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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari -PCR- Greenville County
Court of Common Pleas
Alex Kinlaw, Jr. Circuit Court Judge

Appellate Case No. 2019-000907
Lower Case No. 2017-CP-23-5901

Jerald D. Gaskins, Jr.#00362923 ..... Petitioner,

v.

State of South Carolina ..... Respondent.

BRIEF OF PETITIONER

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010
S.C. Bar No. 6188

Attorney for Petitioner

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Statement of Issues Presented

I. Did the Post Conviction Relief Court err in failing to find trial counsel was ineffective when trial counsel failed to object to the improper cross-examination of Jerald Gaskins when the prosecutor was permitted to ask Mr. Gaskins improper questions on cross-examination?

II. Did the Post Conviction Relief Judge err in failing to find that trial counsel was ineffective when he failed tp object to the expert testimony of Officer Robert Perry as to delayed disclosure when the officer had not been qualified as an expert?

III. Did the Post Conviction Relief judge err in failing to hold trial counsel to be ineffective when trial counsel failed to object to the improper vouching for the credibility of the complaining witness?

STATEMENT OF THE CASE

Procedural History

On February 4-5, 2015, Jerald D. Gaskins went to trial on four counts of criminal sexual conduct with a minor and two counts of a lewd act upon a minor child. He was convicted on all six charges. The judge sentenced him to 20 years for the criminal sexual conduct with a minor on these charges and 15 years on one count of a lewd act upon a minor child with all sentences to run concurrently. The judge sentenced him to five years on charge of a lewd act with that sentence to run consecutively to the other charges.

He filed a timely notice of appeal on February 13, 2015. On April 19, 2017, the South Carolina Court of Appeals affirmed the conviction. The Court of Appeals discussed the issue of other bad acts under Rule 404b of the South Carolina Rules of evidence. The court affirmed this issue based upon *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009). The Court of Appeals also affirmed the issue of improper cross-examination by the solicitor on the ground the issue was not properly preserved.

On September 14, 2017, Mr. Gaskins filed a Post Conviction Relief petition dated August 29, 2017. He filed an amended Petition on September 14, 2018 and October 25, 2018. The hearing was held on October 25, 2018. By Order dated February 1, 2019, Judge Alex Kinlaw denied the Petition. A timely Rule 59 Motion dated February 19, 2019, was filed on March 8, 2019. The Motion was denied on March 4, 2019 and filed on March 5, 2019. The Order was received by counsel on May 30, 2019. App. at 795. A Notice of Intent to Appeal was filed on the same date.

On March 16, 2022, this Court granted the Petition for Writ of Certiorari as to the

improper cross-examination of Mr. Gaskins, the expert opinion testimony of the officer when he as not qualified as an expert, and the testimony was vouching for the credibility of the minor child by two witnesses.

ARGUMENT

Question I

Did the Post Conviction Relief Court err in failing to find trial counsel was ineffective when trial counsel failed to object to the improper cross-examination of Jerald Gaskins when the prosecutor was permitted to ask Mr. Gaskins improper questions on cross-examination?

Failure of trial counsel to object to questions about text messages improperly attributed to Walt Mucienko, the father of the complaining witness[1]

Mr. Gaskins first contends that trial counsel was ineffective in failing to object to questions by the prosecutor concerning text messages allegedly sent by Mr. Gaskins. App. at 432, l 17 to 433, l 25. The messages were introduced at the Post Conviction Relief hearing as Applicant's Exhibit 1. The State began their cross examination of Mr. Gaskins referencing text messages the State claimed were between Mr. Gaskins and Walt Mucienko, the father of the complaining witness. The cross-examination began with Mr. Gaskins denying that the phone number 561-7021 was in fact his number. App. 424, ll 19-20. At the trial, The State never offered any testimony that the number was in fact registered to or used by Mr. Gaskins. Nor did

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[1] The first three issues involved text messages that were introduced by Mr. Gaskins at the PCR hearing. Exhibit № 1 can be referred to as the "Mucienko messages." Exhibit № 2 can be referred to as the "Jamie messages." Exhibit № 3 can be referred to as the "Jay Fowler messages."

the State call Mr. Mucienko to verify the messages. At the Post Conviction Relief hearing, Mr. Gaskins' attorney called Mr. Mucienko as a witness. He denied ever texting Mr. Gaskins or having any conversation with him after the accusations were brought against Mr. Gaskins. App. at 650, l 5 to 651, l 24. At the trial, Mr. Gaskins denied ever texting Mr. Mucienko and continued to deny the phone number was his phone. App. 425, ll 2-24. The substance of the text messages is that Mr. Gaskins was asking Mr. Mucienko to drop the charges against him.

