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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE, RESPONDENT,

V.

JASON JAVIER OTERO, APPELLANT

APPELLATE CASE NO. 2023-001574

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the court erred in admitting expert testimony on delayed disclosure that mirrored the allegations in this case, where the State may not use experts to bolster a minor's testimony, since the evidence impermissibly conveyed to the jury that Minor was credible because her characteristics mirrored the content of the expert's testimony?

II.

Whether the court erred in admitting evidence that Appellant allegedly attempted to escape from jail, where Appellant was not on trial for attempted escape, and where:

a. The evidence did not have the tendency to make the existence of any fact of consequence more probable or less probable than it would have been without the evidence, since the evidence should have been excluded pursuant to Rules 401 and 402, SCRE?

b. The probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, since the evidence should have been excluded pursuant to Rule 403, SCRE?

III.

Whether the court erred in admitting evidence regarding a "photo vault" application on Appellant's telephone (i.e., hidden or encrypted data that law enforcement was never able to access), where the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, since the evidence should have been excluded pursuant to Rule 403, SCRE?

STATEMENT OF THE CASE

On July 12, 2021, a Lexington County Grand Jury indicted Jason Otero, Appellant, for third-degree criminal sexual conduct with a minor, two counts of disseminating harmful material to a minor, and obstruction of justice. R. *(indictments). Appellant was also charged with an additional count of third-degree criminal sexual conduct with a minor, and with first-degree criminal sexual conduct with a minor. Tr. 792, l. 16 – 793, l. 10. Appellant was tried before the Honorable Debra R. McCaslin and a jury, from September 18 – 22, 2023. James Snell and Bradley Kirkland represented Appellant. Rhonda Patterson and Ashley Wellman prosecuted the case. Tr. 1.

Appellant was acquitted of first-degree criminal sexual conduct with a minor and one count of third-degree criminal sexual conduct with a minor. He was convicted of the remaining offenses, and he was sentenced to serve concurrent terms of imprisonment of fifteen years for third-degree criminal sexual conduct with a minor, and ten years for disseminating harmful material to a minor (2021-GS-32-2082); and to serve consecutive terms of imprisonment of ten years for the second count of disseminating harmful material to a minor (2021-GS-32-2081), and five years for obstruction of justice. Tr. 792, l. 16 – 793, l. 10; Tr. 813, l. 17 – 814, l. 4; R. *(sentence sheets).

This appeal follows.

STANDARD OF REVIEW

The standard of review for all the issues is abuse of discretion.

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

"A trial court has particularly wide discretion in ruling on Rule 403 objections." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); *see also State v. Dial*, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." (citation omitted)).

STATEMENT OF FACTS

As the prosecutor would note in opening statements, this was a "disturbing case." Tr. 159, ll. 21-22. The State alleged that Appellant sexually abused his six-year-old child, Minor. Minor "accidentally" disclosed the alleged abuse to a classmate, whose parent notified a school counselor. Tr. 160, ll. 15-21; Tr. 167, l. 23 – 170, l. 24. The counselor, a mandatory reporter of child abuse, spoke with Minor on May 3, 2021. Minor was initially "reluctant" to talk about the matter but eventually disclosed sexual abuse. Minor alleged the last time the abuse occurred the was prior day, while her mother was working. As a result of the conversation with Minor, the counselor contacted law enforcement and social services. Tr. 170, l. 17 – 173, l. 25; Tr. 179, l. 19 – 180, l. 21; Tr. 205, ll. 4-10.

Minor made more detailed allegations during a subsequent forensic interview. (The interview was State's Exhibit #1 and is on file with this Court.) According to Minor, the abuse occurred more than once. Minor claimed Appellant performed oral sex on her, had her perform oral sex on him, and put a vibrating pink "toy" on her genitals, which caused her to wet the bed. According to Minor, Appellant cleaned up the urine with a "dog pad." Minor stated during her forensic interview that Appellant did not take any photographs or videos of her. However, Minor claimed Appellant showed her pornographic videos and photographs on his telephone. Minor alleged one of the explicit videos was of Appellant using a sex toy on Minor's mother. State's Exhibit #1; Tr. 201, l. 1 – 219, l. 8; Tr. 342, ll. 3-10.

