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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

Debra R. McCaslin, Circuit Court Judge

Appellate Case No. 2023-001574

THE STATE,

Respondent,

v.

JASON JAVIER OTERO,

Appellant.

FINAL BRIEF OF RESPONDENT

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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?

Respondent's Counterstatements

I. Whether the trial court abused its discretion in admitting the testimony of a child sexual abuse dynamics expert who had no knowledge of the facts of this case.

II. Whether the trial court abused its discretion in admitting evidence that Appellant attempted to escape from jail after the trial court determined such evidence was evidence of attempted flight, had a strong nexus to a consciousness of guilt, and was admissible as evidence of guilt.

III. Whether the trial court abused its discretion in admitting evidence regarding a Photo Vault application on Appellant's cell phone where the probative value was not outweighed, much less substantially outweighed, by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

STATEMENT OF THE CASE

In July 2021, a Lexington County grand jury indicted Appellant for first-degree criminal sexual conduct ("CSC") with a minor, two counts of third-degree CSC with a minor, and two counts of disseminating harmful material to a minor. (R. 816-817, 818-819, 820-821, 822-823, 824-825). In December 2021, a Lexington County grand jury further indicted Appellant for obstruction of justice. (R. 826-827).

On September 18-22, 2023, Appellant proceeded to a jury trial before the Honorable Debra R. McCaslin. (R. 1). During pretrial motions, Appellant made a motion to suppress any reference of hidden, encrypted, or otherwise unknown data on any computer, telephone, or other device. (R. 82-83). During an initial search of Appellant's residence, Appellant's cellphone was seized by law enforcement. (R. 83). After Appellant provided the passcode to the cellphone, law enforcement found a "Photo Vault" application with approximately 1.5 gigabytes of data and a distinct passcode. (R. 83). Appellant claimed he did not know anything about the application. (R. 84). Law enforcement informed Appellant that they would search the contents of the cellphone; however, before law enforcement was able to search the contents, the phone was remotely reset to factory settings. (R. 84).

The State argued that evidence of the Photo Vault application was relevant because it tended to show a guilty mind. (R. 88). The State contended that even though no one could say what was in the Photo Vault except for Appellant, the evidence showed an encrypted application on Appellant's phone, which Appellant "frantically" reset before law enforcement could search it. (R. 88). Appellant argued that the prejudicial value outweighed anything probative because the State did not know what the data contained. (R. 88). Appellant asserted that Victim was clear that no photos were taken of her. (R. 88). The trial court responded that in Victim's recorded

investigative interview, Victim stated Appellant showed her pictures of her mother and other individuals on Appellant's phone on an application that required a code. (R. 89). The State confirmed that it was not alleging that there were photos of Victim contained in the Photo Vault; rather, the State indicated that "people can draw their own conclusions" about the contents of the erased Photo Vault. (R. 89). The State reiterated that Appellant made the Photo Vault evidence relevant because of his actions, namely his remote reset of his phone, and by his internet searches. (R. 89-90). Appellant argued that the evidence was speculative because no one knew what was in the Photo Vault, which meant that the only inference was negative. (R. 90). The trial court acknowledged that Appellant could cross-examine any witness testifying about the Photo Vault and bring out that no one knew what the data contained. (R. 90). The trial court ruled that the Photo Vault evidence was more probative than prejudicial because Appellant was charged with disseminating harmful material to a minor and with obstruction of justice. (R. 91).

During the trial, Mackenzie Hall, a school counselor at Victim's school, testified that on May 3, 2021, she received a phone call from a parent of one of Victim's classmates. (R. 167, 170). This parent expressed concern about something Victim told the classmate. (R. 170). Hall met with Victim, noting that Victim was reluctant to discuss what she previously told her classmate. (R. 171-73). According to Hall, Victim's smile went away, her eyes got "really big," and she began to cry. (R. 173). Victim told Hall about some things that were happening at home, which last occurred on the day before their conversation. (R. 173). After speaking with Victim, Hall contacted the school resource officer and made a report to the Department of Social Services ("DSS"). (R. 179). Hall participated in a meeting with DSS, law enforcement, and Victim's mother. (R. 180).

Victim testified that she was nine years old at the time of trial. (R. 197). She was six years old when she made her disclosure. (R. 199). At that time, Victim lived with her mother, younger brother, and Appellant, who is her father. (R. 199, 201). She no longer lived with Appellant because "he did something very wrong." (R. 199). Appellant "forced [her] to take [her] clothes off and then he started licking [her] in an inappropriate spot." (R. 201). Victim testified that this occurred in her mother's bedroom more than once. (R. 203-04). When Appellant did this to Victim, she was on the bed and the bedroom door was closed and locked. (R. 204-05). According to Victim, her younger brother was either with their mother or in a different part of the house when this occurred. (R. 205).

