

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable Perry H. Gravely, Circuit Court Judge

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

RICHARD KENNETH GALLOWAY,

APPELLANT

Opinion No. 5905 (S.C. Ct. App. Filed April 20, 2022)

APPELLATE CASE NO. 2022-000914

APPENDIX

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Appeal from Greenville County

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RESPONDENT,

V.

RICHARD KENNETH GALLOWAY,

APPELLANT

APPELLATE CASE NO. 2018-001806

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred where, during the defense's case in chief, it excluded the testimony of a blind expert in psychology and schizoaffective disorder that schizoaffective disorder could cause false memories, since the complainant had been diagnosed with schizoaffective disorder prior to her claim that appellant molested her?

2.

Whether the court erred where it allowed expert testimony of risk factors for childhood sexual abuse, since the subject matter of the testimony was not beyond the ordinary knowledge of the jury?

3.

Whether the court erred where it allowed a witness to testify as an expert in child sexual abuse dynamics and disclosures, despite the witness' failure to comply with a subpoena duces tecum that commanded her to bring any research, publications or reports that she relied on as an expert, since the state failed to prove the reliability of the substance of the expert's testimony?

4.

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

5.

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

STATEMENT OF THE CASE

On September 26, 2017, a Greenville County Grand Jury indicted appellant for criminal sexual conduct with a minor in the first degree and lewd act on a child, offenses alleged to have occurred from 1987 – 1990. R. 577 – R. 580 Appellant was also charged with two additional counts of criminal sexual conduct with a minor in the first degree. R. 16, ll. 5-22.

Appellant was tried before the Honorable Perry H. Gravely and a jury, from May 14 – 16, 2018. R. 1. John Christopher Shipman and Jacob Goldstein represented appellant. R. 1. Justin Holloway represented the state. R. 1.

Appellant was convicted on two of the four indictments: criminal sexual conduct with a minor in the first degree and lewd act on a minor. R. 577, l. 21 – 578, l. 11. However, the jury found appellant not guilty of a second count of criminal sexual conduct with a minor in the first degree, and it hung on a third count of criminal sexual conduct with a minor in the first degree. R. 577, l. 5 – 578, l. 2.

Appellant was sentenced to consecutive terms of thirty years for criminal sexual conduct with a minor in the first degree and ten years for lewd act on a minor. R. 562, ll. 18-22; R. 581- R. 582.

Defense counsel moved the court to reconsider its sentence and a hearing was held on the matter October 4, 2018. R. 565. Appellant was represented by John Christopher Shipman and the state was represented by Brandi Hinton. R. 565. The court denied the motion. R. 574, ll. 16-17.

This appeal follows.

ARGUMENT

1.

The court erred where, during the defense's case in chief, it excluded the testimony of a blind expert in psychology and schizoaffective disorder that schizoaffective disorder could cause false memories, since the complainant was diagnosed with schizoaffective disorder prior to her claim that appellant molested her.

Although the court found Dr. Price was qualified as an expert in schizoaffective disorder, it forbade him from testifying that schizoaffective disorder may produce false memories. The exclusion of this relevant evidence denied appellant his right to present a complete defense since the evidence offered a reasonable explanation of why the complainant might believe she had been molested if she had, in fact, not been.

Standard of review

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting *Douglas*, 369 S.C. at 429-30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." *State v. Grubbs*, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing *Means v. Gates*, 348

S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001)). To show prejudice, the appellant must prove “that there is a reasonable probability the jury’s verdict was influenced by the challenged evidence or the lack thereof.” *Fields v. Reg’l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing *Means*, 348 S.C. at 166, 558 S.E.2d at 924).

Relevant facts

In 2016, law enforcement officials in Greenville received a letter from the complainant in which she accused appellant of molesting her when she was a child in the 1980’s. R. 45, ll. 21-24; R. 371, ll. 19-25. Appellant was ultimately charged with three counts of criminal sexual conduct with a minor in the first degree and with one count of lewd act on a minor based on these allegations.

At trial, the complainant testified that she began seeing a therapist in 2011 to treat her for post-traumatic stress disorder (PTSD). The complainant claimed she had PTSD as a result of childhood sexual abuse by appellant. R. 135, l. 19 – R. 136, l. 14. According to the complainant, in 2012, she was also diagnosed with schizoaffective disorder. R. 185, ll. 18-20.

After the state rested, defense counsel proffered the testimony of Dr. David Price, who was ultimately qualified as an expert in psychology, PTSD, and schizoaffective disorder. R. 403, ll. 2-3; R. 440, ll. 6-23. Dr. Price had not evaluated the complainant, and he testified as a blind expert. R. 425, ll. 12-22. During the proffer, Dr. Price explained that schizoaffective disorder can cause delusions which result in false memories. R., 423, l. 22 – 424, l. 1. When cross-examined by the solicitor, Dr. Price acknowledged these false memories may produce false accusations in court. R. 427, l. 23 – 428, l. 3.

The court ruled that Dr. Price would be allowed to testify about PTSD and schizoaffective disorder generally but ruled that he could not testify about false memory. R. 430, ll. 6-19.

Specifically, the court found the “nature of the testimony is beyond the standard for the jury . . . I think that he’s indicated that he has this knowledge that qualifies him as an expert. Generally, with exception that the substance is reliable as to anything relating to PTSD and schizoaffective disorder.” R. 430, ll. 6-13. “But I am not going to allow any testimony on this whole false memory syndrome¹ or whatever it’s called, you could open the door for every single case from that. So I’m not going to allow anything regarding false memory, repressed memory since he has not evaluated this particular person and be[en] able to diagnose[] that’s what’s going on here.” R. 430, ll. 13-19.

Discussion

The court erred when it denied appellant the opportunity to present a complete defense. Defense counsel properly objected to this restriction here, and the grounds of his objection were apparent from his proffer of Dr. Price’s testimony and from the context.² R. 430, l. 20.

“The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies.”

¹ Although the solicitor tried to couch Dr. Price’s testimony on false memory in terms of a “disorder” or a “syndrome” during his cross-examination, Dr. Price personally avoided using those terms. R. 424, l. 20 – 425, l. 5.

² See Rule 103(a)(2), SCRE, which provides that: “Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission **were made known to the court by offer or were apparent from the context.**” (emphasis added).

Washington v. Texas, 388 U.S. 14, 19 (1967). “Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.” *Id.* “[T]he Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). “The rights to confront and cross-examine witnesses and to call witnesses in one’s own behalf have long been recognized as essential to due process.” *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

Rule 401, SCRE provides that “‘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.” Here, the evidence appellant sought to introduce—that schizoaffective disorder could cause false memories—was relevant, since the complainant said she suffered from this disorder, and the ultimate issue to be decided in the case was whether the molestation alleged to have occurred thirty years earlier happened in fact, or happened only in her mind.

Rule 702, SCRE provides that “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.” “[E]xpert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge.” *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010).

When executing its gatekeeping duties, the “court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First,

the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.” *Id.* at 446, 699 S.E.2d at 175. “Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter.” *Id.* “Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.” *Id.*

Here, the court found the subject matter at issue to be beyond the ordinary knowledge of the jury and it found that Dr. Price had acquired the knowledge to qualify him as an expert. R. 430, ll. 6-10. However, the court aborted its Rule 702 analysis as to the reliability of the false memory testimony and instead stated that its reason for excluding testimony about false memory was because Dr. Price did not evaluate the complainant. R. 430, ll. 13-19. The court’s failure to complete the Rule 702 analysis as to the reliability of Dr. Price’s proffered testimony about false memory was an abandonment of its gatekeeping role and was error.

Since the fact that Dr. Price was testifying as a blind expert did not prevent the court from admitting his testimony as to PTSD and schizoaffective disorder, it was an abuse of discretion to find that his status as a blind expert precluded him from offering testimony on how memory can be affected by schizoaffective disorder. Moreover, as discussed in Issue 3 below, the court allowed the testimony of another education witness—Shauna Galloway-Williams—who was a blind expert, when the evidence was offered by the state. The court’s exclusion of Dr. Price’s testimony here was manifestly arbitrary, unreasonable, and unfair. *See State v. Grubbs*, 353 S.C. at 379, 577 S.E.2d at 496 (court’s ruling on the admissibility of an expert’s testimony is an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair). That is

particularly so, since the state's witness was allowed to give expert testimony about the impact of trauma on memory.³ R. 283, l. 4 – 284, l. 2; R. 331, l. 14 – 332, l. 4.

The court erred when it precluded appellant from presenting a complete defense by excluding relevant evidence offered by a qualified expert. *See Washington v. Texas*, 388 U.S. 14, 19 (1967) (the right to offer the testimony of a witness is, in plain terms, the right to present a defense). Appellant was prejudiced because the exclusion of the evidence left the jury with only one conclusion—the complainant said she was molested because she had, in fact, been molested. Had the jury been presented with another plausible reason for the complainant's testimony—false memory caused by schizoaffective disorder—the jury would likely have found reasonable doubt.

³ Galloway-Williams told the jury that “time and date” are “abstract concept[s] that most children don’t really master until 12 or 14 years old and still they struggle with. So, you know, to expect that a child, or even an adult can remember the time and date of specific events, traumatic events may be very challenging.” R. 331, ll. 14-20.

2.

The court erred where it admitted expert testimony about risk factors for childhood sexual abuse, since the subject matter of the testimony was not beyond the ordinary knowledge of the jury.

Pursuant to Rule 702, SCRE, the trial court must find that the expert testimony at issue is about subject matter that is beyond the ordinary knowledge of the jury before it may be admitted. Expert testimony that age, developmental delays, emotional problems, behavioral problems, substance abuse, poverty, violence, and single-parent homes with live-in partners were risk factors for sexual abuse was not beyond the ordinary ken of the jury, and so its admission was error.

Standard of review

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting *Douglas*, 369 S.C. at 429-30, 632 S.E.2d at 848) (internal quotations omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." *State v. Grubbs*, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing *Means v. Gates*, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001)). To show prejudice, the appellant must prove "that there is

a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing *Means*, 348 S.C. at 166, 558 S.E.2d at 924).

Relevant facts

The state proffered the testimony of Shauna Galloway-Williams, who was ultimately qualified as an expert in child sexual abuse dynamics and delayed disclosures. R. 322, ll. 17-20. During the proffer, in addition to testimony about delayed disclosure, the solicitor asked Galloway-Williams to provide the "risk factors" for "childhood sexual abuse situations." R. 281, ll. 5-7. Galloway-Williams gave the following response.

So, there are some risk factors that we generally talk about in terms of child maltreatment. One of the—some of the personal risk factors that would be part of the child themselves might be the **child's age, developmental delays, emotional problems, behavioral problems**, things that make a child more vulnerable or somewhat easier target for someone to abuse.

There are familial or household risk factors. **Substance abuse** is one of those risk factors. Also, single-parent homes, particularly **single-parent homes with live-in partners** are particularly high risk factors. We tend to see higher rates of abuse in those households.

Then societal factors, they play a role in that as well. **Violence, high poverty**, race may play a role in abuse and neglect scenarios.

R. 309, ll. 8-23 (emphasis added).

At the conclusion of the proffer, defense counsel objected to the admission of Galloway-Williams' testimony based on, inter alia, the fact that "the subject matter is not beyond the ordinary knowledge of the jury." R. 308, l. 21 – 309, l. 5. Counsel correctly argued that, "even nonscientific experts need to meet the foundational requirements of Rule 702." R. 313, ll. 8-9.

However, the court ruled the evidence was admissible. R. 315, ll. 17-18. The court stated that “after hearing, I find the subject matter is beyond the ordinary knowledge of the jury. That she has the requisite knowledge and skill to serve as an expert and that I find the subject testimony reliable.” R. 308, ll. 10-14.

Galloway-Williams’ testimony before the jury tracked her in camera testimony. R. 336, l. 6 – 337, l. 5.

Discussion

The court erred when it allowed Galloway-Williams to testify in her capacity as an expert witness as to risk factors for child sexual abuse since the state failed to prove that the subject matter of this testimony was beyond the ordinary knowledge of the jury. Although the witness was an experienced child advocate, her expert testimony should have been limited to delayed disclosures.

The South Carolina Supreme Court explained in *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010), that “in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony.” “First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.” *Id.* In *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009), the South Carolina Supreme Court clarified that all expert testimony, including nonscientific expert testimony, must satisfy the criteria of Rule 702, SCRE.

The state failed to demonstrate that the expert testimony was beyond the knowledge of the jury. Galloway-Williams testified that age, developmental delays, emotional problems, behavioral problems, substance abuse, poverty, violence, and single-parent homes with live-in

partners were all risk factors for sexual abuse. R. 281, ll. 8-23. This information was not outside of the ordinary knowledge of the jury, and it did not assist the jury with determining a fact at issue or understanding the evidence. When the proffered evidence failed the first step of the Rule 702 inquiry as laid out in *Ford Motor Co.*, the court should have prohibited the testimony.

In *State v. Brown*, 411 S.C. 332, 341–42, 768 S.E.2d 246, 251 (Ct. App. 2015), a case involving this same expert witness, this Court found that “Galloway-Williams’ specialized knowledge of the behavioral characteristics of child sex abuse victims was relevant and crucial in assisting the jury’s understanding of why children might delay disclosing sexual abuse, as well as why their recollections may become clearer each time they discuss the instances of abuse.” *Accord State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999) (expert testimony on behavioral characteristics of child sexual assault victims “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.”)

Here, unlike in *Brown* and in *Weaverling*, the witness’ testimony was not confined to behavioral characteristics of child sexual assault victims, but also included testimony about general risk factors for child abuse. The admission of expert testimony on this topic was error.

The admission of this testimony was not harmless. As the South Carolina Supreme Court observed in *State v. Kromah*, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013), “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.”

3.

The court erred where it allowed a witness to testify as an expert in child sexual abuse dynamics and disclosures, despite the witness' failure to comply with a subpoena duces tecum that commanded her to bring any research, publications or reports that she relied on as an expert, since the state failed to prove the reliability of the substance of the expert's testimony.

Despite being served with a subpoena duces tecum that commanded her to bring any “articles, publications, treatises, books, manuals, [and] data” upon which she relied, the witness offered no support for her testimony in the form of written materials—this was despite her testimony that she relied on research in formulating her opinions. The admission of her testimony as an expert here was error, since the state failed to prove the reliability of the subject matter about which she testified.

Standard of review

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court’s decision to admit expert testimony will not be reversed on appeal absent “a manifest abuse of discretion accompanied by probable prejudice.” *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court’s conclusions “either lack evidentiary support or are controlled by an error of law.” *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting *Douglas*, 369 S.C. at 429-30, 632 S.E.2d at 848) (internal quotations omitted). “A [circuit] court’s ruling on the admissibility of an expert’s testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair.” *State v. Grubbs*, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing *Means v. Gates*, 348 S.C. 161, 166,

558 S.E.2d 921, 924 (Ct. App. 2001)). To show prejudice, the appellant must prove “that there is a reasonable probability the jury’s verdict was influenced by the challenged evidence or the lack thereof.” *Fields v. Reg’l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing *Means*, 348 S.C. at 166, 558 S.E.2d at 924).