On May 3, 2021, immediately after the disclosure, Minor and her mother left the home and went to stay with Minor's grandparents. Tr. 186, l. 19 – 188, l. 15. Law enforcement executed a search warrant at Appellant's home that day and seized Appellant's telephone and a hard drive from a desktop computer. Tr. 332, l. 2 – 334, l. 22; Tr. 433, ll. 4-14. Officer Creech

did a "manual preview" of Appellant's phone and saw there was an email account, "a Google Gmail account, Jason J. Otero, that was associated with the defendant linked to the device." Creech also noticed there was a passcode-protected "photo vault" application (app) which he could not access. According to Creech, the app had a large amount of data—over one and a half gigabytes—contained within it. Creech secured the telephone in his office, but he inadvertently forgot to place the phone in "airplane mode." When Creech went to look at the phone again on May 5, 2021, it had been "reformatted" or remotely reset to factory settings. Therefore, no data could be recovered from the phone. (The remote reset of the telephone, after it had been taken into evidence by law enforcement, was the basis for Appellant's obstruction of justice charge.) Tr. 335, l. 2 – 336, l. 6; Tr. 437, l. 4 – 453, l. 21; R. *(indictment for obstruction of justice).

On May 14, 2021, Minor was interviewed at a children's advocacy center. (Of note, throughout the case and during the forensic interview repeated mentions were made that the family had nineteen cats.) During the forensic interview, Minor disclosed more detailed allegations of abuse which prompted law enforcement to obtain an additional search warrant. State's Exhibit #1; Tr. 342, l. 3-18. On May 17, 2021, law enforcement executed the second search warrant at Appellant's home. Tr. 342, l. 3 – 343, l. 8. This time, they seized Appellant's laptop computer. They also seized a shoebox containing a pink sex toy. They noticed bedding was missing from Minor's bed, and they found a dog "pee pad" in the trash. Tr. 343, l. 9 – 350, l. 13; Tr. 394, l. 6 – 407, l. 15; Tr. 389, ll. 16-18. Appellant was arrested that day (May 17th). Tr. 476, ll. 15-20. On June 1, 2021, Minor had a medical exam at the child advocacy center, and the "medical exam was normal and no injuries were observed." Tr. 293, ll. 13-23.

The desktop computer's hard drive contained sexually explicit videos of Minor's mother. Tr. 435, ll. 20 – 436, l. 20. The laptop computer's internet search history contained incriminating

searches from May 3 – 17, 2021, such as: "wipe Android phone remotely," "erase my device remotely," "can FBI crack Photo Vault," a "series of inquiries about passing polygraphs," "Cheat polygraph," "How to get child molestation case dismissed," and "Bail cost for child sex abuse SC." A 9:41 p.m. search on May 3, 2021, for "wipe Android phone remotely" corresponded with a 9:41 p.m. login to Appellant's Google account. Tr. 453, l. 13 – 475, l. 9; Tr. 456, l. 18 – 457, l. 2.

Relevant to Issue I, the State proffered the testimony of Raymond Olszewski, a social worker and forensic interviewer who was qualified as a "blind" expert in child sexual abuse dynamics. Tr. 284, ll. 6-7; Tr. 287, ll. 2-11. Appellant objected to bolstering. He requested a ruling that the prosecutor not be able to provide, and Olszewski not be permitted to give, examples or hypotheticals which mirrored this case. Defense counsel stated his objection to having "him give any examples or hypotheticals . . . Anything that he comes up with if it matches any aspect of this case, however slight, it's gonna be bolstering, so I'm just gonna ask for no examples. And I don't believe it's proper to give him hypotheticals[.]" Tr. 279, l. 21 – 280, l. 3. The State responded that any "match" of the facts to examples was "highly coincidental." Tr. 280, ll. 12-14. The court ruled that the solicitor could not give Olszewski hypotheticals or examples but that the witness could give his own: "He can state his basis as to why cases sometimes have delayed disclosure. I'll be happy to hear from him on that, okay?" Tr. 281, ll. 14-21.

Virtually the entirety of Olszewsky's testimony about delayed disclosure mirrored the allegations in this case. For example:

- "It could be due to age. A child may be so young that they don't full[y] understand what's happened to them[.]" Tr. 287, ll. 10-22.

- "[T]hey may worry what's going to happen to the family, are they gonna get taken away from the home[.]" Tr. 287, l. 24 – 288, l. 1.
- "They may have been told certain things are gonna happen in order to, you know, not tell." Tr. 288, ll. 3-5.
- "[T]hey may worry that they are gonna be taken away from the home and placed in foster care." Tr. 288, ll. 5-7.
- "[T]hey may worry they won't see their siblings or their pets[.]" Tr. 288, ll. 7-8.
- "They may feel guilt about what's happened, especially if it's something that's happened over a period of time." Tr. 288, ll. 10-12.
- "[C]hildren sometimes care deeply about the offender or the person that's harmed them and they may worry about getting that person in trouble or about losing the attention and affection of that person if they were to tell." Tr. 288, ll. 14-17.
- "[O]ftentimes there's a non-offending caregiver in the home, so the concern may be is that person going to believe me, are they going to support me when I come forward with this[.]" Tr. 289, ll. 19-22.
- The process of disclosure "oftentimes starts with a delay in reporting or even denials when initially asked about what's happened, then they may move into a more partial or tentative phase of disclosure where they're only telling part of it . . . and then children often will—you know, many of them move to a more active disclosure where they're giving a more full accounting of what's happened to them." Tr. 288, l. 23 – 289, l. 11.
- "An accidental disclosure is a disclosure that is discovered by accident or chance[.]" Tr. 290, ll. 13-15.