Victim stated that Appellant used a toy, which she described as oval and pink with buttons that could make it vibrate fast or slow. (R. 206). Victim stated this scared her. (R. 205). She identified a picture of the sex toy Appellant used on her as an "organism." (R. 206-07). According to Victim, Appellant used this toy on her while she was in her bed. (R. 207). Appellant used the sex toy on Victim's vagina while she was not wearing any clothing, which made her "use the bathroom." (R. 207). After she urinated, Appellant used a dog pad to clean up her urine, which he then hid under the dresser in her bedroom. (R. 209).

Victim confirmed that she knew what an orgasm was because Appellant showed her a video and a picture of orgasms on his cellphone. (R. 210-11). She stated that the photo and video were in an application but did not recall the application requiring a passcode. (R. 212). Appellant showed her a video of her mother using the sex toy. (R. 212-13). Victim stated she did not see any other videos and did not recall what was happening in the photograph. (R. 213). She did not see anyone other than her mother in the video and the photo. (R. 213).

Victim testified she knew what sex was because Appellant showed her videos of an adult man and an adult woman having sex. (R. 213-14). She confirmed that these videos did not have her mother in them. (R. 214). Victim stated she had seen something come out of a penis, which Appellant told her was sperm. (R. 216). Victim knew that sperm was "gray white" and had seen it come out of Appellant's penis while they were in her mother's bedroom alone with the bedroom door closed and locked. (R. 216). She did not help Appellant ejaculate. (R. 217). Victim testified that Appellant touched her vagina but not with his penis. (R. 217-18).

Victim stated that the events she described happened over several days and that Appellant told her to never tell anyone. (R. 218). Victim confirmed she told someone at her school about what happened, and she recalled talking to law enforcement about what happened. (R. 218-19). Victim confirmed that Appellant licked her vagina and that she once licked his penis. (R. 219). She stated that after she reported the incidents, she went to stay at her grandparents' house with her mother and younger brother. (R. 220).

April Sykes, a special victims unit lieutenant with the South Carolina Law Enforcement Division, testified that she conducted a videotaped investigative interview with Victim. (R. 244-46). Her videotaped investigative interview was entered into evidence and played for the jury. (R. 248; State's Ex. 1). In Victim's recorded investigative interview, she said the photos and videos Appellant showed her were in an application requiring a passcode. (State's Ex. 1 at 10:40 to 11:10). Further, Victim repeatedly stated that Appellant did not take any pictures or videos of her when he abused her. (State's Ex. 1 at 14:15 to 14:40, 16:15 to 16:45, 18:00 to 18:30).

The State informed the trial court that it intended to qualify Raymond Olszewski as an expert in child sexual abuse dynamics and, along with Appellant, requested to proffer Olszewski's

testimony. (R. 264-65). The State indicated that Olszewski was a blind expert. (R. 264). The trial court allowed the State to proffer Olszewski's testimony. (R. 265).

After Olszewski's proffer, Appellant argued that if the State were to give Olszewski any examples or hypotheticals during its examination, that would constitute improper bolstering of Victim's testimony. (R. 279-80). The State argued that it did not intend to ask any hypothetical or example questions and that if Olszewski provided hypotheticals or examples himself that happened to match any of the facts in this case, then that would be "highly coincidental." (R. 280). The State asserted that it was well settled that this kind of testimony in child sexual abuse dynamics was outside the ordinary knowledge of the jury, which allowed for an expert witness to be utilized. (R. 280). The trial court, in its discretion, determined that Olszewski's testimony was about delayed disclosure and that he was "more than qualified." (R. 281). The trial court found Olszewski's testimony to be based on reliable science and noted that South Carolina case law allows blind experts. (R. 281). The trial court limited Olszewski's testimony to delayed disclosure and told the State not to set out examples for him. (R. 281). The trial court clarified that Olszewski did not know anything about this case, had not interviewed Victim, and was a blind expert, whose purpose was simply to help the jury understand why there might have been a delayed disclosure. (R. 282).