Relevant facts

The state proffered the testimony of Shauna Galloway-Williams, the executive director of the Julie Valentine Center, a child abuse and sexual assault recovery center in the Greenville area. R. 267, l. 24 – 268, l. 6. In addition to her role as executive director, Galloway-Williams said she also taught classes at the University of South Carolina Upstate in child advocacy. R. 269, ll. 16-24. Galloway-Williams shared that in her professional capacity, she maintained forty hours of continuing education credits every two years, and she had over one hundred and fifty hours of skills-based training in assessing maltreated children. R. 269, ll. 7-15.

Galloway-Williams was offered as a blind, nonscientific expert. R. 291, l. 23 – 292, l. 10; R. 306, l. 24 – 307, l. 1. She was ultimately qualified as an expert in child sexual abuse dynamics and delayed disclosures. R. 322, ll. 17-20.

During the proffer, Galloway-Williams acknowledged that she did not perform research in these fields herself but said that her testimony was based on “**decades of research.**” R. 306, ll. 10-16 (emphasis added). According to Galloway-Williams, research on delayed disclosure was done by “surveying victims or looking at previous case files.” R. 298, ll. 19-25. Galloway-Williams also offered that “[s]ome research even supports that many adult[] [victims of child sexual abuse] don’t report until they are adults.” R. 275, ll. 22-23.

In addition to delayed disclosures, Galloway-Williams proffered testimony covered a number of topics: grooming; risk factors for childhood sexual abuse; and the impact of trauma on memory. R. 279, l. 4 – 280, l. 10; R. 281, ll. 5-23; R. 283, l. 4 – 284, l. 2.

At the conclusion of the proffer, defense counsel explained to the court that Galloway-Williams had not complied with a subpoena duces tecum he issued to her. **“I sent Ms. Galloway a subpoena, I know the Court’s familiar with that. We sent it last week. I asked her and directed her to bring with her to court today all the articles, publications, treatises, books, manuals, data that she would be relying upon. She chose to bring to court one article about forensic interviewing. She’s not testifying as a forensic interviewer, so she didn’t respond to the subpoena. That’s it. She didn’t bring anything . . .”** R. 313, l. 22 – 314, l. 7 (emphasis added). “There’s no way [for the defense] to test the accuracy of [her] information.” R. 314, ll. 18-19.

Defense counsel argued against the admission of Galloway-Williams’ testimony as an expert, since the state had not met the foundational requirements of Rule 702, SCRE as to reliability. R. 313, ll. 3-4. Counsel noted that per “*State v. White* and the Ford Motor Company case, even nonscientific experts need to meet the foundational requirements of Rule 702. I don’t think there’s an exception in the law for reliability.” R. 313, ll. 6-11. Counsel also cited *State v. Chavis*,⁴ and argued there must be “some evidence demonstrating that the individual expert is able to draw reliable results from the procedures which he consistently applies.” R. 313, ll. 11-21.

⁴ *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015).

However, the court ruled that “after hearing, I find the subject matter is beyond the ordinary knowledge of the jury. That she has the requisite knowledge and skill to serve as an expert and that I find the subject testimony reliable.” R. 315, ll. 17-18; R. 308, ll. 10-14.

Despite her failure to bring any publications or data relevant to her field pursuant to being subpoenaed to do so, Galloway Williams testified before the jury on direct examination that delayed disclosure, “It’s very common. It’s more common than not from my experience and from the training and research.” R. 326, ll. 8-11. Although Galloway-Williams held out to the jury that she was relying on research, defense counsel was unable to cross-examine her on the research underpinning her testimony since he was unable to view it.

Discussion

Appellant served a subpoena duces tecum on the witness pursuant to Rule 13, SCRCrimP, which ordered her to bring to court any printed materials and data upon which she relied as an expert in the fields in which she was testifying, but the witness instead brought a lone article on a different topic—forensic interviewing.

Galloway-Williams testified that she taught university classes, attended hundreds of hours of continuing education, and considered research in formulating her opinions. The fact that she allegedly did so without possessing any printed materials about her field should have alarmed the trial judge. Absent **any** written materials to support the reliability of the subject matter about which she testified, when she had been subpoenaed to bring them, the court’s finding that her testimony was admissible under Rule 702, SCRE was an abuse of discretion.

The South Carolina Supreme Court explained in *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010), that “in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury

may consider expert testimony.” “First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.” *Id.* Next, “the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter.” *Id.* **“Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.”** *Id.* (emphasis added).

In *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009), the South Carolina Supreme Court clarified that all expert testimony, including nonscientific expert testimony, must meet “a reliability threshold for the jury’s ultimate consideration.” “Reliability is a central feature of Rule 702 admissibility . . .” *Id.* In *State v. Chavis*, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015) the South Carolina Supreme Court explained, that “*State v. White* should apply in qualifying child abuse assessment experts because their testimony is non-scientific.”

“Under *White*, two threshold determinations must be made. First, the qualifications of the expert must be sufficient, and, second, there must be a determination that the expert’s testimony will be reliable.” *Chavis*, 412 S.C. 106-07, 771 S.E.2d at 339.

Galloway-Williams gave expert testimony on a number of topics: delayed disclosures; grooming; risk factors for childhood sexual abuse; and the impact of trauma on memory. However, the state did not establish that her testimony would be reliable as to any of these topics—this failure is made plain by the lack of any written documentation supporting any of the witness’ claims. Although Galloway-Williams testified that she accrued the required continuing education credits and training for her employment, “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.” *Chavis*, 412 S.C. at 108, 771 S.E.2d at 339.

In *State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018), the South Carolina Supreme Court addressed an argument as to the reliability of this exact witness’ testimony. In *Jones*, the defendant alleged “it was error to admit Galloway-Williams’ testimony [about delayed disclosure and the role of non-offending caregivers] because there was no evidence demonstrating her opinions were accurate or reliable. Specifically, Jones alleges Galloway-Williams failed to identify or name studies any supporting her opinions, nor did she state whether any of the literature she relied on had been peer reviewed.” *Id.* at 638, 817 S.E.2d at 271-72.

In finding the trial judge did not abuse his discretion in admitting Galloway-Williams’ expert testimony, the South Carolina Supreme Court reasoned that, “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 journals and trade publications, all of which were uniformly accepted and recognized by child sexual abuse experts and professionals.” *Id.* at 639, 817 S.E.2d at 272.

Here, Galloway-Williams was invited to provide such articles and publications when she was served with a subpoena duces tecum prior to her appearance in court, and she did not do so. Her failure to provide these materials pursuant to subpoena demonstrated that the subject-matter of her testimony was unreliable.

The admission of the expert testimony here was not harmless error. In this case, there was no physical evidence and there were no eyewitnesses to the alleged molestation, which was

alleged to have occurred over thirty years ago. The state's use of Galloway-Williams to testify about delayed disclosures under these circumstances was an important part of its case. The state also relied on Galloway-Williams' proffered testimony on the topics of grooming; risk factors for childhood sexual abuse; and the impact of trauma on memory—to support its otherwise thin case.

The complainant's testimony was the primary evidence against appellant. Under these circumstances, where the complainant claimed she was molested thirty years earlier, the erroneous admission of such evidence cannot be found harmless beyond a reasonable doubt. *See State v. Mizzell*, 349 S.C. 326, 333–34, 563 S.E.2d 315, 319 (2002) (finding error is harmless beyond a reasonable doubt if the “reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt”); *State v. Chavis*, 412 S.C. 101, 110-11, 771 S.E.2d 336, 340-41 (2015) (finding error was harmless where multiple witnesses corroborated the victim's testimony about her abuse, medical evidence supported her claims, and the defendant had taken provocative pictures of the victim in states of undress).

4.

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

Evidence that appellant behaved violently against and threatened to kill the complainant's mother was evidence of prior bad acts. The state did not even contend that the evidence fit within a *Lyle* exception, and the court's admission of this evidence without conducting the requisite analyses under Rule 404(b), *Lyle*, and Rule 403, was error.

Standard of review

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. *State v. Whitner*, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Whitner*, 399 S.C. at 557, 732 S.E.2d at 866.

In order to admit evidence of bad acts not resulting in conviction, the trial court must, "[a]s a threshold matter, . . . determine whether the proffered evidence is relevant." *Clasby*, 385 S.C. at 154, 682 S.E.2d at 895; see *State v. Wallace*, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). "If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence [is admissible under the terms] of Rule 404(b)" to show, inter alia, the existence of a common scheme or plan. *Clasby*, 385 S.C. at 154, 682 S.E.2d at 895. If the testimony is relevant and proffered for a permissible purpose, the trial court must next

conduct a balancing test, pursuant to Rule 403; where the testimony's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. *See State v. Gillian*, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007); *see also* Rule 403, SCRE (“[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...”).

Relevant facts

The state asked the complainant about the nature of her mother's relationship with appellant. R. 114, ll. 19-23. The complainant said the two had physical fights, and defense counsel objected pursuant to Rule 404(b), SCRE. R. 114, l. 25 – 115, l. 5. The solicitor replied that “the State does not seek to admit this under 404(b). This is not common scheme or plan evidence, Your Honor. This is relevant evidence.” R. 115, ll. 7-10. The court ruled, “I’m going to allow the testimony. Objection overruled.” R. 115, ll. 12-13.

Pursuant to the court's ruling, the complainant testified that appellant was an “angry” and “violent” person, and during one “really bad” incident appellant threatened to kill her mother. R. 115, l. 19 – 116, l. 1. The complainant said appellant frequently had “violent event[s]” and “violent outburst[s].” R. 116, ll. 4-8.

Discussion

Testimony that appellant behaved violently against the complainant's mother and threatened to kill her was prior bad act evidence that should have been excluded pursuant to Rule 404(b), SCRE, *Lyle*, and Rule 403, SCRE.

“Evidence of other bad acts is generally inadmissible to prove a defendant's guilt for the crime charged; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule

404(b), SCRE.” *State v. King*, 424 S.C. 188, 199, 818 S.E.2d 204, 210 (2018). The notes to Rule 404(b) provide that “unlike the federal rule which does not limit the purposes for which evidence of other crimes may be admitted, the South Carolina rule limits the use of evidence of other crimes, wrongs, or acts to those enumerated in *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).”

Here, the state agreed the evidence did not fall within a *Lyle* exception. The testimony did not go to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. The solicitor admitted, “the State does not seek to admit this under 404(b). This is not common scheme or plan evidence, Your Honor. This is relevant evidence.” R. 115, ll. 7-10. The court simply overruled the objection. R. 115, ll. 12-13.

The court’s failure to conduct the required Rule 404(b) analysis was an abuse of discretion. The failure to exercise discretion is an abuse of that discretion. *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015). “When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.” *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

“Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE.” *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009); accord *State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). The court must determine “whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.” *State v. King*, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018).

Here, the trial court failed to conduct any analysis under Rule 403, SCRE. In *Spears*, *supra*, this Court held that where it was not implicit or apparent from the record whether the trial court considered whether the probative value of a prior bad act was substantially outweighed by

unfair prejudice, “the trial court erred by failing to conduct an on-the-record balancing test.” *State v. Spears*, 403 S.C. at 254, 742 S.E.2d at 881.

Although there was evidence of other bad acts admitted without objection, that testimony was so outlandish in nature, and unsupported by any documentation, that defense counsel used the “outlandish details” of those other bad acts to support his position that the complainant was “storytelling” rather than testifying to facts.⁵ R. 501, l. 25 – 504, l. 8.

However, the testimony that appellant assaulted the complainant’s mother and threatened to kill her was not outlandish and simply painted appellant as a bad man with a violent character. The erroneous admission of this prior bad act evidence was not harmless. “Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.” *State v. King*, 424 S.C. at 201, 818 S.E.2d at 211 (quoting *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). Here, given the lack of physical evidence and eyewitness testimony, the admission of this bad character evidence was not harmless beyond a reasonable doubt.

⁵ The complainant claimed that appellant shot at her mother’s house, shot at a Texaco station where her mother worked, shot at her grandparents’ house, forced a car chase down the road to a judge’s office, and broke in and kidnapped her brother from a motel. R. 167, l. 8 – 168, l. 11. Although the complainant claimed some of these events “made the news,” or involved law enforcement, Investigator Robert Perry, who had been a police officer for thirty-two years, did not find any police reports or news reports to corroborate these claims. R. 188, l. 4 – 193, l. 18; R. 374, ll. 20-23; R. 388, l. 6 – 390, l. 10.

5.

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

Appellant objected that evidence of the letter's contents must be proved by production of the letter, but the court instead ruled the evidence was admissible as a hearsay exception. Without any knowledge of whether the letter had been lost or destroyed, and whether it could otherwise be obtained, admitting testimony about the contents of the letter was error.

Standard of review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*; see also *State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Relevant facts

The complainant's mother testified that during the timeframe of the alleged sexual misconduct, the mother had broken up with appellant. The mother claimed that shortly thereafter, appellant wrote her a letter in which he apologized for being abusive and tried to rekindle their relationship. R. 229, ll. 21-24; R. 233, ll. 12-18.

Defense counsel objected to hearsay and pursuant to "the best evidence rule." R. 233, ll. 19-22. "If they're going to talk about the contents of the letter, they need the letter to prove it." R. 233, ll. 22-24. The court asked the solicitor whether he had the letter, and the solicitor replied

that he did not. R. 233, l. 25 – 234, l. 2. The solicitor said, “Your Honor, there is no letter, so there’s no way to have better evidence—” R. 234, ll. 1-2. The court did not inquire any further into the circumstances of the letter, and ruled, “I am going to allow it in I think based on state of mind.” R. 234, ll. 7-8.

The complainant’s mother went on to testify that in the letter, appellant “apologized for being mean to us and he said he wouldn’t do it anymore and he really wanted us to come back.” R. 262, ll. 12-14.

Discussion

Rule 1002, SCRE provides: “To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.” Rule 1004, SCRE allows in relevant part that, an original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if “[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or . . . [n]o original can be obtained by any available judicial process or procedure.”

In order to admit evidence of the contents of a letter without the original letter or a copy, the proponent of the evidence—the state—was required to show that the original was lost or destroyed, that the loss or destruction was not in bad faith, and that the original could not be obtained by any available judicial process or procedure, and it did not do so. Instead, the solicitor only said, “there is no letter,” before the court ruled.