- "Chronic abuse is abuse that's occurred . . . many times over a period of time, whereas an acute event is an event that's recent in time that just occurred or took place recently." With chronic abuse, "it can be more difficult to remember details from any one particular incident unless maybe there was something unusual about one or more of the events or the incidents that makes it stand out for some reason in a child's mind." Tr. 290, l. 19 – 291, l. 9.

Relevant to Issue II, the State introduced evidence of an alleged attempted escape: that Appellant had damaged his jail cell while awaiting trial, and that he had a hand-drawn map of Mexico and a list of English words translated into Spanish in his jail cell. Tr. 477, l. 21 – 485, l. 24. (The State would use this evidence to argue in closing that Appellant was trying to "shawshank" his way out of jail.) Tr. 761, ll. 11-13. As seen, Appellant was arrested on May 17, 2021. The jail cell evidence was discovered on November 28, 2021. Tr. 476, l. 15 – 477, l. 25. Appellant objected to the alleged escape evidence on the bases of relevancy and Rule 403, SCRE. Tr. 479, ll. 20-24. The court ruled that the evidence was evidence of flight and had a "strong nexus to a guilty conscience." Tr. 486, l. 14 – 487, l. 11; Tr. 480, ll. 19-23. The court did not place its Rule 403 analysis on the record. The evidence consisted of photographs and testimony that Appellant had an improvised digging tool hidden in his cell and had removed crumbling metal pieces from a vent and the frame of a four-inch-wide "narrow window." The photographs included documentation of the damage to Appellant's jail cell, the hand-drawn map of Mexico, and the list of Spanish and English words. (The photographs were State's Exhibits #21; 29; 36; and 45 – 58; and they are on file with this Court.) Tr. 477, l. 21 – 485, l. 24; Tr. 491, l. 20 – 492, l. 4.

Appellant's cell was built to house one person but three people were housed in it together. Appellant subsequently testified he was simply trying to see and hear outside, and he was not attempting to escape. Tr. 503, l. 5 – 606, l. 7. Appellant had two Spanish-speaking cell mates. He stated the translations and map related to his roommate. Tr. 618, l. 18 – 624, l. 4.

Relevant to Issue III, the State introduced evidence, mentioned above, that Appellant's telephone had a "photo vault" app that contained hidden or encrypted data. Pretrial, the court heard a motion in limine on the matter. Appellant moved to suppress any reference to the existence of hidden or encrypted data on his electronic devices. Tr. 82, l. 25 – 91, l. 15. The State argued that after law enforcement seized Appellant's phone and told him they were going to search the phone and get into the "photo vault" app, Appellant "downloaded a PDF document called Breaking into the Vault, Privacy, Security and Forensic Analysis of Android Vault Applications," and then remotely wiped the phone. Tr. 84, l. 84, l. 4 – 87, l. 3. Appellant objected to the evidence based on Rule 403, SCRE, noting he would be unfairly prejudiced since the jury could only "speculat[e]" about the contents of the app: "the prejudicial value outweighs anything probative." Counsel noted that the minor was asked during the forensic interview whether Appellant took any pictures of her, and she said, "No." Tr. 87, l. 6 – 91, l. 1; Tr. 88, ll. 18-25; *see* State's Exhibit #1.

The prosecutor responded that although it did not intend to argue to the jury that Appellant had photographs of Minor being sexually abused in the "photo vault" app, "people can draw their own conclusions." Tr. 89, ll. 19-24. "We're saying there's an encrypted device [sic] on his phone that he frantically tried to erase before law enforcement could view it or search it as part of the investigation." Tr. 88, ll. 10-13. The solicitor argued the evidence was admissible to show a guilty mind. Tr. 88, ll. 1-5. The solicitor also argued that Minor stated during her

forensic interview that when Appellant showed her pornographic images, "there was a little app that showed a code." Tr. 89, ll. 1-12.

The court ruled the evidence "could go to the obstruction of justice. Also the disseminating. We'll let a jury decide. I find it to be more probative." Officer Creech was permitted to testify about the "photo vault" app: "It suggested to me that the phone's user had certain files they didn't want other people to access or know were there." Tr. 91, ll. 5-12; Tr. 440, ll. 22-24; Tr. 438, l. 14 – 439, l. 11; Tr. 438, l. 19 – 461, l. 12.