Trial counsel finally made an objection as to foundation which was sustained. App. 426, ll 6-23. During a non-jury discussion concerning these text messages, the State represented that the text messages were provided by Mrs. Mucienko, the wife of Walt Mucienko. The State represented that she could verify the authenticity of text messages and the fact that the phone number in question was the number of Mr. Gaskins. App. at 428, ll 8-14. These text messages, introduced at the PCR hearing as Applicants Exhibit 1, had not been provided to defense counsel in discovery and he so testified at the Post Conviction Relief hearing. App. at 722, l 23 to 723, l 9. After the objection and conference, the cross examination of Mr. Gaskins as to the text messages continued and Mr. Gaskins continued to deny having sent any text messages to Mr. Mucienko. Mr. Gaskins testified he cut all ties to the Mucienko family after his arrest on November 14, 2012. App. at 433, ll 22-25.

At the trial, defense counsel offered no further objections to the cross-examination of the text messages. The State never called Mr. or Ms. Mucienko to verify the text messages. The State never called the cell phone provider to establish that the number belonged to Mr. Gaskins. Based upon the testimony at the Post Conviction relief trial, if the defense counsel had properly objected to the questioning based upon the text messages, the State would never have been able

to establish a basis for asking the questions as the messages were not an exchange between Mr. Mucienko and Mr. Gaskins. Mr. Mucienko denied the phone number was his, the cell phone company was his or that he had sent and received those texts from Mr. Gaskins. App. at 650, l 10 to 651, l 22.

These questions were prejudicial to Mr. Gaskins. The State, with no basis for such questions, portrayed Mr. Gaskins as a liar when he denied sending the text messages to Mr. Mucienko. This was a direct attack upon the credibility of Mr. Gaskins. At the Post Conviction Relief hearing, the testimony of Mr. Mucienko proved Mr. Gaskins was telling the truth at his trial. Trial counsel was capable of providing the same testimony at the trial of Mr. Gaskins had trial counsel investigated the text messages or simply interviewed Mr. Mucienko.

As one Court noted "Although a prosecutor may impeach a witness on the basis of prior inconsistent statements, Fed.R.Evid. 613(a), a prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable." *United States. v. Silverstein*, 737 F.2d 864, 868 (10th Cir. 1984); *State v. McGuire,* 272 S.C. 547, 550, 253 S.E.2d 103, 105 (1979)("Counsel should not be permitted to go on a fishing expedition in hopes of finding some misconduct involving moral turpitude by a witness. Merely asking a question that has no basis in fact may be prejudicial."); *State v. Creason*, 847 S.W.2d 482, 486 (Mo. Ct. App. 1993) ("On the other hand, there are limits to the scope of cross-examination. The prosecutor transcends those limits when the questions are asked merely for the purpose of improperly showing other crimes or for the purpose of going into collateral details. There is a general requirement of fairness in cross-examination, and if there is no reasonable basis on which to base such a cross-examination, it should not be made.")(internal citations omitted) The evidence at

the Post Conviction Relief hearing established that a proper objection to the cross-examination would have been sustained. The father of the complaining witness did not engage in a text message exchange with Mr. Gaskins. The sole purpose of this cross-examination of Mr. Gaskins was to impeach his character through improper means. Trial counsel should have made an objection to prevent the improper cross-examination.

The Post Conviction Relief judge erroneously ruled that the performance of trial counsel on this issue was sufficient. No facts in the record sustain this conclusion. The Court of Appeals ruled that this issue was not preserved. App. at 618. If the issue is not preserved, counsel was ineffective. The PCR judge noted that Walt Mucienko denied sending the text messages. App. at 766. He made no finding as to whether Mr. Mucienko was credible or not. Such a finding would have been crucial to the admisisbility and to the prejudice as to the cross-examination.

Failure of trial counsel to object to improper cross-examination of by use of alleged text messages to the sister of complaining witness

In further cross-examination of Mr. Gaskins, the State asked Mr. Gaskins about an alleged text message to the sister of the complaining witness in this case. App. at 435, l 6 to 439, l 2. Mr. Gaskins at trial and in the Post Conviction Relief hearing testified he did not send the texts. The text messages were not introduced at trial. Mr. Gaskins introduced the messages as applicant's Exhibit 2. Trial counsel, testified that he received the pictures of the text messages the day before trial. App. at App. at 718, ll 14-18.[2]

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[2] In the original Petition for Certiorari, Mr. Gaskins inadvertently made stated that these pictures of the text messages with the sister, applicant's exhibit 2, were not given to defense counsel. Exhibit № 2 was given to defense counsel the day before trial. Applicants Exhibit №s 1

Mr. Gaskins testified that upon reviewing the text messages in detail, he noticed many abnormalities that bring the source of the texts into question. While the phone does have the name "Jerald" on the screen, the times on the screen and the times on the messages do not match. The screen times are from 11:18 A.M. until 11:36 A.M.. The times on the messages are from 2:19 A.M. September 30 until October 23 at 11:13 P.M.. The only possible explanation is the messages were forwarded from another phone. The source of that phone was not given at trial. This factual inaccuracy can only be determined from a close examination of the texts. As they were provided to trial counsel, only the day before trial, neither he nor Mr. Gaskins had an adequate opportunity to examine them in detail prior to trial. App. at 718, ll 14-23. Under Rule 5 of the South Carolina Rules of Criminal Procedure, the State is required to provide the defendant with the statements of the defendant. The rules requires disclosure of "any relevant written or recorded statements made by the defendant." The text messages certainly qualify as a written or recorded statement. Mr. Gaskins was given a copy of the texts before the Post Conviction Relief hearing to review. He did not have an adequate opportunity to review them before the trial. App. 653, l 18 to 654, l 5.