Olszewski, a social worker and investigative interviewer at the Metropolitan Children's Advocacy Center and an expert in child sexual abuse dynamics, testified that a delayed disclosure occurs when a child delays reporting what happened to them for some period of time. (R. 287). He indicated that multiple reasons for a delayed disclosure could exist, stating:

> It could be due to age. A child may be so young that they don't fully understand what's happened to them or they may not have the words to say it. As children get older, they may fear the consequences of telling. So they may worry that—what's gonna happen to the family,

> are they gonna get taken away from the home, are they gonna be in some type of trouble, are they gonna be—are they not gonna be believed, are they gonna be blamed from what's happened. They may have been told certain things are gonna happen in order to, you know, not tell. For example, they may worry that they are gonna be taken away from the home and placed in foster care, they may worry they won't see their siblings or their pets or friends, they may have to change schools. They may have some internal struggles that prevent them from telling such as shame, embarrassment. They may feel guilt about what's happened, especially if it's something that's happened over a period of time. They may begin to feel partially responsible for what's happened. You know, children 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.

(R. 287-88). In his experience, children commonly delay disclosure of sexual abuse and typically do not disclose everything that happened to them all at once. (R. 288). Olszewski testified that disclosure is more of a process rather than a singular event and can often start with a delay in reporting or even in denials when a child is initially asked about what happened. (R. 288-89). After that, a child may test the waters to see what others' reactions will be, often with the child saying they do not remember exactly what happened or attempting to minimize what happened, before the child moves to a more active disclosure with a more full account of events. (R. 289). Olszewski testified that the same reasons that exist for delayed disclosure also apply to why a child might not provide every detail of their abuse all at once. (R. 289).

Olszewski stated that it would not be surprising for a child to keep their abuse away from a non-offending parent that lived with the child. (R. 289-90). He explained the differences between accidental and intentional disclosures as well as between chronic and acute abuse. (R. 290). According to Olszewski, if chronic abuse occurred, a child could have difficulty remembering discrete details about a particular incident or event unless there was something that made a particular event stand out in the child's mind. (R. 291). He confirmed that he had not been given and had not reviewed any information regarding this case before he took the stand. (R. 291).

Appellant and the State stipulated that Victim's June 1, 2021 medical examination performed by Nurse Practitioner Chandra Smith was normal with no observed injuries. (R. 293).

Dr. LaDonna Young, a child abuse pediatrician at the University of South Carolina School of Medicine and an expert in general pediatrics as well as child abuse and neglect pediatrics, testified that she would not expect to find evidence of trauma following sexual abuse in a child because genital injuries are not observable in approximately 95% of cases. (R. 294-95, 299). Dr. Young confirmed that a normal examination could be consistent with an instance of sexual abuse. (R. 300-01).

Adam Creech, a criminal investigations sergeant with Lexington County Sheriff's Department and an expert in computer, cellular, and digital analysis, testified that on the day of the incident, he received a call from the school resource officer at Victim's school and was informed that Victim made a disclosure. (R. 314, 320-21). During his investigation, he determined that a cellphone was involved and worked toward obtaining a warrant for Appellant's cellphone. (R. 321). After arriving at Appellant's residence, he and other law enforcement officers seized a number of hard drives, a USB drive, and a cellphone. (R. 332). When he seized Appellant's cellphone, he informed Appellant that he would be searching it. (R. 333-34).

Sergeant Creech took Appellant's cellphone back to his office, placed it on a charger, and left, locking his office on the way out. (R. 335). He confirmed that business records indicated that Victim's mother was working on May 2, 2021, which was the date Victim indicated the last incident occurred. (R. 338). After Victim's investigative interview, which he described as more detailed than her initial disclosure, Sergeant Creech obtained a follow-up warrant for Appellant's residence. (R. 342). During the second search, law enforcement found a pee pad in a garbage bag in Victim's room. (R. 350).

Brenda Snelgrove, a crime scene sergeant with Lexington County Sheriff's Office, testified that during the second search of Appellant's residence, she found a backpack in Appellant's bedroom that contained a laptop and a pair of girls underwear. (R. 395-98). In a shoebox under one of the bedside tables in Appellant's bedroom, Sergeant Snelgrove found sex toys. (R. 400-01). In Victim's bedroom, she found a trash bag containing a girls underwear package, pee pads, and some dried-out wipes. (R. 405).

Sergeant Creech, after being recalled, testified that he found sexually explicit photos of Appellant and Victim's mother, including videos of Victim's mother consistent with video Victim described, on some of the electronics seized from Appellant's residence. (R. 436). He testified that when he seized Appellant's cellphone during the first search, he conducted a quick search of the cellphone. (R. 437). Sergeant Creech recalled seeing personal pictures on the device and noted that a Gmail account was connected to the device. (R. 438). He also observed that an application called "Photo Vault" was installed on Appellant's cellphone. (R. 438). According to Sergeant Creech, Photo Vault is a program that "allows a user to take data and basically lock it up within that software so that . . . it requires its own passcode." (R. 439-40). He determined that the Photo Vault application contained approximately 1.5 gigabytes of data, which he opined "can be a fairly substantial amount of pictures or videos," and indicated that some sort of media was locked in the application. (R. 440). He confirmed that he did not have the passcode for the Photo Vault application on Appellant's cellphone. (R. 440).