Appellant testified in his defense and he denied sexually abusing Minor or showing her pornography. Tr. 554, ll. 5-13. The jury deliberated for approximately five hours and asked a number of questions. As seen, it acquitted Appellant of two charges and convicted him of the remaining four. Tr. 782, l. 11 – 792, l. 8.

ARGUMENT

I.

The court erred in admitting expert testimony on delayed disclosure that mirrored the allegations in this case, where the State may not use experts to bolster a minor's testimony, since the evidence impermissibly conveyed to the jury that Minor was credible because her characteristics mirrored the content of the expert's testimony.

"The assessment of witness credibility is within the exclusive province of the jury." *State v. Makins*, 433 S.C. 494, 501, 860 S.E.2d 666, 670 (2021) (quoting *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). "A witness may not give testimony that improperly bolsters the credibility of the victim." *Chappell v. State*, 429 S.C. 68, 75, 837 S.E.2d 496, 499 (Ct. App. 2019) (cleaned up). "[A] witness cannot bolster the credibility of another witness because doing so invades the province of the jury." *Makins*, 433 S.C. at 502, 860 S.E.2d at 670-71 (citing *Briggs v. State*, 421 S.C. 316, 328, 806 S.E.2d 713, 719 (2017)). "Improper bolstering is testimony that indicates the witness believes the victim, but does not serve some other valid purpose. Improper bolstering also occurs when . . . there is no other way to interpret the testimony other than to mean the witness believes the victim is telling the truth." *Chappell*, 429 S.C. at 75, 837 S.E.2d at 499–500 (cleaned up).

"[I]t is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." *State v. Kromah*, 401 S.C. 340, 358–59, 737 S.E.2d 490, 500 (2013). "While experts may give an opinion, they are not permitted to offer an opinion as to the credibility of others." *State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015). The State may not present the testimony of a "human truth-detector" since such a witness's "opinions of the truth are [not] valuable and suitable for the jury's consumption." *Id.*, 401 S.C. at 356, 737

S.E.2d at 498. *See also State v. Douglas*, 380 S.C. 499, 505, 671 S.E.2d 606, 610 (2009) (Pleicones, J., dissenting) ("Juries do not require the assistance of human 'truth detectors' in assessing the credibility of testimony.").

"[A] forensic interviewer may not be permitted to give testimony that improperly bolsters the credibility of the victim." *Briggs*, 421 S.C. at 323, 806 S.E.2d at 717 (citing *State v. Douglas*, *supra*). "[A] witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." *Briggs*, 421 S.C. at 324, 806 S.E.2d at 717. A forensic interviewer should avoid the following kinds of statements at trial:

> that the child was told to be truthful; a direct opinion as to a child's veracity or tendency to tell the truth; **any statement that indirectly vouches for the child's believability**, such as stating the interviewer has made a 'compelling finding' of abuse; any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or **an opinion that the child's behavior indicated the child was telling the truth**.

State v. Kromah, 401 S.C. at 360, 737 S.E.2d at 500 (cleaned up) (emphasis added).

South Carolina's appellate courts have ruled that the prosecution may permissibly use limited expert testimony about child sexual abuse dynamics.[1] *See State v. Jones*, 423 S.C. 631, 636, 817 S.E.2d 268, 271 (2018) ("behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized"); *State v. Anderson*, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015) ("Certainly we recognize that there is such an expertise: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims."); *State v. Brown*, 411 S.C. 332, 345, 768 S.E.2d 246, 253 (Ct. App. 2015), *overruled on other grounds by State v. Jones*, 423 S.C. at 638, 817 S.E.2d at 271 (expert testimony regarding

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[1] However, the Supreme Court has explained: "This Court has struggled with the parameters for admitting the testimony of the State's child sex abuse dynamics experts, and we will certainly continue to do so." *State v. Galloway*, 443 S.C. 229, 242, 904 S.E.2d 866, 873 (2024) (footnote omitted).

the general behavioral characteristics of child sex abuse victims did not improperly bolster the minor victims' testimony).

In *Jones*, the Supreme Court found that the admission of testimony from an expert in child sexual abuse dynamics who gave "*generalized* testimony did not result in improper bolstering on behalf of the victims." *Jones*, 423 S.C. at 637 n. 2, 817 S.E.2d at 271 n. 2 (emphasis added). In contrast, in *Anderson*, the Supreme Court found an expert witness was improperly permitted to "vouch[] for the minor when she testified only to those characteristics which she observed in the minor." *Anderson*, 413 S.C. at 219, 776 S.E.2d at 79. In this case, although Olszewsky did not interview Minor, his testimony improperly bolstered Minor's credibility because virtually everything about which Olszewsky testified mirrored Minor's characteristics. For example, Olszewsky testified regarding delayed disclosures that:

(1) "It could be due to age. A child may be so young that they don't full[y] understand what's happened to them[.]" Tr. 287, ll. 10-22. In this case, Minor was six years old. She was unable to fully understand what allegedly happened to her. (Her confusion about "orgasms" and "organisms," for example, illustrate this.) Tr. 199, ll. 16-22; Tr. 210, l. 9 – 213, l. 3.