Assuming *arguendo* that the evidence fell within the hearsay exception of a then-existing mental or emotional condition, the evidence was still admitted in violation of the best evidence rule. The proponent of the evidence did not meet its burden to show what happened to the letter

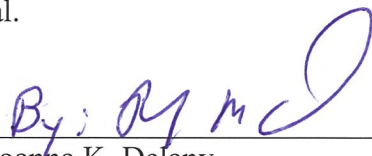
and explain why it could not be obtained by judicial process. The court's admission of testimony about the letter without performing an analysis under Rule 1004, SCRE, was error.

This error was not harmless. Although evidence of other bad acts was admitted without objection during the trial, that testimony favored the defense in that it was outlandish in nature and unsupported by any documentation.⁶ Testimony that appellant apologized for abusing the complainant's mother, however, was not outlandish and it painted appellant as an abusive man. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. King*, 424 S.C. at 201, 818 S.E.2d at 211 (quoting *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). Here, given the lack of physical evidence, eyewitness testimony, or other corroboration, the admission of propensity evidence of appellant's abusive nature cannot be considered harmless beyond a reasonable doubt.

⁶ The complainant claimed that appellant shot at her mother's house, shot at a Texaco station where her mother worked, shot at her grandparents' house, forced a car chase down the road to a judge's office, and broke in and kidnapped her brother from a motel. R. 167, l. 8 – 168, l. 11. Although the complainant claimed several of these events "made the news," or involved police, Investigator Robert Perry, who had been a police officer for thirty-two years, did not find any police reports or news reports to corroborate these claims. R. 188 l. 4 – 193, l. 18; R. 374, ll. 20-23; R. 388, l. 6 – 390, l. 10.

CONCLUSION

Based on the foregoing arguments, appellant respectfully asks this Court to reverse his convictions and sentences and remand for a new trial.



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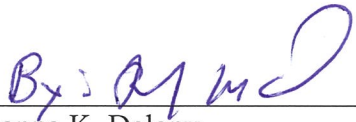
ATTORNEY FOR APPELLANT

This 8th day of April, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 8, 2020.



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICHARD KENNETH GALLOWAY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of April, 2020.

By: Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of April, 2020.

Notary Public (L.S)
Notary Public for South Carolina
My Commission Expires: December 31, 2029

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

Respondent,

vs.

RICHARD KENNETH GALLOWAY,

Appellant.

Appellate Case No. 2018-001806

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL**I.**

The trial court did not err in excluding expert testimony that someone diagnosed with schizoaffective disorder may create false memories because there was no testimony or medical records showing Victim suffered from this symptom or any other symptoms of schizoaffective disorder. Further, because the blind expert was allowed to testify to the jury that someone suffering from schizoaffective disorder may suffer from delusions or hallucinations, Appellant was not prejudiced by the exclusion of the testimony. Finally, any error was harmless because Appellant admitted to the abuse to Victim's mother and Victim's testimony was corroborated by her mother's testimony.

II.

The trial court did not abuse its discretion in allowing expert testimony concerning the risk factors for child sexual abuse because the testimony about characteristics of sexually abused children is beyond the ken of a layperson, and the issue is not preserved for review.

III.

The trial court did not err in qualifying the witness because the State provided sufficient evidence as to the reliability of the field of child abuse dynamics and topics such as delayed disclosure; and the trial court was not required to sanction the State for the alleged failure of the expert witness to comply with the overly burdensome subpoena duces tecum to which the expert witness provided a good faith reply.

IV.

The trial court did not err in allowing testimony that Appellant was physically violent with Victim's mother because it was proper *res gestae* evidence to explain why Victim and Mother did not disclose the sexual abuse to law enforcement, and the testimony was cumulative in nature to other bad acts to which Appellant did not object such as his physical assaults on Victim's biological father, his kidnapping of Victim's brother, his discharge of a weapon at three different buildings, and his attempt to run Victim's mother's vehicle off the road.

V.

The trial court did not err in allowing Victim's mother to testify about a letter Appellant sent her over twenty-five years ago under the best evidence rule, and the testimony was cumulative to other evidence to which Appellant did not interpose an objection.

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Appellant Galloway for three counts of criminal sexual conduct with a minor in the first degree and one count of lewd act on a minor for events occurring between 1987 and 1990. Following a three day trial on May 14-16, 2018, the jury convicted Appellant of one count of criminal sexual conduct in the first degree and lewd act on a minor. The jury acquitted Appellant of one of the remaining counts of criminal sexual conduct on a minor and returned a hung verdict on the last count of criminal sexual conduct on a minor.

The presiding trial judge, the Honorable Perry H. Gravely, sentenced Appellant to consecutive sentences of thirty years imprisonment for criminal sexual conduct with a minor and ten years imprisonment for lewd act on a minor. Judge Gravely denied Appellant's subsequent motion to reconsider the sentence.

STATEMENT OF FACTS

Victim was thirty-nine years old at the time of trial, and she testified to abuse she received prior to her eleventh birthday. R. p. 70. By the time of trial she lived in Missouri and had not seen Appellant Galloway in years. Appellant was her uncle by marriage until he divorced Victim's aunt. R. p. 71. He later became romantically involved with Victim's mother, which provided Galloway the opportunity to sexually abuse Victim. R. p. 215.

Victim testified Victim's mother [Mother] worked at a Texaco gas station in Greenville and one night during the summer before Victim started fourth grade, Appellant babysat Victim and her brother at the University Inn where he was staying while Mother worked. R. p. 79; pp. 85-86. After putting both children to bed, Appellant got in bed with Victim, pulled her close, and minutes later, was reaching into her underwear. After a few minutes, he stopped. R. pp. 89-90. This was the first

occurrence in a pattern of sexual abuse Appellant inflicted upon Victim.

Victim told Mother what happened the next day, and Appellant did not watch the children again for a long time. R. p. 90. However, Victim, Mother, and Victim's brother later moved into a house to live with Appellant. Appellant took her one day to Brevard, North Carolina, to chop wood for his mother. While there, Appellant fondled Victim while she stood on the tailgate of his pick-up truck. R. pp. 92-94.

Another time, while at Appellant's mother's house in Greenville, Victim woke up to Appellant taking her pants off and performing oral sex on Victim. Appellant's mother was not home at the time. Victim testified while the abuse was occurring, she focused on the Christmas tree in the room. R. p. 97.

Victim testified that although she was capable of showering on her own and showered on her own beforehand, Appellant nonetheless started insisting in helping Victim shower and he checked to make sure she was clean. Appellant fondled Victim's breasts and told Victim if he did not play with her breasts, they would not grow. R. p. 107. Appellant also fondled Victim inside her underwear after she fell asleep. R. p. 108. Additionally, he would perform oral sex on Victim in his bedroom. R. p. 108. She recalled him rubbing his hands between her labia when she was in fifth grade. R. pp. 108-110.

Mother continued to work at Texaco, and Appellant often kept Victim out of school to help Appellant either chop wood, or pick produce for resale at a roadside stand in North Carolina. Victim testified she was encouraged to play in the stream behind the roadside stand and get wet so Appellant could see through her shirt and her nipples would get hard. R. pp. 111-12. Victim also testified Appellant sexually assaulted her at his brother's home in North Carolina. R. p. 113.

Victim testified Appellant was physically violent with Mother. Victim testified during one episode of violence, she grabbed the phone to call 911 and Appellant grabbed the phone from her, threatening that if she called, he would kill Mother. R. pp. 115-16. Victim testified Appellant also disciplined her with a switch. He would make Victim pick out a branch for the switch and take her clothes off. Appellant then would hit her with the switch from her shoulders to her knees. This happened frequently when she was in fifth grade. R. p. 117.

Victim testified she left Appellant's residence with Mother and her brother when she was in sixth grade. R. pp. 118-19. They moved to University Inn Hotel, but Appellant found them and kicked in the door. He grabbed Victim's brother. Victim rode with Mother as she chased after Appellant's vehicle. Victim's brother was subsequently returned. R. p. 121.

They then moved in with Victim's grandparents, who were both alcoholics. As the grandparents became more violent, Victim testified Mother was considering moving back in with Appellant. Faced with this disquieting prospect, Victim disclosed the sexual abuse to Mother, who immediately left the house carrying a gun. The next morning, Mother summoned her outside to the fence where Appellant stood. Appellant told Victim she needed to forgive him or he would go to hell. Victim responded then she guessed he was going to hell. R. pp. 122-24.

She moved with her mother and brother to a duplex. Appellant drove into their yard and "did doughnuts." He also tried to run Mother and Victim off the road. Another time, Appellant and two other people pulled Victim's biological father out of the car and beat him up, breaking his ribs. R. pp. 124-27.

After sixth grade, the family left Greenville and rode with a truck driver to California. They returned East to a cabin in North Carolina where she started seventh grade. However, they moved

again, to Asheville, after Appellant found them. R. pp. 125-27. Victim bore a child at fifteen and moved out of the house at sixteen to live her first husband. She dropped out of high school and earned her GED. She joined the military, married again in 1999, and was stationed in Germany. When she divorced again and was released from the Army, she moved back to Missouri where she was stationed for some time. She started back her relationship with her second ex-husband, but he died in a car accident before they could remarry. R. pp. 131-34.

Victim later disclosed abuse to a counselor at a domestic violence shelter where she worked. She testified she was diagnosed with post-traumatic stress disorder (PTSD). R. pp. 135-36. She testified she rarely saw her Mother in subsequent years because Mother became involved in another abusive relationship and her relationship with Mother became strained. R. p. 138. In 2016, she decided to report Appellant's abuse to law enforcement in the various jurisdictions where she was abused. R. p. 138.

Defense counsel elicited testimony from Victim on cross-examination that she told Investigator Perry that Appellant one time shot up the Texaco station. R. p. 167. Victim also testified on cross-examination that she left the Army with a 70% disability rating for PTSD. R. p. 173. Victim verified on cross-examination that she told Investigator Perry she was previously diagnosed with schizoaffective disorder and treated at a hospital in 2012, and she suffered a brain injury in a car wreck the next year. R. pp. 185-86.

Mother testified she first met Appellant through her sister while Appellant was briefly married to her sister. They started dating when Appellant became a regular customer at the Texaco where she worked. R. p. 215. Mother confirmed she brought the children to Appellant at the University Inn where he was staying so he could babysit them. Afterwards, Appellant approached

Mother and told her that he was asleep and was groggy and mistook Victim for Mother when he woke up with Victim's leg on him and his arm around Victim. Victim subsequently told Mother about the sexual assault at University Inn. Mother testified she did not let the children stay with Appellant for a long while afterwards. R. pp. 216-17.

However, as Mother's relationship with Appellant progressed, Mother and her children moved in with Appellant. The children were not allowed to do much socially and they often worked with Appellant while she worked at Texaco. She confirmed that both children were good and did not need to be disciplined often. Additionally, the brother spent a lot of time outside, which would have left Appellant and Victim alone together inside the house. R. pp. 219-22.

Mother confirmed Appellant began stalking the family after they moved out of his house. R. p. 224. She confirmed Appellant kidnapped the brother and one time, Appellant beat up Victim's biological father. She also confirmed Victim's account that one time they fled to Magistrate Cagle's office and sought a protective order. R. pp. 225-28.

Importantly, Mother confirmed Victim's account of how she disclosed Appellant's sexual abuse when Mother considered moving back in with Appellant. Victim said, "No Mamma, we can't go back." R. p. 231, line 25 – p. 232, line 4. Mother testified that in response to the disclosure, she took a gun and visited Appellant, demanding if there was something he needed to tell her. Appellant replied he had talked with his mother and she told him he needed to ask for forgiveness from Mother and Victim. Mother confirmed Appellant visited them in the front yard of Victim's grandparents later and asked both Mother and Victim to forgive him for being abusive to them. Victim refused to forgive him, replying she guessed he was going to hell. R. pp. 230-34.

Galloway-Williams testified before the jury as an expert in child abuse dynamics. She

testified delayed disclosure of sexual abuse was common. She testified the most common reason a child does not disclose abuse is fear. She explained disclosure is commonly delayed if the perpetrator is in a position of authority. Children may also not disclose because they do not believe their voice is going to be heard. R. pp. 326-28. Galloway-Williams testified as to factors that made certain children more likely to be sexually abused. She further testified that if the child sees the perpetrator violent towards other people, the child would internalize the violence and be less likely to report the sexual abuse. R. pp. 332-28.

Investigator Robert Perry testified that in his present position, he has investigated several cases involving allegations of sexual abuse from the 1970s through the 1990s. He does not find forensic evidence in these cases due to their age. On cross-examination, Investigator Perry confirmed Victim told him Appellant shot at a Texaco gas station where Mother worked, but Investigator Perry did not research police records or media records to confirm if the event occurred. R. p. 390.

The only witness for the defense was a psychologist, Dr. David Price. Dr. Price testified he never met Victim or interviewed Victim. Dr. Price testified about PTSD, noting typically someone with PTSD does not want to talk about the traumatic events causing the disorder. Dr. Price also explained schizoaffective disorder. He noted it was considered a thought disorder. Symptoms of the disorder may include the presence of delusions, hallucinations, and anhedonia. Dr. Price testified that delusions and hallucinations are not uncommon symptoms of schizoaffective disorder. R. pp. 443-47.

Dr. Price admitted on cross-examination that he previously evaluated Appellant in 2012. He also admitted he does not actively work in the field of dynamics of child abuse. R. pp. 448-49. Dr.

Price admitted on cross-examination that someone suffering from PTSD may have their memory of the traumatic events distorted or the memories may remain accurate, it just varies from individual to individual. R. pp. 449-51. Dr. Price testified most people diagnosed with schizoaffective disorder are diagnosed with the disorder between the ages of eighteen to twenty-eight. R. p. 453. On redirect examination, Dr. Price admitted that flashbacks may be recounted exactly or the flashbacks may be an inaccurate recollection of events. R. p. 462.

STANDARD OF REVIEW

All five issues raised by Appellant Galloway concern either the admission or exclusion of evidence. Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." (emphasis added)). The improper admission of evidence is reversible error only when the admission causes prejudice. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Similarly, the exclusion of evidence is reversible only where error and prejudice are shown. State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990).

ARGUMENT

I.

The trial court did not err in excluding expert testimony that someone diagnosed with schizoaffective disorder may create false memories because there was no testimony or medical records showing Victim suffered from this symptom or any other symptoms of schizoaffective disorder. Further, because the blind expert was allowed to testify to the jury that someone suffering from schizoaffective disorder may suffer from delusions or hallucinations, Appellant was not prejudiced by the exclusion of the testimony. Finally, any error was harmless because Appellant admitted to the abuse to Victim's mother and Victim's testimony was corroborated by her mother's testimony.

Appellant complains the trial court erred in limiting Dr. Price's testimony that someone suffering from schizoaffective disorder may create false memories. However, no evidence was presented at trial as to any symptoms of schizoaffective disorder that Victim might have suffered, including any false memories. Also, no evidence was presented that Victim suffered from any mental health issues during the time in her childhood that she alleged she was sexually abused, at the time she reported abuse in 2016, or when she testified in 2018. Without proof that Victim suffered false memories or other symptoms of schizoaffective disorder at any time, the jury would need to speculate in the absence of evidence to consider Dr. Price's excluded blind-expert testimony. His testimony was not relevant and not probative for the jury's consideration.