When he seized the cellphone from Appellant, Sergeant Creech told Appellant that he would be searching both the phone and the Photo Vault application on the phone. (R. 443). Sergeant Creech subsequently took Appellant's cellphone to his office, placed it on a charger, and locked his office. (R. 443). He did not place the cellphone on airplane mode. (R. 444). When

Sergeant Creech went to search the cellphone two days after he seized it, the phone had undergone a remote factory reset. (R. 445). Sergeant Creech testified that it was not possible to recover data on the cellphone with the tools then presently available. (R. 446).

Sergeant Creech prepared a search warrant to obtain the Google subscriber information for the Gmail account he observed on Appellant's cellphone before it was remotely reset. (R. 447). The Google information, which was obtained after the cellphone was reset, indicated that Appellant's Gmail account had been removed from Appellant's cellphone because the Google information showed Appellant's Gmail account was not associated with any cellphones. (R. 450).

Sergeant Creech testified that from the laptop seized during the second search, law enforcement was able to pull Appellant's internet search history, which showed that on the day of the first search, Appellant searched for how to wipe an Android phone remotely. (R. 456-57, 651). The day after the first search, Appellant searched for whether law enforcement could recover deleted emails, if cellphones had photo histories, and for how to wipe a phone through a Faraday cage. (R. 458-59, 464, 651).

Sergeant Creech testified that he assisted in investigating an attempted escape incident involving Appellant prior to trial. (R. 477). He identified a series of photos that he took of Appellant's jail cell and of items that he recovered from Appellant's jail property. (R. 479; State's Ex. 21, 29, 36, 45-58). Sergeant Creech stated that in Appellant's jail cell, a narrow window had been removed from the wall, and an air vent cover had been removed but was being held in place by plastic cutlery. (R. 483). He found a digging implement behind the air vent cover. (R. 483). Sergeant Creech also found a hand drawn map of Mexico and a piece of paper with basic Spanish statements on it. (R. 485; State's Ex. 21, 29). He confirmed that at least one of Appellant's cellmates spoke Spanish. (R. 485).

Before Appellant cross-examined Sergeant Creech, the trial court "clarified the record" regarding Appellant's objection to evidence of escape, stating that under South Carolina case law, evidence of escape is a sign of a guilty conscious. (R. 486). The trial court ruled that the evidence from Appellant's jail cell was evidence of flight and that a strong nexus existed to a guilty conscious. (R. 486-87). The trial court relied on *State v. Middleton*[1] in making its ruling. (R. 487).

Ormica Thomas, an administrative sergeant with Lexington County Sheriff's Department, testified that on September 23, 2022, she worked at the county detention center and encountered Appellant as he was being moved to a different cell. (R. 498-99). Sergeant Thomas did not know anything about Appellant's case and did not ask him any questions. (R. 499). Appellant told her that "he felt terrible for what he did, that the person that he did it to was a good person and did not deserve it." (R. 499). Appellant also told her that "he's had a long time to think about it and that was wrong." (R. 499-500).

Appellant testified that he did not do any of the things Victim alleged. (R. 554). According to him, on the day that law enforcement conducted their first search of his residence, he provided his cellphone to Sergeant Creech along with the passcode. (R. 557). He denied using the sex toy on Victim and stated he never showed it to her. (R. 563). Appellant testified that Victim "easily" had access to the box containing the sex toy in his room. (R. 565). He stated that he used pee pads in his house like napkins, essentially "for anyone or anything." (R. 566). According to Appellant, finding a pee pad in Victim's room was normal due to the number of pets—two dogs and nineteen cats—in the house. (R. 567). Appellant testified that the bag found during the second search was a diaper bag, not a bookbag, and was mainly used for Victim and her younger brother, so it was not unusual to find kids underwear in it. (R. 576).

[1] 441 S.C. 55, 893 S.E.2d 279 (2023).

According to Appellant, his laptop was in a drawer in the living room during the first search and everyone in his house had access to it. (R. 577). He claimed to be unsure of how the Photo Vault application became installed on his cellphone and that he did not use it or have the passcode for it. (R. 584). He stated that at one point, because he did not like his phone's operating system, he began downloading files onto his phone from "nefarious potential sources." (R. 584-85). Appellant stated he first saw the Photo Vault application on his phone when Sergeant Creech showed it to him. (R. 585).