(2) "[T]hey may worry what's going to happen to the family, are they gonna get taken away from the home[.]" Tr. 287, l. 24 – 288, l. 1. In this case, Minor was removed from the home after disclosing the alleged abuse, and she went to stay with her grandparents. Tr. 220, ll. 11-25; Tr. 186, l. 19 – 188, l. 15.

(3) "They may have been told certain things are gonna happen in order to, you know, not tell." Tr. 288, ll. 3-5. Here, Minor alleged that Appellant told her not to tell, and that she was frightened by the things he did. Tr. 218, ll. 10-22; Tr. 205, l. 20 – 206, l. 1.

(4) "[T]hey may worry that they are gonna be taken away from the home and placed in foster care." Tr. 288, ll. 5-7. The school counselor testified that she was a mandatory reporter and she notified the Department of Social Services (DSS) about the allegations. A DSS worker came to the school and met with law enforcement and Minor's mother and the counselor. Law enforcement thereafter escorted Minor and her mother home to get their belongings and then over to stay with Minor's grandparents. Tr. 171, l. 20 – 172, l. 1; Tr. 179, l. 19 – 180, l. 21; Tr. 188, ll. 6-15.

(5) "[T]hey may worry they won't see their siblings or their pets[.]" Tr. 288, ll. 7-8. In this case, Minor was removed from her home where she had nineteen pet cats. She also had a sibling. Tr. 172, ll. 19-20; Tr. 205, ll. 11-14.

(6) "They may feel guilt about what's happened, especially if it's something that's happened over a period of time." Tr. 288, ll. 10-12. In this case, Minor alleged the abuse occurred multiple times over a period of time. Tr. 201, ll. 17-21; Tr. 219, ll. 14-18.

(7) "[C]hildren sometimes care deeply about the offender or the person that's harmed them and they may worry about getting that person in trouble or about losing the attention and affection of that person if they were to tell." Tr. 288, ll. 14-17. In this case, Appellant, the accused, was Minor's father. Tr. 199, ll. 19-22.

(8) "[O]ftentimes there's a non-offending caregiver in the home, so the concern may be is that person going to believe me, are they going to support me when I come forward with this[.]" Tr. 289, ll. 19-22. Here, there was a non-offending caregiver in the home—Minor's mother, who was "flabbergasted" and "choked up" by the allegations. Tr. 205, ll. 4-11; Tr. 187, ll. 7-22.

(9) The process of disclosure "oftentimes starts with a delay in reporting or even denials when initially asked about what's happened, then they may move into a more partial or tentative

phase of disclosure where they're only telling part of it . . . and then children often will—you know, many of them move to a more active disclosure where they're giving a more full accounting of what's happened to them." Tr. 288, l. 23 – 289, l. 11. In this case, the disclosure was delayed, Minor was reluctant to disclose when questioned by the school counselor, then she made a partial disclosure, and then finally she made a more detailed disclosure during the forensic interview. Tr. 173, ll. 1-25; Tr. 321, l. 19 – 323, l. 24; Tr. 342, ll. 3-10.

(10) "An accidental disclosure is a disclosure that is discovered by accident or chance[.]" Tr. 290, ll. 13-15. Here, the State alleged the abuse was discovered because Minor "accidentally" disclosed to a schoolmate. Tr. 160, ll. 15-21; Tr. 167, l. 23 – 170, l. 24.

(11) "Chronic abuse is abuse that's occurred . . . many times over a period of time, whereas an acute event is an event that's recent in time that just occurred or took place recently." With chronic abuse, "it can be more difficult to remember details from any one particular incident unless maybe there was something unusual about one or more of the events or the incidents that makes it stand out for some reason in a child's mind." Tr. 290, l. 19 – 291, l. 9. Minor alleged the abuse was chronic; the abuse occurred more than one time. The last instance alleged was acute—the day before. One of the allegations was more detailed than others—Minor testified one episode of abuse involved a "dog pad" and a sex toy. Tr. 206, l. 3 – 209, l. 24.