Dr. Price was qualified to provide expert testimony on schizoaffective disorder and post-traumatic stress disorder. Appellant complains the trial court erred in limiting his testimony by not allowing him to testify that people with schizoaffective disorder may produce false memories. Dr. Price was permitted to testify before the jury that possible symptoms of schizoaffective disorder may include delusions or hallucinations. He also was permitted to testify that someone suffering from

PTSD may have distorted memories. R. pp. 449-51.

The right to present a defense is not unlimited, but must “bow to accommodate other legitimate interests in the criminal trial process.” Rock v. Arkansas, 483 U.S. 44, 55 (1987). While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence regardless of its admissibility under the rules of evidence. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586, 594 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge’s ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) (“The appellate court reviews a trial judge’s ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives **great deference** to the trial court.” (emphasis added)).

Under Rule 702, SCORE:

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.

Before admitting expert testimony, the trial judge must find: (1) the expert’s testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011).

Even if the trial court determines proposed expert testimony meets the criteria of Rule 702,

SCORE, it still may be excludable if it is not relevant or is unduly prejudicial. See State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (noting both expert testimony and fact testimony about trauma resulting from sexual abuse is admissible if its probative value is not outweighed by the danger of unfair prejudice). Under Rule 401, SCORE: “‘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.” Under Rule 403, SCORE: “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, ...”

The evidence Victim suffered from schizoaffective disorder presented at trial was limited to Victim’s admission on cross-examination that she told the detective she was diagnosed with schizoaffective disorder and her admission that she was hospitalized for schizoaffective disorder in 2012. R. pp. 185-86. Defense counsel did not ask Victim about any of the symptoms Victim might have suffered from her schizoaffective disorder. The defense did not produce medical records or present any testimony to the circumstances of her hospitalization. The defense did not present any evidence as to the presence of any symptoms of schizoaffective disorder that Victim may have exhibited. Therefore, it is speculative at best that Victim produced false memories as a result of her suffering from schizoaffective disorder. Accordingly, the trial court did not err in excluding this portion of the blind expert testimony because insufficient foundation was presented to make Dr. Price’s testimony relevant. The jury would have needed to rankly speculate, without evidence, that Victim suffered these symptoms in order to believe that the memories of sexual abuse were fabricated as a result of her mental condition.

In State v. Turner, 373 S.C. 121, 129-30, 644 S.E.2d 693, 698 (2007), the appellant argued

the trial court erred by not allowing him to question the victim regarding her diagnosis of schizophrenia and the names of the medications she was taking. During the in camera proceedings, the trial court observed, “There would be very little that would assist the jury in evaluating her ability to recall what happened or her credibility. The court felt it would require speculation on the jury’s part to connect the medical testimony to her ability to testify truthfully.” Id. at 130, 644 S.E.2d at 698.

The Supreme Court found no error, opining, “Because the victim was taking her medication at the time of the robbery and at the time of the trial, her schizophrenia diagnosis and the types of medications she was taking were irrelevant to her ability to truthfully recall the events. Further, appellant has not shown why the specific information was needed or any nexus between the medications the victim was taking and any alleged misidentification of appellant.” Id. at 131, 644 S.E.2d at 698.

Further, the Supreme Court found the appellant failed to show he was unfairly prejudiced by the limitation because the victim testified on direct examination that she took medication and was taking the medication on the day of the robbery; and on cross-examination, the appellant elicited testimony that if she does not take medication, over a period of time, she will get confused, forgetful and may hear voices. Id.

In the present case, as in Turner, there was no evidence connecting Dr. Price’s excluded testimony with the fact testimony presented. No evidence was presented that Victim incurred false memories at any point as a result of schizoaffective disorder. No testimony was presented Victim suffered from schizoaffective disorder in her childhood during 1987 to 1990, or at any time prior to 2012. Moreover, no evidence was presented that she was suffering from symptoms of the disorder

when she reported the sexual assaults to law enforcement authorities in 2016. No evidence was presented that her treatment for the disorder in 2012 was not successful or that medication and treatment failed to contain any symptoms Victim might have otherwise suffered.

Appellant was not prejudiced by the exclusion of the testimony. Exclusion of evidence is reversible only where error and prejudice are shown. State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990). In the instant case, Dr. Price was allowed to testify that someone suffering from schizoaffective disorder may suffer delusions or hallucinations. Additionally, Dr. Price testified that someone suffering from PTSD may suffer flashbacks that are not accurate memories. Therefore, essentially the same information was provided to the jury. When other properly admitted testimony reveals essentially the same information, the improper exclusion of admissible evidence is harmless. State v. Brown, 344 S.C. 302, 543 S.E.2d 568 (Ct. App. 2001) (finding, in a speeding prosecution, that even if magistrate should have allowed the video of the roadway into evidence, it was cumulative to testimony concerning the roadway and a diagram of the road that was used at trial) *overruled on other grounds by* State v. Oxner, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011).

Additionally, any error was harmless because Mother corroborated many of the events Victim described. In a surprising departure from many other trials for sex crimes, Appellant, the perpetrator, was the first to disclose the first occurrence of sexual abuse, telling Mother something occurred at University Inn, but claiming it was a mistake because he thought Victim was Mother when he woke up with his arm around Victim. R. p. 216, line 18 – p. 217, line 9. Further, Mother confronted Appellant after Victim later disclosed the longstanding sexual abuse to Mother. Appellant sought forgiveness rather than deny the abuse. R. pp. 230-34. Therefore, evidence guaranteed the jury would not believe the allegations of abuse were driven by schizoaffective disorder-induced false

memories. Given this level of corroboration and the lack of evidence Victim suffered any of the described symptoms of schizoaffective disorder, any error was harmless and Appellant was not prejudiced by the limitation on Dr. Price's irrelevant testimony. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

II.

The trial court did not abuse its discretion in allowing expert testimony concerning the risk factors for child sexual abuse because the testimony about characteristics of sexually abused children is beyond the ken of a layperson, and the issue is not preserved for review.

Appellant argues the trial court abused its discretion because it allowed Galloway-Williams to testify about the risk factors for child sexual abuse. Appellant argues such testimony is not beyond the ken of lay jurors, but this claim is not supported by a sufficient objection to the trial court nor legal authority to this Court. Because most jurors are not familiar with the dynamics of child sexual abuse, the testimony was beyond the ken of lay jurors and proper for expert testimony.

How the issue arose

During trial, Appellant's counsel made a motion to require the trial court to exercise its gatekeeping function under Rule 702, SCRE, as to Galloway-Williams' expected testimony. Counsel advised the trial court, "And I expect we're going to have a motion at that time after the testimony is proffered objecting to her being qualified as a witness and being allowed to provide testimony to the jury in this case. So, I don't know that [the prosecutor] needs to touch on every single detail of her testimony, but the substance of it, the heart of it, I think, yes." R. p. 263, lines 1-13.

The trial court noted that Galloway-Williams' expert testimony was found admissible under Rule 702, SCRE in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015). However, defense counsel argued a hearing was required, relying on State v. Anderson, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015). So the trial court presided over an in camera hearing on the matter. When Galloway-Williams took the stand in camera, the trial court amusingly referred to some prior event,

telling Galloway-Williams, “I won’t shock you like I did in Pickens.” So it appears the trial court was familiar with Galloway-Williams’ testimony from at least one past trial. R. p. 267, lines 16-18.

Galloway-Williams testified to her considerable credentials, including: (1) she was currently the Executive Director of the Julie Valentine Center; (2) she earned a bachelor’s degree in psychology and master’s degree in counseling; (3) she attended the continuing education required for her to maintain her South Carolina license as a professional counselor; (4) her attainment of over 150 hours of skills-based training related to the investigation and assessment of children where there are allegations of child maltreatment; (5) her coursework as an adjunct professor at USC-Upstate teaching a course in child maltreatment and a course on gender violence in society; (6) her experience providing professional assistance, including counseling, to children when there is an allegation of child maltreatment, neglect, or sexual assault; and (7) her twenty years of experience in the mental health field. R. pp. 267-72.

The trial court found she was qualified to provide expert testimony after defense counsel advised he did not have any “specific questions about her qualification necessarily” but defense counsel still wanted to understand the substance of the expert testimony. R. pp. 271-73.

Galloway-Williams then testified in camera, defining delayed disclosure and explaining factors that result in delayed disclosure (R. pp. 275-78). Additionally, she testified about grooming (R. pp. 278-80); piecemeal disclosure (R. pp. 280-81); the effect of threats and violence on delayed reporting (R. pp. 281-83); and a child’s ability to remember details of the abuse (R. p. 283). In the mix, she provided testimony about the risk factors for child sexual abuse (R. p. 281).

Defense counsel engaged in a lengthy cross-examination, but did not challenge testimony regarding the risk factors for child abuse. R. pp. 285-88. After the trial court reaffirmed his ruling

finding the testimony admissible, defense counsel placed his objections on the record, arguing none of the three prongs of Rule 702, SCRE were met for the testimony as a whole. He targeted testimony concerning delayed disclosure and the non-offending caregiver's role in enabling or discouraging disclosure, arguing it was not beyond the common knowledge of jurors, and he also argued testimony regarding a children's ability to recall or remember details of abuse was not proper. R. pp. 309-12. He asserted Galloway-Williams was not qualified because she did not do research or keep statistics, and made an argument about Galloway-Williams' response to defense counsel's broad subpoena request. R. pp. 313-15. However, defense counsel never argued that Galloway-Williams' testimony about the risk factors for child sexual abuse was improper testimony.

When Galloway-Williams testified before the jury, defense counsel reasserted his previous objection made in camera when the prosecution moved for the trial court to qualify Galloway-Williams as an expert. Trial counsel at this time also added an objection that the expert testimony was bolstering even though Galloway-Williams never interviewed or spoke with Victim. R. pp. 321-22. When Galloway-Williams testified about risk-factors before the jury, defense counsel did not interpose an objection. R. pp. 336-37.

Appellant's argument is not preserved for review. The ground asserted on appeal must be supported by the objection raised at trial. State v. Silver, 314 S.C. 483, 486, 431 S.E.2d 250, 251 (1993). The argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review. State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."). Defense counsel offered several meritless arguments to the trial court, but not the one advanced now on appeal, that testimony about the risk

factors of abuse were not beyond the common knowledge of jurors. Instead, defense counsel argued, against the overwhelming weight of authority, that delayed disclosure was not beyond the common knowledge of jurors. Yet he did not target the limited testimony presented on the risk factors. Accordingly, this Court should not review the issue on appeal.

Now on appeal, Appellant contends Galloway-Williams should not have been allowed to testify specifically to the risk factors of sexual abuse because it is information that is not beyond the ken of lay jurors. Appellant fails to cite any authority to support this assertion, but instead, Appellant cites State v. Weaverling, 337 S.C. 460, 474-475, 523 S.E.2d 787, 794 (Ct. App. 1999) and State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015). Those cases support a contrary position to Appellant's argument because those cases found behavioral characteristics of sexually abused children are beyond the common knowledge of laypersons and therefore expert testimony does assist the finder of fact pursuant to Rule 702, SCRE. Specifically, this Court noted in Brown, "Numerous jurisdictions considering this issue have similarly concluded it is more appropriate for an expert to explain the behavioral traits of child sex abuse victims to a jury." Brown, 411 S.C. at 342, 768 S.E.2d at 246. So Appellant argues even though the behavioral characteristics of child abuse are beyond the knowledge of laypersons, for some unspecified reason, risk factors of child abuse are not. However, this Court concluded in Brown, testimony was appropriate from qualified experts on the general behavioral characteristics of child sex abuse victims because it did not fall within the ordinary knowledge of jurors who did not have prior experience, "either directly or indirectly" with sexual abuse. Brown, 411 S.C. at 342, 768 S.E.2d at 251.

The entirety of Galloway-Williams' expert testimony represents testimony that is beyond the knowledge of most jurors, and therefore, helpful to the trial of fact. Rule 702, SCRE. The Nebraska

Supreme Court observed the following:

The reasoning for a rule allowing an expert to testify about sexual abuse in generalities, without being familiar with the alleged victim, is that **few jurors have sufficient familiarity with child sexual abuse** to understand the dynamics of a sexually abusive relationship, and the behavior exhibited by sexually abused children is often contrary to what most adults would expect.

State v. Roenfeldt, 486 N.W.2d 197, 204 (Neb. 1992) (emphasis added, citation and internal quotation marks omitted).

Behavioral testimony on the effects of sexual abuse on children and their reactions to sexual abuse has been a topic of expert testimony for over a quarter of a century. The Supreme Court of Hawaii observed in 1990 that “sexual abuse of children ‘is a particularly mysterious phenomenon.’” State v. Batangan, 799 P.2d 48, 51 (Haw. 1990) (quoting State v. Castro, 756 P.2d 1033, 1044 (Haw. 1988)). The Hawaii Supreme Court quoted with approval the observations of other courts as follows:

While jurors may be capable of personalizing the emotions of victims of physical assault generally, and of assessing witness credibility accordingly, tensions unique to trauma experienced by a child sexually abused by a family member have remained largely unknown to the public. . . . [T]he routine indicia of witness credibility – consistency, willingness to aid the prosecution, straight forward rendition of the facts – may, for good reason, be lacking. As a result jurors may impose standards of normalcy on child victim/witnesses who consistently respond in distinctly abnormal fashion.

Batangan, 799 P.2d at 51 (quoting State v. Moran, 728 P.2d 248, 251 (Ariz. 1986) and State v. Middleton, 657 P.2d 1215, 1222 (Or. 1983) (Roberts, J., concurring)).

In the instant case, Galloway-Williams’ testimony about risk factors for abuse was not beyond the ken of laypersons because laypersons typically do not have experience with sexual abuse.

Therefore, the trial court did not abuse its discretion.

III.

The trial court did not err in qualifying the witness because the State provided sufficient evidence as to the reliability of the field of child abuse dynamics and topics such as delayed disclosure; and the trial court was not required to sanction the State for the alleged failure of the expert witness to comply with the overly burdensome subpoena duces tecum to which the expert witness provided a good faith reply.

Appellant claims that Galloway-Williams should not have been allowed to testify based on what Appellant’s trial counsel unilaterally felt was an inadequate response to an overly broad and harassing subpoena duces tecum. Appellant’s trial counsel did not ask the trial court to enforce the subpoena by requiring Galloway-Williams to retrieve additional materials. The trial court did not err in declining to grant the motion to suppress Galloway-Williams’ testimony based on defense counsel’s broad request, especially in light of Galloway-Williams’ good-faith response to the request.