Appellant admitted to remotely resetting his phone because he "didn't know what was on it." (R. 589). Appellant admitted to destroying evidence on his phone by remotely resetting it. (R. 646). He further admitted that he had pornography on his phone, including a video of Victim's mother. (R. 592). Appellant stated that it was possible Victim saw her mother's video on his cellphone because it was stored in the photos application. (R. 593).

Regarding the damage done to his jail cell, Appellant testified that after he removed the windowpane, he used the newfound space under the window for storage. (R. 600). Correctional officers did not notice that Appellant removed the windowpane for over a month. (R. 600). According to Appellant, it was not possible to escape through the window because the window was too narrow for him to fit through. (R. 603). His reasons for removing the windowpane included wanting to see and hear outside. (R. 603). When correctional officers discovered that he removed the windowpane, Appellant confirmed that he took it out and that his cellmates had nothing to do with it. (R. 607). He also confirmed that everything, including the digging implement, found in the air vent in his jail cell belonged to him. (R. 614).

Regarding the statement he made to Sergeant Thomas when she moved him to a different cell, Appellant claimed that the person he referred to was another correctional officer who was on

duty on night when he participated in an incident at the jail. (R. 616). He stated his statement to Sergeant Thomas was not about Victim. (R. 616).

While Appellant stated he had no plans to escape to Mexico, he felt he did not have a future in South Carolina when he eventually got out of prison and felt he had no hope if he continued to stay in the United States. (R. 621-24). Appellant testified that the map of Mexico and the paper with simple Spanish phrases were not evidence of an attempt to learn Spanish before escaping to Mexico. (R. 624; State's Ex. 21, 29). Appellant confirmed he did not have any connections to Mexico. (R. 624).

The jury found Appellant guilty of one count of third-degree CSC with a minor, two counts of disseminating harmful material to a minor, and obstruction of justice. (R. 793; 837-838). The jury acquitted Appellant of first-degree CSC with a minor and the other count of third-degree CSC with a minor. (R. 792; 836).

The trial court imposed a cumulative thirty-year sentence. (R. 814). The trial court sentenced Appellant to fifteen years' imprisonment for third-degree CSC with a minor, a concurrent ten-year sentence for the first disseminating harmful material to a minor conviction, a consecutive ten-year sentence for the second disseminating harmful material to a minor conviction, and a consecutive five-year sentence for obstruction of justice. (R. 813-14; 828-835).

This appeal followed.

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. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "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).

"The decision to admit or exclude testimony from an expert witness rests within the trial court's sound discretion." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). "The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion." *Id*.

An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

I. The trial court did not abuse its discretion in admitting the testimony of a blind expert in child sexual abuse dynamics because the blind expert addressed general concepts and characteristics of child sexual assault victims.

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

In *State v. Anderson*, our Supreme Court recognized the expertise of child abuse assessment experts, who testify to the behavioral characteristics of sex abuse victims, but cautioned:

> The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility.

413 S.C. 212, 218-19, 776 S.E.2d 76, 79 (2015). In the present case, the State followed the Supreme Court's guidance in *Anderson* and had a blind expert, who had no information about this case and had not spoken to Victim, testify about child sexual abuse dynamics. (R. 282, 287, 291). Our Supreme Court has specifically acknowledged that child sexual abuse dynamics is an area of specialized knowledge in which the State is permitted to utilize expert witnesses. *See State v. Jones*, 423 S.C. 631, 636, 817 S.E.2d 268, 271 (2018) ("[T]he law in South Carolina is settled: behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized."); *Anderson*, 413 S.C. at 218, 776 S.E.2d at 79 ("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.").

In *Kromah*, our Supreme Court held that forensic interviewers should avoid certain topics, including (1) stating that a child victim was instructed to be truthful; (2) offering a direct opinion on the child victim's "veracity or tendency to tell the truth"; (3) indirectly vouching for a child victim, "such as stating the interviewer has made a 'compelling finding' of abuse"; (4) indicating that the interviewer believes the child victim's allegations in the current matter; and (5) opining as to whether the child victim's behavior indicated that the child victim was telling the truth. 401 S.C. at 360, 737 S.E.2d at 500.

In direct contrast to this case, *Kromah* involved expert testimony from a *forensic interviewer* who had interviewed the victim. Here, Olszewski was a blind expert and did not conduct the investigative interview with Victim. (R. 282, 291). Moreover, the expert in *Kromah* indicated that she believed the child victim's allegations of abuse by testifying that a "compelling finding" of physical child abuse existed. *Id*. at 356-59, 737 S.E.2d at 499-500. Again, Olszewski never interviewed Victim and had no knowledge of the facts of this case. (R. 282, 291). Further, Olszewski never commented—directly or indirectly—about the credibility of Victim's allegations or testimony. Olszewski also did not make any of the statements prohibited by our Supreme Court in *Kromah*. Therefore, because Olszewski did not indicate he believed Victim was telling the truth, this testimony was admissible.