This was not a case where the expert's testimony merely corroborated some of Minor's behavior. *Cf. State v. Cartwright*, 425 S.C. 81, 96, 819 S.E.2d 756, 764 (2018) ("although Dr. Benedetto's testimony corroborated *some* of the minor victims' general behavior, she properly testified in broad terms based on her expert qualifications") (emphasis added); *State v. Barrett*, 416 S.C. 124, 131-33, 785 S.E.2d 387, 390-91 (Ct. App. 2016) (expert's testimony did not vouch

for victim's veracity or improperly bolster her testimony since expert "did not limit her testimony to explaining the exact behavioral characteristics Victim exhibited."). In *Barrett*, this Court concluded that, "Although [the expert] explained some of the behavioral patterns Victim exhibited—i.e., delayed reporting and sequence of reporting to peers before adults—she also explained additional characteristics that Victim did not display." *Id.* Unlike the testimony in *Barrett* and *Cartwright*, in this case practically everything to which Olszewsky testified matched Minor's behavior and circumstances.

There was no way to interpret this testimony other than as "improperly bolster[ing] the credibility of the victim." *Briggs*, 421 S.C. at 323, 806 S.E.2d at 717. *See also State v. Makins*, 433 S.C. at 505, 860 S.E.2d at 672 (expert's testimony did serve a purpose other than to vouch for Minor's credibility as it was required to lay foundation for introducing Minor's graphic drawing of the abuse into evidence). Olszewsky's testimony did not serve a purpose other than to bolster Minor's credibility, since it was not needed to introduce other evidence and since the only things Olszewsky's testimony mentioned were things that mirrored these allegations. The testimony amounted to an impermissible "opinion that the child's behavior indicated the child was telling the truth." *Kromah*, 401 S.C. at 360, 737 S.E.2d at 500. This admission was error.

The error was not harmless. "An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result." *State v. Kromah*, 401 S.C. 340, 360, 737 S.E.2d 490, 501 (2013). "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). "Harmless beyond a reasonable doubt" means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt. *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002).

"The determination whether a bolstering error is harmless depends on whether the case turns on the credibility of the victim." *State v. Chavis*, 412 S.C. at 110, 771 S.E.2d at 341. "[O]ur courts have found improper bolstering testimony was prejudicial in every South Carolina case in which the State presented no physical evidence of the defendant's guilt or relied solely on the victim's testimony to establish the details of the crime." *Chappell v. State*, 429 S.C. at 81, 837 S.E.2d at 503. "[I]t is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." *State v. Kromah*, 401 S.C. at 357, 737 S.E.2d at 499. Olszewsky was qualified as an expert and his opinion on delayed disclosure mirrored the allegations in this case. The case turned on credibility—that of Minor and that of Appellant. Appellant denied the allegations. Minor had a normal medical exam. The jury deliberated for five hours and it acquitted Appellant of two out of the three criminal sexual conduct with a minor charges. There is a reasonable likelihood the State's improper bolstering of Minor improperly tipped the scales on these facts.

II.

The court erred in admitting evidence that Appellant allegedly attempted to escape from jail, where Appellant was not on trial for attempted escape, and where:

a. the evidence did not have the tendency to make the existence of any fact of consequence more probable or less probable than it would have been without the evidence, since the evidence should have been excluded pursuant to Rules 401 and 402, SCRE.

This evidence was not relevant to whether Appellant committed sexual misconduct, disseminated obscene material, or obstructed justice by remotely resetting his phone, which were the matters to be decided by the jury. The court incorrectly ruled this was evidence of consciousness of guilt. Rule 401, SCRE, provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402, SCRE, provides that, "Evidence which is not relevant is not admissible."

"As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt." *State v. McDowell*, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976). However, South Carolina's appellate courts "have clarified that for such an act by a defendant to be relevant as 'consciousness of guilt' under Rule 401, there must be a nexus between the conduct and the offense charged." *State v. Middleton*, 441 S.C. 55, 61, 893 S.E.2d 279, 282 (2023) (cleaned up). *See State v. Pagan*, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006) ("Flight evidence is relevant when there is a nexus between the flight and the offense charged."). The court must consider whether the State established a nexus between the defendant's conduct and the charges for which he is on trial such that the conduct had "any

tendency" to make the defendant's consciousness of guilt "more probable . . . than it would be without the evidence." *State v. Middleton*, 441 S.C. at 62, 893 S.E.2d at 282 (quoting Rule 401, SCRE). "We must consider precisely how a particular piece of evidence might show a defendant's consciousness of guilt. We look to see whether the chain of inferences leading from the evidence shows a guilty conscience derivative of the offense charged." *Id.*, 441 S.C. at 64, 893 S.E.2d at 283 (cleaned up).

This was not evidence of flight. As seen, Appellant did not flee when he had the chance to flee—after he was notified of the allegations on May 3, 2021, but before he was arrested two weeks later. Appellant remained at home until law enforcement arrested him on May 17, 2021. Nor was this escape evidence—Appellant did not escape. The evidence was merely that on November 28, 2021, Appellant had damaged his cell by removing metal from around an extremely narrow "window" and a vent, and that his cell contained a map of Mexico and some Spanish translations. This was not conduct which demonstrated consciousness of guilt—it was ambiguous. There was no nexus—the jail cell matter occurred approximately six months after Appellant's arrest. Appellant was jailed for months in a small, one-person cell with two other inmates, two of whom were native Spanish speakers. The "window" was a four-inch slit. As Appellant would subsequently testify, he was not trying to escape, but instead wanted to see and hear outside.