How the issue arose

On May 8, only six days before trial, defense counsel sent Galloway-Williams a subpoena asking for “all articles, publications, texts, manuals, treatise, facts and data” upon which Galloway-Williams would base her opinion. Galloway-Williams sent back an e-mail response two days later, on May 10, which she discussed during the in camera hearing:

So, I did bring you an article on forensic interviewing because it is an article that I referenced in the email after I also explained to you that it would be impossible to bring every article, treatise, book, text, training manual that I’m basing my opinion on. Because the field is based on, again, over twenty years of research. So, the article I gave you gives you a good overview with a pretty lengthy bibliography of the topics related to child abuse. It’s called forensic interviewing, but within that article, there is a subsection on delayed reporting.

R. p. 353, lines 12-22.

The trial court cautioned defense counsel when he attempted to interrupt Galloway-Williams, then Galloway-Williams continued:

So my response to you was that it's near impossible to gather all of those materials and to produce them. I did give you reference cites that you were looking for, National Children's Alliance, National Children's Advocacy Center. They are lengthy – you can find lots of information about these articles – about these topics in those areas.

R. p. 353, line 23 – p. 354, line 11. Trial counsel's cross-examination ended feebly with a repeat of the remonstration that Galloway-Williams brought only one article. R. p. 354, lines 9-11.

Trial counsel never sought to explain to the trial court why the information, including the article that provided a beneficial overview and reference cites, was inadequate. Trial counsel, as far as the record indicates, never sought to narrow the scope of the subpoena or provide guidance as to what additional materials he needed. The record also fails to indicate that trial counsel investigated the materials cited in the e-mail or the article. It is clear that trial counsel was only using the subpoena to engage in gamesmanship. The trial court did not err in declining to suppress Galloway-Williams' obviously reliable expert testimony.

Appellant complains Galloway testified “without possessing any printed materials about her field [which] should have alarmed the trial judge.” The trial court did not abuse its discretion by failing to be alarmed, however, because the reliability of Galloway Williams' testimony is well-established by case law. Notably absent from Appellant's brief is any authority that an expert who provides abundant testimony about their experience, their training, and information in the field, nonetheless is required to bring “documentation” as Appellant alleges in his brief. Br. of App. p. 19.

Appellant's argument falters because Appellant did not request the trial court to compel

Galloway-Williams to bring more materials. In State v. Hughes, 346 S.C. 339, 552 S.E.2d 35 (Ct. App. 2001), an expert in child sexual abuse treatment and counseling testified for the State and opined the child's behavior was consistent with child sexual abuse. On cross-examination, she admitted she used her notes to refresh her memory and the defendant sought to inspect the notes pursuant to Rule 612, SCRE. This court reversed the trial court because the trial court "apparently believed it was powerless to order [the witness] to produce anything that was not in the courtroom." In his dissent in Hughes, Judge Goolsby opined that the trial judge's comments indicated he was engaging in an exercise of discretion in denying the request for the witness to produce the notes and also noted defense counsel could have ensured the documents were in court by issuing a subpoena duces tecum under Rule 13, SCRCrimP. Id. at 345-46; 552 S.E.2d at 38-39.

By analogy, under Rule 5, SCRCrimP, the trial court retains discretion to determine what remedy, if any, is appropriate for a violation of the rule. State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996) (finding under Rule 5, the court may order the offending party to permit discovery or inspection, grant a continuance, or prohibit the party from introducing the undisclosed evidence, or enter any other appropriate order the court deems just under the circumstances). In the instant case, the trial court could in his discretion, allow Galloway-Williams to testify even though she did not bring all the articles she ever read, all the training materials she ever viewed, or notes of the therapy and interviews with abused children she has conducted. Defense counsel could have requested the trial court order Galloway-Williams to produce more materials, but he did not. The record shows Galloway-Williams attempted to provide a source with an overview of the topics and citations for defense counsel's further investigation. The record is silent as to whether counsel actually conducted any research of the cited materials in the article Galloway-Williams provided to counsel.

Under Rule 702, SCORE:

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.

Before admitting expert testimony, the trial judge must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011).

“Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge.” Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). Generally, courts allow experts to testify if they are more qualified in the field than a juror on the subject. Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997). An expert witness may state an opinion based on facts not within his first-hand knowledge, and may base his opinion on information, whether or not admissible, made available to him before the hearing if the information is of the type reasonably relied upon in the field. Rule 703, SCORE; Dawkins v. Fields, 354 S.C. 58, 64, 580 S.E.2d 433, 436 (2003). Defects in an expert witness' education and experience go to the weight, not the admissibility, of the expert's testimony. Gooding, 326 S.C. at 253, 487 S.E.2d at 598.

The requirement of showing reliability only relates to the area of expertise, and not the reliability of an expert witness' testimony. State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012) (“To be clear, the reliability of a witness's testimony is not a prerequisite to determining

whether or not the witness is an expert.”). Further, the trial court must take care in its undertaking of the gatekeeper function without infringing on the jury’s duty as a factfinder, the gatekeeper role merely requires the trial court “decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law.” Watson, 389 S.C. at 445, 699 S.E.2d at 174.

The admission of expert testimony is within the sound discretion of the trial court. State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). The need for this standard is astutely explained by the United States Supreme Court as follows:

[The abuse of discretion] standard applies as much to the trial court’s decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary “reliability” proceedings in ordinary cases where the reliability of an expert’s methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert’s reliability arises.

Kumho Tire Company v. Carmichael, 526 U.S. 137, 152 (1999).

In Graves v. CAS Medical Systems, 401 S.C. 63, 735 S.E.2d 650 (2012), our Supreme Court found the circuit court erred by not allowing a doctor to be qualified as an expert on Sudden Infant Death Syndrome (SIDS) even though the doctor testified she did not consider herself an expert on SIDS. Id. at 78, 735 S.E.2d at 657. The Court noted “an expert need not be a specialist in the particular branch of the field.” Id. The doctor had thirty years’ experience as a neonatologist and stayed current on SIDS literature. The doctor routinely encountered SIDS in her practice. The Court found that the circuit court abused its discretion in excluding the testimony. Id. at 78, 735 S.E.2d at 657-58.

In Honea v. Prior, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988), Prior contended the circuit

court erred in qualifying two social workers as experts to testify on a victim's mental condition. However, the Court of Appeals observed: "A witness may be competent to testify as an expert although the witness acquired his or her knowledge through practical experience **and not by scientific study, training, or research.**" *Id.* at 530, 369 S.E.2d at 849 (emphasis added). The Court of Appeals found each social worker was qualified based on her education, post-graduate training, and clinical experience with victims of sexual assault, as well as her opportunities to observe the victim. *Id.* at 531, 369 S.E.2d at 849. In the instant case, Galloway-Williams was well qualified to testify about child abuse dynamics. The trial court did not abuse its discretion.

A law review article confirms the reliability of expert testimony on subjects such as delayed disclosure:

Psychological research demonstrates that delayed reporting is common among sexually abused children. Frequently when children finally disclose, they give slightly different versions of the abuse to different interviewers. Finally, although there is debate about how many sexually abused children recant, it is undisputed that some children recant and some recant their recantation. **Thus, from a psychological point of view, expert testimony about delay, inconsistency, and recantation is not controversial. From the legal perspective, such testimony is not worrisome.**

John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y, 45-46 (2010) (footnotes omitted) (emphasis added). This article was cited favorably in Brown. 411 S.C. at 343, 768 S.E.2d at 251.

Further, "[D]isclosure in child abuse cases is generally delayed because of coercion, guilt, or some other reason, [and thus] there will be no physical evidence to corroborate the victim's allegations. Therefore . . . expert testimony will . . . assist the jury in understanding the evidence." People v. Beckley, 456 N.W.2d 391, 402 (Mich. 1990). "Indeed, the majority of states permit expert

testimony to explain delayed reporting, recantation, and inconsistency” People v. Spicola, 947 N.E.2d 620, 635 (N.Y. 2011).

The Supreme Court examined the reliability of opinion testimony Galloway-Williams provided in State v. Jones, 423 S.C. 631, 638-39, 817 S.E.2d 268, 271 (2018). The Supreme Court observed:

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

Id. at 638-39, 817 S.E.2d at 271. In the instant case, the trial court did not err because evidence supports the reliability of Galloway-Williams’ expert testimony and the trial court exercised its discretion in allowing her testimony notwithstanding defense counsel’s dissatisfaction with Galloway-Williams response to his broad subpoena request.

IV.

The trial court did not err in allowing testimony that Appellant was physically violent with Victim's mother because it was proper res gestae evidence to explain why Victim and Mother did not disclose the sexual abuse to law enforcement, and the testimony was cumulative in nature to other bad acts to which Appellant did not object such as his physical assaults on Victim's biological father, his kidnapping of Victim's brother, his discharge of a weapon at three different buildings, and his attempt to run Victim's mother's vehicle off the road.

Appellant contends the trial court erred in overruling Appellant's objection to testimony that Appellant was physically violent with Mother. The testimony was probative to help explain why Victim and Mother did not disclose Appellant's sexual abuse to law enforcement. It also is not prejudicial because the prosecution elicited testimony on a number of other bad acts Appellant committed plus Appellant's counsel elicited some further violent events in a clear exercise of strategy.

How the issue arose

Victim testified Appellant's relationship with Mother started out okay, but then things "got bad fast," with physical fights. R. p. 114, line 19 – p. 115, line 2. At this point, Appellant interposed an objection, arguing it was inadmissible under Rule 404(b), SCRE. The prosecution answered it was relevant evidence, but then asked to approach to present further argument. However, the trial court declined further argument and ruled it would allow the testimony, so the prosecution did not complete its discussion about the purpose of admitting the testimony. R. p. 115, lines 3-14.

Victim continued to testify that when Appellant was angry, he was violent. She testified he had physical altercations with Mother and one in particular was really bad. She did not describe the episode though – instead the prosecution interjected a question as to whether she ever called 911.

Victim replied she tried once to call 911 and Appellant grabbed the phone and asked her what she was doing. She said she would call the police and he responded that if she did, he would kill Mother. R. p. 115, line 16 – p. 116, line 1.

Asked if the physical abuse occurred regularly, Victim answered,

There would be an outburst and there would be – there would be a violent event, then there would be some like quiet anger in the house, then everything would be okay for a while. Then it would – something else would happen, then it would be another violent outburst. Sometimes we would leave and go stay somewhere else for a day or two, but we came back.

R. p. 116, lines 2-10.

In addition to testimony about the domestic violence visited upon Mother, Victim testified Appellant disciplined her harshly for things like biting her nails or not making her bed neatly enough by being made to pick a switch from a tree, take her clothes off, and proceed to be beaten with the switch by Appellant from shoulders to knees to the extent sometimes that blood was drawn. R. pp. 116-17. Counsel did not object to this testimony.

Victim testified, without an on-record objection, that Mother and the children stayed at University Inn where Appellant broke in, kicked in the door, and kidnapped Victim's younger brother. R. pp. 120-21.

Victim testified after she moved into a nearby duplex with Mother and her brother, Appellant would drive his truck through the back yard, "doing doughnuts." R. p. 124, lines 10-21. Appellant also would tailgate Mother's car and try to run her car off the road. R. p. 124, line 24- p. 125, line 3.

Victim testified another time, Appellant was chasing them in their car, and Mother took them to the Magistrate's Office to seek protection. R. pp. 125-26. Defense counsel did not object to any of this

testimony.

Victim testified that one time, Appellant and his sister pulled Victim's biological father out of his truck and hit and kicked him. Victim testified the father suffered broken ribs and a busted face. R. pp. 126-27. Defense counsel did not object to any of this testimony.

Appellant's defense counsel elicited testimony from Victim on cross-examination that Appellant shot at the Texaco station and exhorted, "But you didn't tell us anything about that yesterday." R. p. 167, lines 8-18. Therefore, contrarily, defense counsel was complaining that Victim did not testify about prior bad acts. Defense counsel also elicited testimony that Appellant shot at Victim's grandparent's house and had a fight with Victim's uncle. R. p. 168

Mother confirmed these bad acts occurred, and added additional events: She confirmed Appellant drove into the yard of the duplex and did "doughnuts." She added that he shot at their duplex, and told the prosecutor, "I mean, a lot of stuff happened at the duplex. Let me know how much you want to hear." R. p. 223, lines 8-15. Mother confirmed Appellant kidnapped Victim's brother. R. p. 223. Mother also confirmed Appellant tried to run Mother's car off the road and she fled with her children to the Magistrate's Office to seek protection. R. pp. 226-27. Mother confirmed Appellant beat Victim's father severely, and she needed to take the father to the hospital that night. R. pp. 227-28. Mother testified Appellant harassed her at the Texaco station and he beat up her boss. Officers responded to that incident. R. pp. 228-29. Mother further testified, without objection, that the gun she used to confront Appellant after Victim disclosed was "a handgun a customer gave me at work, you know, for protection. It wasn't store protection, it was protection from [Appellant], you know." R. p. 231, lines 2-9.

The testimony about the physical confrontations between Appellant were probative because

the testimony explains a reason why Victim would be reluctant to disclose the sexual abuse visited upon her by Appellant. “The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred.” State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). Res gestae evidence is admissible so long as the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014); Rule 403, SCRE.

In the instant case, Victim and Mother delayed disclosure of the sexual abuse to law enforcement for roughly twenty-five years. The violent nature within the household explains this. Note Galloway-Williams provided expert testimony that not only threats directly to a child, but also a child’s observation of a perpetrator’s violence on others, will inhibit the child from disclosing sexual abuse. R. pp. 337-38.

Further, Appellant was not prejudiced by the admission of Victim’s testimony about violence against Mother because it was cumulative in nature to evidence of other violent acts such as (1) testimony that Appellant made Victim strip and he whipped her with a switch until she bled; (2) Appellant hit and kicked Victim’s biological father; (3) Appellant attempted to force Mother’s vehicle off the road; (4) Appellant assaulted Mother’s boss at the Texaco and law enforcement was called; (5) Appellant shot at the duplex; (6) Appellant shot at the Texaco station; (7) Appellant stalked the family; and (8) Appellant kidnapped Victim’s brother.

The introduction of allegedly inadmissible evidence is harmless when the evidence is merely cumulative to other evidence presented without objection. State v. Kirton, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122-23 (Ct. App. 2008); State v. Funderburke, 251 S.C. 536, 540, 164 S.E.2d 309, 311

(1968) (“Cumulative evidence has repeatedly been defined to be additional evidence of the same kind to the same point.”). Therefore, this Court should affirm the conviction and sentence.

V.

The trial court did not err in allowing Victim’s mother to testify about a letter Appellant sent her over twenty-five years ago under the best evidence rule, and the testimony was cumulative to other evidence to which Appellant did not interpose an objection.