However, this Court has held that an independent expert witness's testimony can constitute improper bolstering if "(1) the witness directly states an opinion about the victim's credibility, (2) the sole purpose of the testimony is to convey the witness's opinion about the victim's credibility, or (3) there is no way to interpret the testimony other than to mean the witness believes the victim

is telling the truth." *Chappell v. State*, 429 S.C. 68, 77, 837 S.E.2d 496, 501 (Ct. App. 2019). Here, Olszewski did not directly or indirectly state an opinion about Victim's credibility. His testimony, which was general in nature and served the purpose of assisting the jury in understanding of the complex dynamics of child victims in sexual abuse cases including why children might delay disclosing instances of sexual abuse, did not convey any opinion about Victim's credibility. Moreover, because Olszewski did not interview Victim and did not know anything about the facts of this case, his testimony cannot be interpreted to mean he believed that Victim was telling the truth because he did not know what Victim alleged occurred.

Because Olszewski never commented on the credibility of Victim but rather offered admissible expert testimony regarding general behavioral characteristics of child sex abuse victims, his testimony did not improperly bolster Victim's testimony. *See State v. Brown*, 411 S.C. 332, 345, 768 S.E.2d 246, 253 (Ct. App. 2015) ("Further, because [the independent expert] never commented on the credibility of the minor victims, but rather offered admissible expert testimony regarding behavioral characteristics of child sex abuse victims, we find such testimony did not bolster the minor victims' testimony.") *abrogated on other grounds by State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018).

Olszewski's testimony focused broadly on various reasons sex abuse victims may delay disclosure and how the disclosure process progresses generally. (R. 287-91). Merely because his testimony corroborated some of Victim's reasons for delaying disclosure of abuse does not mean his testimony improperly bolstered Victim's testimony. *See Brown*, 411 S.C. at 345, 768 S.E.2d at 253 ("The fact that [the independent expert's] testimony corroborated some of the minor victims' reasons for delaying disclosure of the abuse does not mean her testimony improperly bolstered their accounts."); *id*. (holding that the independent expert "merely offered reasons why children

might delay disclosing instances of sexual abuse to assist the trier of fact's understanding of the complex dynamics of child victims in sexual abuse cases."). Therefore, the trial court did not abuse its discretion in admitting the expert testimony because the expert testimony was admissible evidence that did not constitute improper bolstering.

II. The trial court did not abuse its discretion in admitting evidence of Appellant's attempted escape because the evidence was admissible as some evidence of consciousness of guilt and the State established a nexus between Appellant's attempted escape and the charges against him.

A. The attempted escape evidence was relevant as evidence of guilt and was properly admitted under Rules 401 and 402 of the South Carolina Rules of Evidence.

Rule 402 of the South Carolina Rules of Evidence provides a central tenant of evidence law, namely that "[a]ll relevant evidence is admissible" and "[e]vidence which is not relevant is not admissible." Rule 401 of the South Carolina Rules of Evidence defines relevant evidence as "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, Sergeant Creech's testimony about Appellant's attempted escape from the county detention center indicated a consciousness of guilt, which made it relevant as evidence of guilt.

"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). Both our Supreme Court and this Court 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. Pagan*, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006) (citing *State v. Robinson*, 360 S.C. 187, 195, 600 S.E.2d 100, 104 (Ct. App. 2004)). In *State v. Cartwright*, our Supreme Court held there must be "an unmistakable nexus . . . by clear and convincing evidence linking the [defendant's conduct] to a guilty conscience derivative of the offense for which the defendant is on trial." 425 S.C. 81, 92, 819

S.E.2d 756, 762 (2018); *see also State v. Martin*, 403 S.C. 19, 28, 742 S.E.2d 42, 47 (Ct. App. 2013) (requiring "a nexus between the [conduct] and the offense charged"). In *State v. Middleton*, our Supreme Court held that its reasoning in *Pagen* and *Cartwright* transcend the facts of those cases and applies to "any case in which the State contends the defendant's guilty act or evasive conduct is relevant because it shows a consciousness of guilt." 441 S.C. 55, 61, 893 S.E.2d 279, 282 (2023); *see also Martin*, 403 S.C. at 28, 742 S.E.2d at 46 (stating "because flight is merely one form of evasive conduct, we find the . . . test used to determine the admissibility of flight evidence is equally useful in determining the admissibility of evidence of other types of evasive conduct").

