected to those questions at trial. (R. 112-13). Even if preserved, both the trial judge and this Court correctly noted that Galloway-Williams could not bolster Victim's testimony because she was a blind expert who had never met Victim. In making his ruling the trial judge noted:

> She's not addressing [Victim]'s credibility. She's never met [Victim]. She couldn't possibly address her credibility. She's just going to discuss from what her experience has provided her why people delay in disclosing sexual abuse. She's not going to talk about [Victim] because she's never met her and she doesn't know her and knows nothing about her case. So she can't be bolstering her credibility."

(R. 95, lines 16-25). Similarly, this Court found "Galloway-Williams never treated child and never testified she believe Child, nor did she provide any indication that she had considered Child's specific disclosures..... Galloway-Williams never linked her general statements to this case or Child's credibility." State v. Acker Opinion No. 5892 (S.C. Ct. App. filed January 19, 2022) (Howard Adv. Sh. No. 3 at 60). Furthermore, this Court found "there was no evidence that Child exhibited behavioral problems such that others would be less likely to credit her disclosures." State v. Acker Opinion No. 5892 (S.C. Ct. App. filed January 19, 2022) (Howard Adv. Sh. No. 3 at 59). Because Galloway-Williams did not know Victim and did not know anything about her case, she could not improperly vouch for or bolster Victim's credibility. Accordingly, this Court did not err in affirming the trial judge's ruling allowing Galloway-Williams to testify as an expert witness.

Appellant next argues this Court erred in affirming the trial judge's decision to allow Shauna Galloway-Williams to testify as an expert in the field of child maltreatment and child abuse dynamics because the probative value of her testimony was substantially outweighed by the danger of unfair prejudice. Appellant's argument fails for two reasons. First, Galloway-Williams' testimony was relevant and had probative value because it assisted the jury in understanding how children react differently to abuse. As our Supreme Court observed in Jones: "the law in South Carolina is settled: behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized." Jones, 423 S.C. at 636, 817 S.E.2d at 271.

Second, Galloway-Williams' testimony could not be unfairly prejudicial because she did not know anything about Victim's case. When calling a witness to testify about behavioral characteristics of child abuse, the better practice is "not to have the individual who examined the alleged victim testify, but rather to call an independent expert." State v. Anderson, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015). Here, the State complied with the Supreme Court's recommendation in Anderson and called a blind expert who didn't know anything about Victim's case. Thus, as this Court correctly noted, Appellant did not suffer any unfair prejudice because Galloway-Williams "did not testify that *Child* displayed behaviors associated with abuse or that she harmed herself and suffered depression." State v. Acker Opinion No. 5892 (S.C. Ct. App. filed January 19, 2022) (Howard Adv. Sh. No. 3 at 62). This Court correctly affirmed the trial judge's ruling.

Appellant next argues this Court erred in determining that Appellant's objection to the testimony of Victim's grandmother regarding Appellant's addiction to pornography was not preserved for appeal. Appellant asserts that his general reference to Rule 404 SCRE and

character evidence preserved his objection for appeal. On the contrary, a review of the record reveals Appellant had an opportunity to place his specific objection on the record and he failed to do so. When Victim's grandmother testified at trial, Appellant offered an objection that was addressed in an off the record bench conference. (R. 59). The trial judge overruled Appellant's objection, but gave Appellant an opportunity to place his objection more fully on the record. (App. 66-68). Appellant objected under Rule 401, Rule 403, and Rule 404 SCRE. In regard to Rule 404, Appellant offered "Additionally, under 404 I don't see any type of exception. It's character evidence, and character evidence, of course as the Court knows, is generally inadmissible." (R. 68, lines 6-9). Appellant did not specify whether he was objecting under Rule 404(a) or Rule 404(b) SCRE. Appellant merely stated that character evidence is generally inadmissible which closely resembles the language of Rule 404(a) SCRE. By contrast, Appellant did not use the words "prior bad acts", "Lyle evidence", or any language that would otherwise indicate Appellant was objecting under Rule 404(b) SCRE. Because a Rule 404(b) argument was not presented to the trial court, this Court correctly held Appellant failed to preserve the issue for appeal.

Finally, Appellant argues this Court erred in affirming the trial judge's decision to deny Appellant's directed verdict motion as to the charge of disseminating obscene material to a minor. While Appellant concedes the State is not required to introduce the obscene material into evidence, Appellant nonetheless maintains the State failed to prove the material was obscene. (Petition for Rehearing 34). In support of his argument, Appellant maintains the State relied solely on Victim's testimony that Appellant forced her to watch "videos of people of having sex." Appellant's argument ignores the remainder of Victim's testimony in which she stated Appellant put his hand around her neck and held her so she couldn't move while he touched

himself. (R. 34). This testimony belies Appellant's assertion that the material he showed Victim was not obscene. To the contrary, when considered in the light most favorable to the State, evidence existed that the material shown to Victim appealed to the prurient interest in sex by virtue of Appellant touching himself while he forced Victim to watch the material. Accordingly, this Court correctly held that the trial judge properly denied Appellant's motion for a directed verdict on the charge of dissemination of obscene material to a minor.

CONCLUSION

For all of the foregoing reasons, the State requests the panel deny Appellant's petition for rehearing.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

February 16, 2022

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2016-002368

THE STATE, Respondent,

vs.

THOMAS STEPHEN ACKER, Appellant.

PROOF OF SERVICE

I, Leigh Ann Stone, certify that I have served the within Return to Petition for Rehearing on Appellant by sending an electronic copy via email to the address listed in AIS for the following individual:

Katherine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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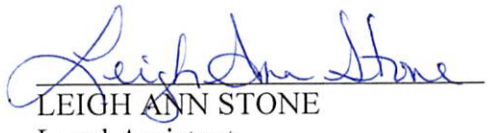
I further certify that all parties required by Rule to be served have been served.
This 16th day of February, 2022.



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The South Carolina Court of Appeals

The State, Respondent,

v.

Thomas Stephen Acker, Appellant.

Appellate Case No. 2016-002368

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C.J.

J.

A.J.

Columbia, South Carolina

FILED
Mar 25 2022

cc:
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