Mother testified she confronted Appellant after Victim disclosed Appellant had been sexually abusing her. Mother testified a couple of days after confronting Appellant, Appellant came to her parents’ house where Mother and Victim were staying. Mother and Victim approached Appellant at the fence in the front of the yard. R. pp. 232-33. The prosecutor asked a compound question asking what happened when they came down to the fence and “[d]id he catch your attention in any way?” R. p. 233, lines 9-10. Mother then testified Appellant pulled his big truck in the driveway and added, “And plus, it was right after that letter that he had wrote to me and wanted me to come back.” R. p. 233, lines 11-14.

The prosecutor asked what the letter talked about and Mother testified, “He just talked to me about he was sorry that he’s been abusive –” At that point, Appellant objected based on hearsay and the best evidence rule. R. p. 233. The trial court asked if the letter was available and the prosecutor asked, “Your Honor, there is no letter, so there’s no way to have better evidence.” R. pp. 233-34. The trial court ruled, “Well, I’m going to allow it, I think based on state of mind.” R. p. 234, lines 7-8. Mother then testified Appellant “apologized for being mean to us and he said he wouldn’t do it anymore and he really wanted us to come back.” R. p. 234, lines 11-14.

The question of whether to admit evidence under the best evidence rule is addressed to the discretion of the trial court. State v. Halcomb, 382 S.C. 432, 443, 676 S.E.2d 149, 154 (Ct. App. 2009). The preliminary question is whether “there has been sufficient evidence to prove loss,

destruction or unavailability of an original document so as to justify the admission of secondary evidence” The question of the adequacy of this showing is also within the discretion of the trial court. Id. at 443, 676 S.E.2d at 154-55.

Rule 1002, SCRE, requires that to prove the content of a writing, the original writing is required. However, under Rule 1004, SCRE:

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if –

(1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or

. . .

(4) The writing, recording, or photograph is not closely related to a controlling issue.

In the instant case, the prosecutor proffered the letter was unavailable and given that the letter was from over a quarter of a century ago, this would be expected. Therefore, the trial court did not abuse its discretion in accepting the prosecutor’s proffer that the letter was not obtainable under Rule 1004(1) and (2). Additionally, the writing was not closely related to a controlling issue under Rule 1004(4) because Appellant was not charged for any of the physical assaults on Victim and the specific content of the letter was not at issue – Mother’s testimony about the letter was admissible to show Appellant’s conciliatory demeanor and attrition at that point in time. Accordingly, the trial court did not abuse its discretion. See Jackson v. Crews, 873 F.2d 1105, 1110 (8th Cir. 1989) (finding witness’ testimony he received a flyer describing plaintiff’s arrest by defendant and asking for any witnesses to contact plaintiff was allowed because the testimony was not trying to prove the

contents of the writing under Rule 1002, FRE, and “even if [plaintiff was] trying to prove the content of the flyer, he would have been exempted from producing the flyer because the issue was collateral to the principal issue in the trial” under Rule 1004(4)FRE).

Further, Appellant was not prejudiced by Mother’s testimony about the letter. Appellant argues that the testimony “painted appellant as an abusive man.” However, as discussed in Issue IV, Appellant did not object to other evidence of Appellant’s violent acts, which included physically assaulting three other men (Victim’s uncle, Victim’s biological father, and Mother’s boss), shooting at buildings, whipping Victim’s naked body with a switch until she bled, and attempting to run Mother’s vehicle off the road. Accordingly, the letter is merely cumulative to other evidence of bad acts to which Appellant did not object. The introduction of inadmissible evidence is harmless when the evidence is merely cumulative to other evidence presented without objection. State v. Kirton, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122-23 (Ct. App. 2008); State v. Funderburke, 251 S.C. 536, 540, 164 S.E.2d 309, 311 (1968) (“Cumulative evidence has repeatedly been defined to be additional evidence of the same kind to the same point.”).

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

April 27, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

Respondent,

vs.

RICHARD KENNETH GALLOWAY,

Appellant.

Appellate Case No. 2018-001806

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

Respectfully submitted,

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April 27, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No: 2018-001806

THE STATE,

Respondent,

v.

RICHARD KENNETH GALLOWAY,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on counsel of record for the Appellant by electronic mail to the address listed for counsel in AIS, and by depositing one copy of the same in the United States mail, postage prepaid, addressed to Joanna K. Delany, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.
This 27th day of April, 2020.



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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Richard Kenneth Galloway, Appellant.

Appellate Case No. 2018-001806

Appeal From Greenville County
Perry H. Gravely, Circuit Court Judge

Opinion No. 5905
Heard December 6, 2021 – Filed April 20, 2022

AFFIRMED

Appellate Defender Joanna K. Delany, of Columbia, for
Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Attorney General David A. Spencer, of
Columbia, and Solicitor William W. Wilkins, III, of
Greenville, for Respondent.

THOMAS, J.: Richard Kenneth Galloway appeals his convictions of criminal sexual conduct with a minor in the first degree and lewd act upon a child, arguing the trial court erred in (1) limiting the testimony of his expert witness, (2) allowing the State's expert witness to testify about risk factors for childhood sexual abuse, (3) permitting the State's witness to testify about childhood sexual abuse dynamics and disclosures although she did not comply with a subpoena duces tecum, (4)

admitting evidence of his alleged prior bad acts against Victim's mother, and (5) admitting testimony in violation of the best evidence rule. We affirm.

FACTS

The events leading to Galloway's charges occurred between January 1, 1988, and July 31, 1990, and all charges concerned the same victim (Victim). In 2016, Victim revealed a delayed disclosure of prior abuse. Investigator Robert Perry, who worked with GCSO's Crimes Against Children Unit, interviewed Victim, Victim's mother, and other family members. After Perry conducted two interviews and a telephone call with Galloway, Galloway was arrested. A jury trial was held in May 2018. Victim, who was thirty-nine years old and had travelled from Missouri for the trial, testified she initially knew Galloway because he had been married to her aunt.

During an in-camera hearing, Victim testified the first time Galloway abused her was at the University Inn in Greenville County, where he was babysitting her and her brother. Victim alleged Galloway reached into her pants and touched her vagina. According to Victim, Galloway claimed he mistook her for her mother in his sleep. Victim testified that under the pretext of supervising her, Galloway insisted on helping Victim shower and would wash her buttocks, vagina, and breasts, telling her if he did not play with her breasts they would not grow. Victim also discussed one occasion when Galloway took her into her mother's bedroom, laid her on the bed, removed her pants, and performed oral sex. Before the jury, Victim testified her mother, Patricia Waldrop, worked at a gas station convenience store. Victim testified Galloway began frequenting the store, and she similarly testified regarding the babysitting incident at the University Inn. The day after the first abuse, Victim told Waldrop what happened. Although Galloway did not babysit her and her brother for a long time, she, Waldrop, and Victim's brother later moved in with Galloway. Victim also described abuse that occurred in North Carolina, stating when she was stacking wood into a truck, Galloway came up behind her, reached into her underwear, and fondled her.

Victim testified Galloway's relationship with Waldrop "started out okay" but "just got bad fast." When Victim began to testify about physical fights between Waldrop and Galloway, Galloway objected under Rule 404(b), SCRE. The State replied it did not seek admission of the disputed evidence under Rule 404(b); rather, it contended it was "relevant evidence." The trial court overruled Galloway's objection without specifying a reason for its ruling. Victim testified Galloway would be violent when he was angry and had physical altercations with

Waldrop. She recalled an incident when she tried to call 911 after a "really bad" altercation and Galloway, upon learning what she was doing, threatened to kill Waldrop.

Victim eventually again disclosed Galloway's abuse to Waldrop and, shortly thereafter, she saw Galloway at the home of Waldrop's mother and Galloway told Victim if she did not forgive him he would go to hell. According to Victim, she responded, "I guess you're just going to go [to] hell." Although they never moved back in with Galloway, Galloway continued to behave violently toward Victim and her family, and Victim testified that on different occasions, Galloway kidnapped her brother, drove "doughnuts" in their yard, attempted to run Victim and Waldrop off the road, and along with two other persons, pulled Victim's biological father from his car, busted his face, and broke his ribs. According to Victim, she suffered from post-traumatic stress disorder (PTSD) and schizoaffective disorder. She attributed the PTSD as arising from the abuse.

Waldrop, who testified after Victim, corroborated much of Victim's testimony. Waldrop also testified without objection that Galloway himself had corroborated much of Victim's account of the first time Galloway abused her, claiming he woke up next to Victim and put his arm around her, thinking it was Waldrop. During her testimony, Waldrop referenced a letter that Galloway had written to her in which he expressed a desire for a reconciliation. When asked by the State to elaborate about what Galloway said in the letter, Waldrop said, "[h]e just talked to me about he was sorry that he's been abusive." Galloway immediately objected on the grounds of hearsay and the best evidence rule. As to the best evidence rule, Galloway asserted, "If they're going to talk about the contents of the letter, they need the letter to prove it." The trial court asked if the letter was available, and the State replied there was no letter. The court allowed Waldrop to continue discussing it, reasoning her testimony was "based on state of mind." Waldrop testified that in the letter Galloway "apologized for being mean to us and he said he wouldn't do it anymore and he really wanted us to come back."

The State called Shauna Galloway-Williams, a licensed professional counselor and the executive director of a child abuse and sexual assault recovery center. During an in-camera hearing, Galloway-Williams testified about her qualifications, current employment, and risk factors of childhood abuse.¹ The State sought to have her

¹ The factors identified by Galloway-Williams were age, disabilities, emotional problems, behavioral problems, substance abuse, poverty, violence, and single-parent homes, particularly those with live-in caregivers.

qualified as an expert in childhood sexual abuse dynamics and disclosure pursuant to Rule 702, SCRE. Galloway objected, arguing the subject matter was not beyond the ordinary knowledge of the jury, Galloway-Williams was not qualified as an expert to testify regarding the issues for which her testimony was being offered, and her testimony was not reliable. Galloway requested the trial court "exercise its gatekeeping role under [Rule] 702[, SCRE]." Galloway further complained that the week before trial he had sent Galloway-Williams a subpoena duces tecum directing her "to bring with her to court . . . all the articles, publications, treatises, books, manuals, [and] data that she would be relying upon." However, she brought only one article about forensic interviewing. The trial court qualified her as an expert.

Before the jury, Galloway-Williams testified that one risk factor for childhood sexual abuse was a single-parent household with a live-in caregiver. Galloway-Williams also identified common reasons that a child victim would delay reporting abuse. One such factor was the child's awareness that disclosure could result in consequences to the child and the child's family. According to Galloway-Williams, "these consequences may be based on unrealized fears or they may be based on threats that were made." As to the subpoena, Galloway-Williams explained it would have been impossible to bring all of the publications she based her opinions on, and the article on forensic interviewing that she provided to the defense before trial gave a good overview and a lengthy bibliography of the topics related to child abuse. Although Galloway-Williams conceded the article was "called forensic interviewing," she noted it included a subsection on delayed reporting.

Galloway did not testify on his own behalf; however, he proffered Dr. David Price, a forensic psychologist and forensic neuropsychologist, as an expert witness in general psychology, specifically in PTSD and schizoaffective disorder. During an in-camera hearing in which Dr. Price discussed his qualifications and proposed testimony, he testified on direct examination that it was possible for someone to have a false memory of abuse but the reasons for such an occurrence varied among individuals. On cross-examination, Dr. Price conceded that although it was possible that someone who was "schizoaffective now . . . could possibly . . . misrepresent something in their mind," such a misrepresentation could also occur in the absence of a schizoaffective disorder. Dr. Price also clarified he was testifying as a blind expert, had not evaluated Victim and was not testifying about anything in detail about her, and was therefore not able to state there was anything in her past that would have made her more likely to have false memories. Price explained he could not give an expert opinion about Victim without either

evaluating her or reviewing her medical records and other relevant documents. The trial court allowed Dr. Price to testify as an expert but prohibited him from testifying about false memory and repressed memory because he had not evaluated Victim. Dr. Price's jury testimony included a statement that possible symptoms of schizoaffective disorder include delusions or hallucinations and that someone suffering from PTSD may have distorted memories.

The jury convicted Galloway of one charge of criminal sexual conduct on a minor in the first degree (CSC)² and of lewd act on a minor. The trial court sentenced Galloway to consecutive sentences of thirty years' imprisonment for first-degree CSC and ten years for lewd act on a minor. The court denied Galloway's motion for reconsideration of his sentence. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, we review the decisions of the trial court only for errors of law." *State v. Gilmore*, 396 S.C. 72, 77, 719 S.E.2d 688, 690 (Ct. App. 2011). "Therefore, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous." *State v. Banda*, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). Thus, "this [c]ourt is limited to determining whether the trial court abused its discretion." *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). An appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Id.*

LAW/ANALYSIS

I. LIMITATION ON DR. PRICE'S TESTIMONY

Galloway argues the trial court erred in prohibiting Dr. Price from testifying that schizoaffective disorder could cause false memories because, despite finding the subject matter of the testimony was beyond the ordinary knowledge of the jury and Dr. Price had acquired the knowledge to be qualified as an expert, the court failed to give due consideration to the reliability of the testimony regarding false memory. Thus, Galloway contends the trial court abandoned its gatekeeping duty to consider all three preliminary prerequisites of Rule 702, SCRE. We find no reversible error.

² The jury acquitted Galloway of one CSC charge and was unable to reach a unanimous verdict on the remaining CSC charge.

"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. "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). Before admitting expert testimony, the trial court must determine the following: "(1) whether the evidence will assist the trier of fact; (2) whether the expert has acquired the requisite knowledge and skill to qualify as an expert in that particular subject matter[;] and (3) whether the substance of the testimony is reliable." *State v. Jones*, 423 S.C. 631, 636, 817 S.E.2d 268, 270 (2018). "The appellate court reviews a trial [court's] ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." *State v. Torres*, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010).

Galloway concedes the trial court performed the first two requirements of its gatekeeping function by finding the subject matter of the testimony was beyond the ordinary knowledge of the jury and by finding Dr. Price had acquired the knowledge to be qualified as an expert. Galloway argues the trial court erred in failing to give due consideration as to the third requirement, whether the substance of the testimony is reliable. We find the trial court considered the evidence for reliability. Although Dr. Price indicated schizoaffective disorder could result in false memories, he also acknowledged false memories could occur in the absence of the disorder, which casted doubt on a causal link. Furthermore, Dr. Price stated he would need to evaluate Victim, or at least review her records, to opine on whether Victim's memories of the alleged abuse were false. In addition, because of the absence of any evidence that Victim fabricated or otherwise imagined her recollections of her past abuse, its probative value would have been substantially outweighed by the possibility that it would confuse the issues or mislead the jury. Under these circumstances, we find the restriction on Dr. Price's testimony was within the trial court's discretion. *Id.* (stating an appellate court reviews decisions regarding the admissibility of evidence under an abuse of discretion standard); Rule 403, SCRE (allowing relevant evidence to be excluded if its probative value would be substantially outweighed by other factors, including confusion of the issues or misleading of the jury).