"[T]o demonstrate the relevance of any type of evasive conduct or guilty act, the State must show a nexus between the conduct and the defendant's consciousness he is guilty of the specific crime." *State v. Middleton*, 441 S.C. at 65, 893 S.E.2d at 284. The State did not show such a nexus here and the evidence was irrelevant and inadmissible. Rule 401, SCRE; Rule 402, SCRE.

The improper admission of this evidence was not harmless. "To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice. Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) (citation omitted). "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. Pagan*, 369 S.C. at 212, 631 S.E.2d at 267. Appellant denied sexually abusing Minor.[2] Minor had a normal medical exam. The jury struggled with the case, deliberating for five hours and acquitting Appellant of the most serious charge—first-degree criminal sexual conduct with a minor, as well as acquitting him of one count of third-degree criminal sexual conduct with a minor. It would not have taken much to tip the scales.

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[2] Although Appellant's testimony included his explanation of the alleged escape evidence, he did not somehow waive his objection by testifying about the subject of the erroneously-admitted evidence. Appellant is allowed to try to mitigate the effect of a bad ruling. *E.g.*, Rule 17, SCRCrimP ("If an objection has once been made at any stage to the admission of evidence, it shall not be necessary thereafter to reserve rights concerning the objectionable evidence."); *State v. Middleton*, 441 S.C. at 67-68, 893 S.E.2d at 285 (rejecting State's argument that erroneously admitted evidence was harmless since it was cumulative to more damaging testimony on the subject that came out during cross-examination).

II.

The court erred in admitting evidence that Appellant allegedly attempted to escape from jail, where Appellant was not on trial for attempted escape, and where:

b. **the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, since the evidence should have been excluded pursuant to Rule 403, SCRE.**

Assuming arguendo the Court finds the alleged attempted escape evidence was relevant, "even where the evidence is shown to be relevant, if its probative value is substantially outweighed by the danger of unfair prejudice, the evidence must be excluded." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Cartwright*, 425 S.C. 81, 91, 819 S.E.2d 756, 761 (2018) (quoting *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001)). "The determination of whether the danger of unfair prejudice outweighs the probative value of evidence must be based on the entire record and will turn on the facts of each case." *State v. Holland*, 385 S.C. 159, 171, 682 S.E.2d 898, 904 (Ct. App. 2009) (quoting *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)).

Appellant disputes that the evidence had any probative value, as discussed in Issue II. a., above. It was irrelevant. However, the evidence was unfairly prejudicial because it invited a verdict on an improper basis by depicting Appellant as a man who must be jailed to protect the community, and one who could not be adequately jailed, to boot. This evidence portrayed

Appellant as an inveterate criminal. Rather than focus the jury's attention on the issues before it, this evidence drew the jury's attention to Appellant's confinement and failure to follow the rules at the jail. This confused the issues and was unfairly prejudical. *Cf. State v. Traylor*, 360 S.C. 74, 85 n. 12, 600 S.E.2d 523, 528 n. 12 (2004) (mugshots are prejudicial because they imply a defendant's prior bad acts); *Deck v. Missouri*, 544 U.S. 622, 630 (2005) (visible shackling undermines the presumption of innocence and the related fairness of the factfinding process); *Estelle v. Williams*, 425 U.S. 501, 512 (1976) (State may not compel an accused to stand trial before a jury while dressed in identifiable prison clothes since the clothing may affect a juror's judgment and impair the presumption of innocence). Moreover, the evidence was misleading since Appellant did not escape and he did not flee when he had the chance to, for two weeks prior to arrest but after the disclosure.

The court should have performed an on-the-record 403 analysis. Its failure to do so was error. *See Hamrick v. State*, 426 S.C. 638, 652, 828 S.E.2d 596, 603 (2019) ("if the trial court was concerned the video would mislead the jury, it was required to conduct an on-the-record Rule 403 analysis"); *State v. Benton*, 443 S.C. 1, 9, 901 S.E.2d 701, 705 (2024) (trial court should have placed Rule 403 analysis on the record, since "on-the-record arguments and rulings enable judicial review and allow the parties and the public to better understand the rulings").

As discussed above, the improper admission of this evidence was not harmless. "To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice. Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) (citation omitted). "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. Pagan*, 369 S.C. at 212, 631 S.E.2d at 267.