In *Middleton*, our Supreme Court laid out three considerations for determining the admissibility of flight evidence, including (1) whether the defendant was "aware of an existing arrest warrant or indictment for his crimes"; (2) whether the defendant's "guilty act or evasive conduct was primarily some form of action"; (3) whether the chain of inferences leading from the evidence shows a guilty conscious derivative of the offense charged. *Middleton*, 441 S.C. at 63-64, 893 S.E.2d at 283.

Here, Appellant was in the county detention center awaiting trial for the indicted charges in this case. (R. 476). The evidence presented through photographs and Sergeant Creech's testimony show that Appellant removed a windowpane in his jail cell with a digging implement, which he stored in an air duct after removing the air vent. (R. 479-85; State's Ex. 45-58). There is evidence that some mortar between concrete cinderblocks in the jail cell was damaged. (State's Ex. 45, 47). Thus, Appellant's conduct was primarily a form of action. Further, Appellant had created a map of Mexico and had a list of simple Spanish phrases, which suggests that if he had managed to escape from the county detention center, he planned to find his way to Mexico.

(R. 485; State's Ex. 21, 29, 36). By his own admission, Appellant felt he had no hope or future in the United States. (R. 621).

By busting out his jail cell window, regardless of his ability to fit through the window, possessing a digging implement that he could have used to enlarge the window opening, and possessing documents suggesting that he would flee to Mexico if given the chance, the State demonstrated a nexus between Appellant's conduct in the jail cell and his consciousness of guilt for the indicted charges of this case. Afterall, "it is not to be supposed that one who is innocent and conscious of that fact would flee" or, in this case, attempt to escape from jail and flee to Mexico. *See Middleton*, 441 S.C. at 61, 893 S.E.2d at 282 (quoting *Martin*, 403 S.C. at 29, 742 S.E.2d at 47). Therefore, the photographs of Appellant's jail cell and Sergeant Creech's testimony about Appellant's attempted escape are relevant to show a consciousness of guilt. Thus, the trial court did not abuse its discretion in finding them relevant and admissible under Rules 401 and 402 of the South Carolina Rules of Evidence.

B. The trial court did not abuse its discretion in admitting evidence of Appellant's attempted escape from jail because the probative value of the evidence—to assist the jury in understanding Appellant's consciousness of guilt—was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury under Rule 403 of the South Carolina Rules of Evidence.

"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 . . . ." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "[T]he determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case." *State v. Stokes*, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009).

As previously discussed, evidence of Appellant's attempted escape from jail was relevant as evidence of consciousness of guilt. The evidence was not *unfairly* prejudicial because the photographs and testimony did not mention any prior bad acts or discuss anything more than was necessary to show that Appellant attempted to escape from the county detention center while awaiting trial on the charges in this case. *Cf. State v. Traylor*, 360 S.C. 74, 85 n.12, 600 S.E.2d 523, 528 n.12 (2004) (stating that the admission of mug shots can be reversible error if they imply a defendant committed prior bad acts). Thus, the probative value of the evidence in assisting the jury to understand Appellant's consciousness of guilt was not substantially outweighed by any danger of unfair prejudice to Appellant, and the trial court did not abuse its discretion in admitting the evidence. *See State v. Collins*, 409 S.C. 524, 536, 763 S.E.2d 22, 28 (2014) ("[T]he standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE is whether there is a danger of *unfair* prejudice that *substantially* outweighs the probative value of the evidence." (emphasis in original)).

C. Should this Court determine the evidence of Appellant's attempted escape was not relevant or that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, any such abuse of discretion by the trial court in admitting the evidence is harmless.

"Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). Where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached," an insubstantial error that does not affect the result of the trial is considered harmless. *Id*. A harmless error analysis is contextual and specific to the circumstances of the case: "No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless

when it could not reasonably have affected the result of the trial." *State v. Reeves*, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990).

In this case, Victim's testimony and recorded investigative interview, physical evidence discovered at Appellant's residence, the video and photographic evidence discovered on several of Appellant's electronic devices, and Appellant's admission that he remotely reset his cellphone and destroyed evidence provide such substantial and competent evidence of Appellant's guilt for the charges upon which the jury found him guilty that no other rational conclusion can be reached. Therefore, if this Court determines that evidence of Appellant's attempted escape is not relevant or that the probative value of that evidence was substantially outweighed by the danger of unfair prejudice such that the trial court abused its discretion in admitting the evidence, which the State disputes, then any such abuse of discretion was harmless because it did not affect the outcome of the trial.