II. RISK FACTORS OF CHILDHOOD SEXUAL ABUSE

Galloway argues the trial court abused its discretion in allowing Galloway-Williams to testify as an expert about the risk factors of childhood sexual abuse because the subject matter of the testimony was not beyond the ordinary knowledge of the jury. We disagree.

In *State v. Weaverling*, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999), this court found expert testimony regarding "common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts" was admissible. Our court found "[s]uch testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault." *Id.* at 475, 523 S.E.2d at 794. In *Jones*, 423 S.C. at 636, 817 S.E.2d at 271, our supreme court likewise found "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." In addition, the court found expert testimony on "the behavior of nonoffending caregivers" was "contrary to what a reasonable person would expect." *Id.* at 637, 817 S.E.2d at 271. Thus, it affirmed the trial court's finding that the testimony "fell outside the scope of lay knowledge and was therefore admissible." *Id.* Most recently, in *State v. Acker*, Op. No. 5892 (S.C. Ct. App. filed Jan. 19, 2022) (Howard Adv. Sh. No. 3 at 48, 54-55), this court found an expert's testimony concerning risk factors such as substance abuse in the home, a child's age, a child's special needs or disabilities, and behavioral problems were beyond the ordinary knowledge of the jury. We likewise find the risk factors associated with childhood abuse admitted in this case were not likely to be within the common knowledge of jurors. Thus, we find the trial court did not abuse its discretion in admitting the evidence.

III. FAILURE TO COMPLY WITH SUBPOENA DUCES TECUM

Galloway argues the trial court erred in qualifying Galloway-Williams as an expert and allowing her to testify despite her failure to comply with his subpoena duces tecum requesting articles and publications on which her opinions were based. We disagree.

In *Jones*, the court considered whether it was error to admit expert testimony where Jones alleged "there was no evidence demonstrating [the] opinions were accurate or reliable . . . [and the expert] failed to identify or name any studies supporting her opinions, nor did she state whether any of the literature she relied on had been peer reviewed." 423 S.C. at 638, 817 S.E.2d at 271–72. Our supreme court found no error where the "testimony focused on explaining the concept of delayed disclosure and the role of nonoffending caregivers in the dynamics of

sexual abuse." *Id.* at 639, 817 S.E.2d at 272. Although the expert in *Jones* "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." *Id.* In addition, "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." *Id.*

At trial, Galloway-Williams testified at length regarding her qualifications as a licensed professional counselor, provided a source with an overview of the topics she was expected to testify about, and explained it contained an extensive bibliography of the topics related to child abuse. We find the trial court acted within its discretion in qualifying her as an expert witness regardless of whether she fully complied with the subpoena duces tecum. *See State v. Morris*, 376 S.C. 189, 203, 656 S.E.2d 359, 367 (2008) ("The qualification of a witness as an expert is a matter largely within the trial court's discretion and will not be reversed absent an abuse of that discretion.").

IV. EVIDENCE OF PRIOR VIOLENCE

Galloway argues the trial court erred in admitting testimony about his violent behavior toward Waldrop, claiming the evidence was prior bad act evidence that did not fall within any of the exceptions enumerated in Rule 404(b), SCRE or *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), and the trial court failed to conduct the mandatory balancing analysis. We find no reversible error.

When Victim initially testified about Galloway's violent acts toward Waldrop, Galloway objected under Rule 404(b), SCRE. The State replied it did not seek admission of the disputed evidence under Rule 404(b); rather, it contended it was "relevant evidence." The trial court overruled Galloway's objection and allowed Victim to testify. Galloway acknowledges he did not object to the admission of other evidence of bad acts later admitted, but he argues the other evidence admitted did not prejudice him because it supported his theory that Victim was making "outlandish" accusations and fabricating events.

"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." Rule 404(b), SCRE. "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence

of the prior bad act must be clear and convincing." *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008).

"As a threshold matter, the trial [court] must initially determine whether the proffered evidence is relevant" *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). Once the court finds the evidence is relevant, it must then determine if it fits within one of the enumerated exceptions to Rule 404(b). *Id.* at 154–55, 682 S.E.2d at 895. If the court finds the prior bad act evidence is clear and convincing and falls within an exception, it must then determine if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *Id.* at 155–56, 682 S.E.2d at 896. This requires the trial court to conduct a balancing test, "which must be based on the entire record." *State v. Scott*, 405 S.C. 489, 506, 748 S.E.2d 236, 245 (Ct. App. 2013) (quoting *Clasby*, 385 S.C. at 156, 682 S.E.2d at 896). A trial court's failure to conduct the balancing test is error. *State v. Spears*, 403 S.C. 247, 254, 742 S.E.2d 878, 881 (Ct. App. 2013). However, this error is subject to a harmless error analysis. *See State v. King*, 424 S.C. 188, 201, 818 S.E.2d 204, 211 (2018) (applying harmless error analysis where trial court erred in failing to conduct a Rule 404(b) analysis before admitting prior bad acts evidence).

In this case, although we agree with the trial court admission of the evidence because we find it was relevant to Victim's delayed disclosure, we find the trial court erroneously failed to conduct a balancing test. However, we find the court's error was harmless because many other instances of Galloway's violence were admitted without objection. Victim testified without objection that Galloway broke into a hotel room and kidnapped her younger brother. Victim and Waldrop both testified Galloway drove his truck into the yard "doing doughnuts." Victim testified Galloway attempted to run her mother's car off the road and once chased them in the car. Victim also recounted an incident in which Galloway pulled her father from a vehicle, busted his face, and broke his ribs. Waldrop testified Galloway shot at their duplex, harassed her at work, and beat up her boss. Because so many other instances of Galloway's violence were admitted without objection, we find any error in failing to conduct a Rule 404(b) analysis when admitting Victim's initial testimony about Galloway's violence was harmless. *See State v. Kirton*, 381 S.C. 7, 37–38, 671 S.E.2d 107, 122–23 (Ct. App. 2008) (stating the admission of inadmissible evidence is harmless where it is merely cumulative to other evidence that is admitted without objection).

V. GALLOWAY'S LETTER

Galloway argues the trial court erred in permitting Waldrop to testify about a letter Galloway allegedly wrote to her without producing the letter. We find no reversible error.

During testimony questioning Waldrop's thoughts and consideration of returning to Galloway, she testified Galloway wrote her a letter in which "he apologized for being mean to us and he wouldn't do it anymore and he really wanted us to come back." The State responded, "there is no letter, so there's no way to have better evidence"

"The question of whether to admit evidence under [Rules 1001 to 1004, collectively known as the best evidence rule,] is . . . addressed to the discretion of the trial court." *State v. Mitchell*, 399 S.C. 410, 421, 731 S.E.2d 889, 895–96 (Ct. App. 2012) (alteration in original) (quoting *State v. Halcomb*, 382 S.C. 432, 443–44, 676 S.E.2d 149, 154–55 (Ct. App. 2009)). "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Rule 1002, SCRE. However, under Rule 1004, SCRE,

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if--

- (1) Originals Lost or Destroyed. . . ; or
- (2) Original Not Obtainable. . . ; or
- (3) Original in Possession of Opponent. . . ; or
- (4) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue.

The letter referred to abusive behavior against Victim's mother, not sexual abuse of Victim, which was the controlling issue. Thus, the original letter is not required because it referenced a collateral matter under Rule 1004(4), SCRE. Furthermore, even if the admission of the letter was error, we find it was harmless error. *See Matter of Bilton*, 432 S.C. 157, 167, 851 S.E.2d 442, 447 (Ct. App. 2020) (explaining if improper evidence is admitted, "the next step is to determine whether the erroneous admission qualifies as a harmless error"); *id.* (explaining the analysis to determine if the erroneous admission of evidence was harmless requires the court to decide if the error contributed to the guilty verdict). In this case, any error in admitting the letter was harmless as cumulative based on the many other instances of violence admitted without objection. *See Kirton*, 381 S.C. at 37–38,

671 S.E.2d at 122 (stating the admission of inadmissible evidence is harmless where it is merely cumulative to other evidence that is admitted without objection).

CONCLUSION

Based on the foregoing, Galloway's convictions are

AFFIRMED.

GEATHERS, J., and HUFF, A.J., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

 THE STATE,

RESPONDENT,

V.

RICHARD KENNETH GALLOWAY,

APPELLANT

 APPELLATE CASE NO. 2018-001806

 Appeal from Greenville County

 Honorable Perry H. Gravely, Circuit Court Judge

 Opinion No. 5905

 PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Appellant, Richard Kenneth Galloway, respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court.

In September of 2017, a Greenville County Grand Jury indicted Appellant for four counts of criminal sexual conduct with a minor (CSCM) in the first degree and one count of lewd act on a minor. These indictments were for offenses alleged to have occurred in the 1980's and 1990's. R. 16, ll. 5-22; R. 577 – R. 580. Appellant was tried before the Honorable Perry H. Gravely and a jury, from May 14 – 16, 2018. R. 1. Appellant was convicted on two of the four indictments:

CSCM in the first degree and lewd act on a minor. R. 577, l. 21 – 578, l. 11. However, the jury found appellant not guilty of a second count of CSCM in the first degree, and it hung on a third count of CSCM in the first degree. R. 577, l. 5 – 578, l. 2. The court sentenced Appellant to consecutive terms of thirty years for CSCM in the first degree and ten years for lewd act on a minor. R. 562, ll. 18-22; R. 581- R. 582. A timely notice of intent to appeal was served and the direct appeal perfected.

On December 6, 2021, a three judge panel of this Court heard oral argument. On April 20, 2022, this Court affirmed Appellant’s convictions in *State v. Galloway*, Op. No. 5905 (S.C. Ct. App. filed April 20, 2022) (Howard Adv. Sheet No. 14 at 50). Appellant respectfully asserts this Court overlooked and/or misapprehended the following points.

1.

The court erred where, during the defense’s case in chief, it excluded the testimony of a blind expert in psychology and schizoaffective disorder that schizoaffective disorder could cause false memories, since the complainant was diagnosed with schizoaffective disorder prior to her claim that Appellant molested her.

It was undisputed that Complainant was diagnosed with schizoaffective disorder prior to contacting law enforcement with these allegations. R. 185, ll. 18-20. Dr. Price, who was offered as a “blind” expert in psychology, PTSD, and schizoaffective disorder, testified *in camera* that schizoaffective disorder could cause delusions, which result in false memories, which may produce false accusations. R. 420, l. 23 – 424, l. 18.

The trial court ruled that Dr. Price would be allowed to testify about PTSD and schizoaffective disorder generally but ruled that he could not testify about false memory. R. 430, ll. 6-19. Specifically, the court found the “nature of the testimony is beyond the standard for the

jury . . . I think that he's indicated that he has this knowledge that qualifies him as an expert. Generally, with exception that the substance is reliable as to anything relating to PTSD and schizoaffective disorder." R. 430, ll. 6-13. "But I am not going to allow any testimony on this whole false memory syndrome¹ or whatever it's called, you could open the door for every single case from that. So I'm not going to allow anything regarding false memory, repressed memory since he has not evaluated this particular person and be[en] able to diagnose[] that's what's going on here." R. 430, ll. 13-19.

This Court found that,

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

State v. Galloway, Op. No. 5905 (S.C. Ct. App. filed April 20, 2022) (Howard Adv. Sheet No. 14 at 55).

The trial court's decision that Dr. Price could testify, just not about what was helpful to the defense's case, was an abuse of discretion. In deciding this issue, this Court overlooked Appellant's argument that the exclusion of this evidence denied Appellant his right to present a

¹ Although the solicitor tried to couch Dr. Price's testimony on false memory in terms of a "disorder" or a "syndrome" during his cross-examination, Dr. Price noted this was not a "syndrome" and he avoided using those terms. R. 424, l. 20 – 425, l. 5.

defense. “Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.” *Washington v. Texas*, 388 U.S. 14, 19 (1967). “[T]he Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). “The rights to confront and cross-examine witnesses and to call witnesses in one’s own behalf have long been recognized as essential to due process.” *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). The testimony was critical to Appellant’s defense—Appellant pleaded not guilty; he denied the charges. He was constitutionally entitled to introduce evidence to support his plea of not guilty.

This Court found that “because of the absence of any evidence Victim fabricated or otherwise imagined her recollections of past abuse, its [Dr. Price’s testimony] probative value would have been substantially outweighed by the possibility that it would confuse the issues or mislead the jury.” Respectfully, this finding overlooks Appellant’s argument that because he had pleaded not guilty, he had a right to present a defense—to provide the jury with information it could use to determine whether the allegations were proven beyond a reasonable doubt. Dr. Price’s testimony would have aided the jury in doing so—its probative value was substantial and it was not confusing or misleading, so it was admissible under Rule 403, SCRE. Nevertheless, Rule 403 was not the basis of the trial judge’s ruling.

This Court also misapprehended Appellant’s argument on Dr. Price’s qualification under Rule 702. Pursuant to Rule 702, SCRE, before the jury may consider expert testimony, the trial court must, *inter alia*, the trial court evaluate the substance of the testimony and determine whether it is reliable.” *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). However,

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

This Court further overlooked Appellant's argument that, in contrast, the trial court allowed the testimony of another education witness—Shauna Galloway-Williams—who was a "blind" expert, when the evidence was offered by the State. The court's exclusion of Dr. Price's testimony here was manifestly arbitrary, unreasonable, and unfair. *See State v. Grubbs*, 353 S.C. at 379, 577 S.E.2d at 496 (court's ruling on the admissibility of an expert's testimony is an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair). That is particularly so, since the State's witness was allowed to give expert testimony about the impact of trauma on memory. R. 283, l. 4 – 284, l. 2; R. 331, l. 14 – 332, l. 4.

3.

The court erred where it allowed a witness to testify as an expert in child sexual abuse dynamics and disclosures, despite the witness' failure to comply with a subpoena duces tecum that commanded her to bring any research, publications or reports that she relied on

as an expert, since the state failed to prove the reliability of the substance of the expert's testimony.

It was undisputed Galloway-Williams was served with a subpoena duces tecum that commanded her to bring any “articles, publications, treatises, books, manuals, [and] data” upon which she relied. Nevertheless, Galloway-Williams did not bring the materials upon which she claimed she relied in formulating her opinions. Instead, she brought one article about forensic interviewing. R. 313, l. 22 – 314, l. 19. The admission of her testimony as an expert here was error, since the State failed to prove the reliability of the subject matter about which she testified.