Appellant denied sexually abusing Minor.[3] Minor had a normal medical exam. The jury struggled with the case, deliberating for five hours and acquitting Appellant of the most serious charge—first-degree criminal sexual conduct with a minor, as well as acquitting him of one count of third-degree criminal sexual conduct with a minor. It would not have taken much to tip the scales.

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[3] Again, although Appellant's testimony included an explanation of the alleged escape evidence, he did not somehow waive his objection by testifying about the subject of the erroneously-admitted evidence. Appellant is allowed to try to mitigate the effect of a bad ruling. *E.g.*, Rule 17, SCRCrimP ("If an objection has once been made at any stage to the admission of evidence, it shall not be necessary thereafter to reserve rights concerning the objectionable evidence."); *State v. Middleton*, 441 S.C. at 67-68, 893 S.E.2d at 285 (rejecting State's argument that erroneously admitted evidence was harmless since it was cumulative to more damaging testimony on the subject during cross-examination).

III.

The court erred in admitting evidence regarding a "photo vault" application on Appellant's telephone (i.e., hidden or encrypted data that law enforcement was never able to access), where the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, since the evidence should have been excluded pursuant to Rule 403, SCRE.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Cartwright*, 425 S.C. 81, 91, 819 S.E.2d 756, 761 (2018) (quoting *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001)). "The determination of whether the danger of unfair prejudice outweighs the probative value of evidence must be based on the entire record and will turn on the facts of each case." *State v. Holland*, 385 S.C. 159, 171, 682 S.E.2d 898, 904 (Ct. App. 2009) (quoting *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)).

The testimony was that Appellant had roughly one and a half gigabytes of data contained in the app. Appellant was not found to have child pornography and Minor did not allege that he took any pictures of her. The prosecutor stated she not intend to argue to the jury that Appellant had photographs of Minor being sexually abused in the "photo vault" app, but "people can draw their own conclusions." Tr. 89, ll. 19-24. The speculation required by the jury regarding this evidence meant that it had no probative value—the jury did not know what the app contained. But the same speculation meant the unfair prejudice was extreme, since the evidence encouraged

the jury to speculate that Appellant had the worst thing possible hidden on his phone—child pornography. The evidence made Appellant look like a pervert. Inviting a jury to speculate about a matter irrelevant to guilt improperly diverted the jury's attention from its duty to decide guilt or innocence solely on the evidence presented. *E.g.*, *State v. Sloan*, 278 S.C. 435, 438, 298 S.E.2d 92, 93 (1982) (solicitor's improper argument invited the jury to speculate about a matter irrelevant to guilt and diverted the jury from its duty to decide guilt or innocence solely on the evidence presented). The speculative nature of the evidence caused unfair prejudice, confused the issues, and misled the jury. The danger this evidence would cause the jury to make a decision on an emotional basis was high, since child pornography is abhorrent. Child sexual abuse cases are already rife with the potential for mischief. *E.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 439 (2008) (recognizing that child rape is a crime that "in many cases will overwhelm a decent person's judgment"). The evidence should have been excluded pursuant to Rule 403, SCRE.

The erroneous admission of this evidence prejudiced Appellant. "To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice. Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." *State v. Byers*, 392 S.C. at 444, 710 S.E.2d at 58 (citation omitted). "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. Pagan*, 369 S.C. at 212, 631 S.E.2d at 267. This case turned on credibility—that of Minor and that of Appellant. Appellant denied the allegations.[4] Minor had a normal

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4 Although Appellant's testimony included his explanation about the "photo vault" app, he did not somehow waive his objection by testifying about the subject of the erroneously-admitted evidence. As seen, Appellant is allowed to try to mitigate the effect of a bad ruling. *E.g.*, Rule 17, SCRCrimP ("If an objection has once been made at any stage to the admission of evidence, it shall not be necessary thereafter to reserve rights concerning the objectionable evidence."); *State*

medical exam. The jury deliberated for five hours and it acquitted Appellant of two out of the three criminal sexual conduct with a minor charges. The jury's speculation regarding whether Appellant possessed child pornography in the encrypted app was not harmless on these facts.

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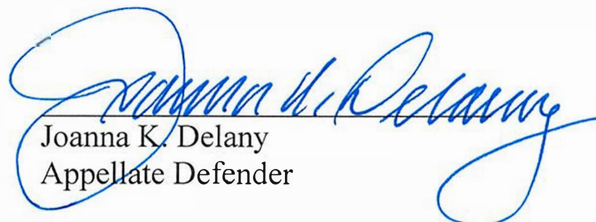
v. Middleton, 441 S.C. at 67-68, 893 S.E.2d at 285 (rejecting State's argument that erroneously admitted evidence was harmless since it was cumulative to more damaging testimony on the subject during cross-examination).

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of October, 2024.