III. The trial court did not abuse its discretion in admitting evidence regarding the Photo Vault application on Appellant's cellphone because the probative value of the evidence—to assist the jury in understanding Victim's testimony from trial and her recorded investigative interview as well as Appellant's obstruction of justice charge—was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury under Rule 403 of the South Carolina Rules of Evidence.

The State has the right to prove every element of the crime charged. *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). Here, evidence of the Photo Vault application on Appellant's phone was relevant to corroborate Victim's recorded investigative interview, where she stated that Appellant showed her explicit photos and videos of her mother in an application on Appellant's phone that needed its own passcode. (State's Ex. 1 at 10:40 to 11:10). It was also relevant because Appellant remotely reset his phone after it was seized by law enforcement. (R. 646). Because a person commits the offense of disseminating harmful material to a minor if they present a minor with "any material . . . that depicts sexually explicit nudity or sexual activity,"

the State had to show that Appellant showed Victim sexually explicit media as Victim alleged in her recorded investigative interview and in her testimony. S.C. Code Ann. §§ 16-15-375 & -385; *see State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003) ("The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion.").

The trial court balanced the probative value of the Photo Vault testimony against its prejudicial effect, albeit briefly, and determined that the testimony was admissible despite the State not knowing what was contained in the application. (R. 90-91, 439). The trial court found that the evidence could go to both the disseminating of harmful material charges as well as to the obstruction of justice charge. (R. 91). *See State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008) ("A trial [court's] decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances.").

Despite Appellant's claims at trial, and now on appeal, that testimony about the Photo Vault application would unfairly prejudice him because, according to him, the evidence would encourage the jury to speculate that Appellant had child pornography on his phone, this argument is entirely without merit. Appellant deleted the entire contents of his phone before law enforcement could extract any evidence from it; therefore, the only person who knew what was contained in the Photo Vault application was Appellant. (R. 646). Appellant and Victim both stated that Appellant did not take any photos of Victim. (R. 591; State's Ex. 1 at 14:15 to 14:40, 16:15 to 16:45, 18:00 to 18:30). While the jury would not have known what was contained in the Photo Vault application, its existence on Appellant's phone before he remotely reset the phone corroborates Victim's account of events from her recorded investigative interview and directly goes to show that Appellant obstructed justice by knowingly destroying relevant evidence.

Based on the entire record, the probative value of the Photo Vault testimony was not outweighed, much less substantially outweighed, by any prejudicial effect. *See State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007) ("The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case."); *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) ("Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one."). According to Appellant, both at trial and on appeal, his mere speculation that the jury might disregard both his and Victim's testimony that he did not have explicit photographs of Victim on his phone constituted unfair prejudice. It did not. The evidence at trial focused on Appellant showing Victim explicit media of *adults* on his phone and at no point did the evidence presented tend to suggest that Appellant had any other kind of explicit media on his phone. Therefore, the prejudicial effect to Appellant was minimal, and the probative value of the evidence was not substantially outweighed by this minimal prejudicial effect.

To the extent that this Court determines that the trial court abused its discretion in admitting the Photo Vault evidence, any such error is harmless because the evidence in the record does not support any rational conclusion other than Appellant's guilt. *See State v. Reyes*, 432 S.C. 394, 406, 853 S.E.2d 334, 340 (2020) ("Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it 'could not reasonably have affected the result of the trial.'" (quoting *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985))); Collins, 409 S.C. at 538, 763 S.E.2d at 29-30 (holding that when determining whether error is harmless beyond a reasonable doubt, appellate courts often

look to whether the "defendant's guilt has been conclusively proven . . . such that no other rational conclusion can be reached").

CONCLUSION

Based on the foregoing, the State requests that this Court affirm Appellant's convictions for third-degree CSC with a minor, two counts of disseminating harmful material to a minor, and obstruction of justice, as well as his associated sentences.

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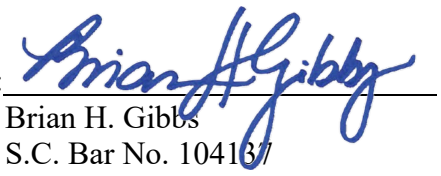
By: 
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April 10, 2025
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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

Debra R. McCaslin, Circuit Court Judge

Appellate Case No. 2023-001574

THE STATE,

Respondent,

v.

JASON JAVIER OTERO,

Appellant.

PROOF OF SERVICE

I, Grace Sommer, certify that I have served this Final Brief of Respondent on Joanna K. Delany, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 10th day of April 2025.

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