Galloway-Williams was offered as a “blind,” nonscientific expert and she was qualified as an expert in child sexual abuse dynamics and delayed disclosures. R. 291, l. 23 – 292, l. 10; R. 306, l. 24 – 307, l. 1; R. 322, ll. 17-20. During a proffer, Galloway-Williams said that her testimony was based on “decades of research.” R. 306, ll. 10-12. In addition to delayed disclosures, Galloway-Williams’s proffered testimony covered a number of topics: grooming; risk factors for childhood sexual abuse; and the impact of trauma on memory. R. 279, l. 4 – 280, l. 10; R. 281, ll. 5-23; R. 283, l. 4 – 284, l. 2.

After being qualified, Galloway-Williams gave expert testimony to the jury on a number of topics: delayed disclosures; grooming; risk factors for childhood sexual abuse. R. 316, l. 18 – 339, l. 20. Galloway-Williams also testified to the impact of time and of trauma on memory. R. 283, l. 4 – 284, l. 2; R. 331, l. 14 – 332, l. 4. (However, as noted in Issue 1 above, the defense’s expert witness was not permitted to opine on the impact of schizoaffective disorder on memory).

Particularly relevant here, Galloway Williams testified before the jury that delayed disclosure, “It’s very common. It’s more common than not from my experience and from the training and research.” R. 326, ll. 8-11. Although Galloway-Williams held out to the jury that she

was relying on research, defense counsel was unable to cross-examine her on the research underpinning her testimony since he was unable to obtain it due to the witness's noncompliance with his subpoena.

In *State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018), the South Carolina Supreme Court addressed an argument as to the reliability of this exact witness' testimony. In *Jones*, the defendant alleged "it was error to admit Galloway-Williams' testimony [about delayed disclosure and the role of non-offending caregivers] because there was no evidence demonstrating her opinions were accurate or reliable. Specifically, Jones alleges Galloway-Williams failed to identify or name studies any supporting her opinions, nor did she state whether any of the literature she relied on had been peer reviewed." *Id.* at 638, 817 S.E.2d at 271-72. In finding the trial judge did not abuse his discretion in admitting Galloway-Williams' expert testimony, the South Carolina Supreme Court reasoned that, "**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 journals and trade publications**, all of which were uniformly accepted and recognized by child sexual abuse experts and professionals." *Id.* at 639, 817 S.E.2d at 272.

In this case, this Court cited to *Jones* but concluded that,

At trial, Galloway-Williams testified at length regarding her qualifications as a licensed professional counselor, provided a source with an overview of the topics she was expected to testify about, and explained it contained an extensive bibliography of the topics related to child abuse. We find the trial court acted within its discretion in qualifying her as an expert witness regardless of whether she fully complied with the subpoena duces tecum.

State v. Galloway, Op. No. 5905 (S.C. Ct. App. filed April 20, 2022) (Howard Adv. Sheet No. 14 at 57).

However, providing one article with “topics related to child abuse,” was insufficient to comply with the subpoena and establish reliability in this case. This Court overlooked or misapprehended the fact that Galloway-Williams was the same expert witness as the witness in *Jones*, wherein the witness claimed she could provide peer-reviewed journals and publications backing her opinions if she was given time. Several years passed between the trial in *Jones* and this trial. Galloway-Williams’s failure to comply with the subpoena in this case made her expert qualification an abuse of discretion under Rule 702, SCRE. Her failure to provide these materials pursuant to subpoena demonstrated that the subject-matter of her testimony was unreliable.² See *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010); *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009); *State v. Chavis*, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015).

The court abused its discretion given the unreliability of the subject-matter as demonstrated by the witness’s failure to comply with the subpoena. This is particularly apparent when contrasted with the limitation on Dr. Price’s testimony. See *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting *Douglas*, 369 S.C. at 429-30, 632 S.E.2d at 848) (internal quotations omitted) (An abuse of discretion occurs when the circuit court’s conclusions “either lack evidentiary support or are controlled by an error of law”); *State v. Grubbs*, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing *Means v. Gates*, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001)) (court’s ruling on the admissibility of an expert’s testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair).

² In *State v. Acker*, 435 S.C. 716, 729, 869 S.E.2d 873, 880 (Ct. App. 2022), Acker similarly argued that on reliability grounds it was error to admit Galloway-Williams’s testimony where Galloway-Williams “did not provide the necessary specific research, publications, training information, or case studies on which she relied to support her testimony . . .” It is notable that Galloway-Williams has failed to produce these alleged materials in multiple cases.

The admission of Galloway-William's testimony was not harmless. There was no physical evidence and there were no eyewitnesses to the alleged molestation, which was alleged to have occurred over thirty years ago. The State's use of Galloway-Williams to testify about delayed disclosures under these circumstances was an important part of its case. The State also relied on Galloway-Williams' testimony on the topics of grooming, risk factors for childhood sexual abuse, and the impact of trauma on memory. *See State v. Mizzell*, 349 S.C. 326, 333–34, 563 S.E.2d 315, 319 (2002) (finding error is harmless beyond a reasonable doubt if the “reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt”).

4.

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

Evidence that Appellant behaved violently against and threatened to kill the complainant's mother was evidence of prior bad acts. The State did not contend the evidence fit within a *Lyle* exception, and the court's admission of this evidence without conducting the requisite analyses under Rule 404(b) and Rule 403, was error. Although this Court agreed that the trial court's failure to conduct a balancing test under Rule 403, SCRE was error, it overlooked Appellant's argument that the evidence would not reach a 403 balancing test, since it did not meet an exception in 404(b), SCRE and *Lyle*. This propensity evidence should have been excluded under Rules 404(b) and Rule 403.

The State asked the complainant about the nature of her mother's relationship with Appellant. R. 114, ll. 19-23. The complainant said the two had physical fights, and defense counsel

objected pursuant to Rule 404(b), SCRE. R. 114, l. 25 – 115, l. 5. The solicitor replied that “the State does not seek to admit this under 404(b). This is not common scheme or plan evidence, Your Honor. This is relevant evidence.” R. 115, ll. 7-10. The court ruled, “I’m going to allow the testimony. Objection overruled.” R. 115, ll. 12-13. Pursuant to the court’s ruling, the complainant testified that Appellant was an “angry” and “violent” person, and during one “really bad” incident Appellant threatened to kill her mother. R. 115, l. 19 – 116, l. 1. The complainant said Appellant frequently had “violent event[s]” and “violent outburst[s].” R. 116, ll. 4-8.

This Court concluded that,

although we agree with the trial court admission of the evidence because we find it was relevant to Victim's delayed disclosure, we find the trial court erroneously failed to conduct a balancing test. However, we find the court's error was harmless because many other instances of Galloway's violence were admitted without objection. Victim testified without objection that Galloway broke into a hotel room and kidnapped her younger brother. Victim and Waldrop both testified Galloway drove his truck into the yard “doing doughnuts.” Victim testified Galloway attempted to run her mother's car off the road and once chased them in the car. Victim also recounted an incident in which Galloway pulled her father from a vehicle, busted his face, and broke his ribs. Waldrop testified Galloway shot at their duplex, harassed her at work, and beat up her boss. Because so many other instances of Galloway's violence were admitted without objection, we find any error in failing to conduct a Rule 404(b) analysis when admitting Victim's initial testimony about Galloway's violence was harmless.

State v. Galloway, Op. No. 5905 (S.C. Ct. App. filed April 20, 2022) (Howard Adv. Sheet No. 14 at 59).

Testimony that Appellant behaved violently against the complainant’s mother and threatened to kill her was prior bad act evidence that should have been excluded pursuant to Rule 404(b), SCRE, *Lyle*, and Rule 403, SCRE. “Evidence of other bad acts is generally inadmissible to prove a defendant’s guilt for the crime charged; however, such evidence may be admissible to

show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE.” *State v. King*, 424 S.C. 188, 199, 818 S.E.2d 204, 210 (2018); *see also State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). The State agreed the evidence did not fall within a *Lyle* exception. The testimony did not go to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. The evidence was inadmissible pursuant to Rule 404(b), and this Court misapprehended or overlooked Appellant’s argument that the evidence did not fall within a 404(b) exception.

“Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE.” *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009); *accord State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). Here, this Court concluded the evidence was “relevant to Victim’s delayed disclosure,” but that does not mean the evidence would pass a 403 balancing test. The trial court must determine “whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.” *State v. King*, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018). It would not have passed the balancing test. *See, e.g., State v. Johnson*, 293 S.C. 321, 326, 360 S.E.2d 317, 320 (1987) (much of prior bad act testimony “established no material fact or element of the crime for which appellant was on trial; instead, it served to prejudice the jury by focusing its attention on appellant’s propensity to commit criminal acts”).

This Court also overlooked or misapprehended Appellant’s argument that the evidence was not cumulative. Although there was evidence of other bad acts admitted without objection, that testimony was so outlandish in nature, and unsupported by any documentation, that defense counsel made the strategic decision to use the “outlandish details” of those other bad acts to support his position that the complainant was “storytelling” in his closing argument. R. 501, l. 25 – 504, l.

8. However, the testimony that Appellant assaulted the complainant's mother and threatened to kill her was not outlandish and simply painted Appellant as a bad man with a violent character. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. King*, 424 S.C. at 201, 818 S.E.2d at 211 (quoting *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). Here, the admission of this bad character evidence was not harmless beyond a reasonable doubt.

5.

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

The complainant's mother claimed that after she broke up with Appellant, he wrote her a letter in which he apologized for being abusive and tried to rekindle their relationship. R. 229, ll. 21-24; R. 233, ll. 12-18. Defense counsel objected to hearsay and pursuant to "the best evidence rule." R. 233, ll. 19-22. The solicitor said, "Your Honor, there is no letter, so there's no way to have better evidence—" R. 234, ll. 1-2. The court ruled, "I am going to allow it in I think based on state of mind." R. 234, ll. 7-8. The complainant's mother went on to testify that in the letter, Appellant "apologized for being mean to us and he said he wouldn't do it anymore and he really wanted us to come back." R. 262, ll. 12-14.

This Court determined that,

The letter referred to abusive behavior against Victim's mother, not sexual abuse of Victim, which was the controlling issue. Thus, the original letter is not required because it referenced a collateral matter under Rule 1004(4), SCRE. Furthermore, even if the admission of the letter was error, we find it was harmless error . . . In this case, any error in admitting the letter was harmless as cumulative based

on the many other instances of violence admitted without objection. *See Kirton*, 381 S.C. at 37–38, 671 S.E.2d at 122 (stating the admission of inadmissible evidence is harmless where it is merely cumulative to other evidence that is admitted without objection).

State v. Galloway, Op. No. 5905 (S.C. Ct. App. filed April 20, 2022) (Howard Adv. Sheet No. 14 at 60).

In deciding this issue, this Court overlooked Appellant’s argument that the State failed to meet its burden as proponent of the evidence by showing *why* the letter was unavailable. Rule 1002, SCRE provides: “To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.” Rule 1004, SCRE provides that an original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

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

In order to admit evidence of the contents of a letter without the original, the proponent of the evidence—the State—was required to show that the original was lost or destroyed, that the loss or destruction was not in bad faith, and that the original could not be obtained by any available judicial process or procedure, and it did not show these things. Instead, the solicitor only said,

“there is no letter,” before the court ruled. *See Riggs v. Royal Beauty Supply, Inc.*, 879 S.W.2d 848, 850-51 (Ct. App. Tenn. E.S. 1994) (where witness simply stated “I’m sorry. I don’t have the letter,” the proponent of other evidence of contents of the letter failed to establish foundation under Tenn. R. Evid. 1004 and the witness’s testimony about the letter’s contents was properly excluded). Assuming *arguendo* that the evidence fell within the hearsay exception of a then-existing mental or emotional condition, the evidence was still admitted in violation of Rules 1002 and 1004, SCRE. The proponent of the evidence did not meet its burden to show what happened to the letter and explain why it could not be obtained by judicial process. The court’s admission of testimony about the letter without performing an analysis under Rule 1004, SCRE, was error.

Next, this Court misapprehended the letter’s import in finding pursuant to Rule 1004, SCRE that the letter related to a collateral matter rather than being closely related to a controlling issue. *See Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 580 (D. Md. 2007) (providing illustration of difference between controlling issue and collateral matter under Fed. R. Evid. 1004: a doctor testifying as an expert in a personal injury case can testify she is licensed to practice medicine without having to produce the license itself, but where a defendant is charged with practicing medicine without a license, his testimony alone that he has a license will not be accepted, as the license is closely related to a controlling issue).

The controlling issue in this case was whether Appellant molested Complainant, and propensity evidence was closely related to this controlling issue. Propensity evidence is generally inadmissible given its efficacy in convincing a factfinder the defendant is guilty of the crime charged since he has committed other bad acts. Therefore, propensity evidence was closely related to the controlling issue of whether Appellant was guilty. *See generally Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (state may not show defendant’s prior trouble with the law, specific

criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime because the evidence would “weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge”).

This Court also misapprehended or overlooked Appellant’s argument that he was harmed because the admitted evidence was not cumulative to other, separate bad acts because counsel made the strategic decision to use the “outlandish details” of those other bad acts to support his position that the complainant was “storytelling” in his closing argument. R. 501, l. 25 – 504, l. 8.

Although evidence of other, separate bad acts was admitted without objection during the trial, that testimony favored the defense in that it was outlandish in nature and unsupported by any documentation. Testimony that Appellant apologized for abusing the complainant’s mother, however, was not outlandish and it painted Appellant as an abusive man. “Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.” *State v. King*, 424 S.C. at 201, 818 S.E.2d at 211 (quoting *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). Here, given the lack of physical evidence, eyewitness testimony, or other corroboration, the admission of propensity evidence of Appellant’s abusive nature cannot be considered harmless beyond a reasonable doubt.

Respectfully Submitted,

s/ Joanna K. Delany
JOANNA K. DELANY
Appellate Defender

This 5th day of May, 2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICHARD KENNETH GALLOWAY,

APPELLANT

APPELLATE CASE NO. 2018-001806

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon David Spencer, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Richard Kenneth Galloway, #376354, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 5th day of May, 2022.

s/ Joanna K. Delany

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

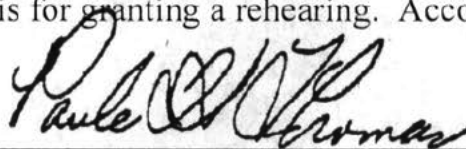
v.

Richard Kenneth Galloway, Appellant.

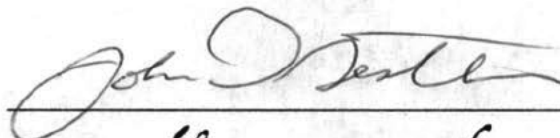
Appellate Case No. 2018-001806

ORDER

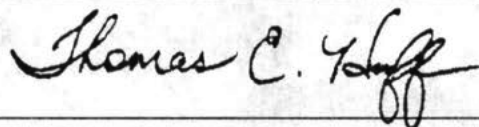
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
Joanna Katherine Delany, Esquire
David A. Spencer, Esquire
The Honorable Perry H. Gravely

FILED
Jun 02 2022