The text messages in Exhibit № 2, also contain references that would clearly indicate they were not from Mr. Gaskins. For example, on the 11:22 A.M. text, the statement is made "Hey tell momma that me and [complaining witness] are going to the movies if she needs me ill only answer the phone for yall." App. at 662, ll 18-20. Mr. Gaskins denied he sent such a message. He pointed out that the reference to "momma" would certainly not have been to his own mother

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and 3 were not provided to defense counsel. He did not see those exhibits until the Post Conviction Relief hearing. App. at 722, ll 15-25; 723, l 24 to 724, l 5.

and appears to be a reference to the complaining witness's mother. He also pointed out that on October 7 at 10:23 the text says "Thats good. Just wanted to say we should have one more cool out befor I go to new york." App. at 666, ll 3-4. Mr. Gaskins stated he had never been to New York and had never made plans to go to New York. He stated the brother of the complaining witness, however, had in fact been to New York and moved there around the time of the text.

He also pointed out the text of October 8 at 4:13. In response to "wyd" [what are you doing] the text is "Painting and waiting to pic up [complaining witness] from school. What are you doing?" App. at 663, ll 15-17. Mr. Gaskins stated he had never picked up the complaining witness from school and he does not paint except for painting rooms or houses. He stated the complaining witness's brother does paint in the artistic sense. App. at 663, l 25 to 664, l 6.

On the text following the text of October 13, at 11:52 A.M., the message is "I thought we hot straight last nite about bowling so why are u telling mom I didn't invite u this is BS Jamie [sister of complaining witness] and you know it. Who catches all the hell, Not you." App. at 664, ll 20-23. Mr. Gaskins testified that again this message would not have come from him as the reference in the text is to "mom." In the context of the conversation the reference would not have been to the mother of Mr. Gaskins. He also pointed out that again on the text message of October 13 at 12:00 PM makes no sense if the reference to "mom" is his mother.

These text messages were obviously prejudicial to Mr. Gaskins. The implication sought to be placed upon them by the State is that he was constantly texting about the complaining witness. The messages gave credibility to the testimony of the complaining witness. Many of these same texts were referred to during the direct testimony of the sister of the complaining witness. While defense counsel made an objection, it was overruled. The testimony was that the

sister had received the messages and she took pictures of her phone with her Ipad. App. at 111, ll 1-2. Her testimony suggests the pictures taken with Ipad were made before this case arose. App. at 111, ll 6-8.

This also raises a serious question as to the authenticity of the text messages. Mr. Gaskins was arrested on November 14, 2012. App. at 442, ll 17-22. This case was tried in February of 2015. The testimony at the trial was the photos of the text messages were not provided to the prosecution in this case until the actual trial of the case. These messages in Exhibit № 2 were turned over to the trial counsel the day the trial started. For over 27 months the sister of the complaining witness held on to the photos which, according to her testimony, she saved because this day may come.[3] There was no explanation at trial or the Post Conviction Relief hearing as to why she waited 27 months to disclose she had the photographs of the texts when she claimed the photographs were taken for the purpose of helping a prosecution. App. at 111, ll 6-8. Interestingly, the Ipad was also not brought to the trial for defense counsel to examine. At the Post Conviction Relief hearing, the State never explained the source of these text messages other than what the trial record established. At trial, the State never attempted to authenticate the text messages other than the sister testifying that she took a picture of the phone messages with her Ipad. App. at 105, ll 6-7.

Had trial counsel made a proper objection either during the direct examination of the sister of the complaining witness or during the cross examination of Mr. Gaskins, the State

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[3] Also, Officer Robert J. Perry testified that when the incident was first reported he specifically asked "[I]f anybody had any information that could corroborate some of the stuff [complaining witness] had stated." App. 348, ll 2-3. He previously had testified he believed her sister was present. App. at 347, ll 23-24.

would have been required to authenticate the messages. The failure to make a proper objection, enabled the state to use the text messages, which were never introduced or authenticated, to impeach Mr. Gaskins. The discrepancies in the messages were significant and call into question the authenticity of the texts. A proper examination of the messages easily could have convinced the jury they were not from Mr. Gaskins and the witness was not truthful when she said they were. No defendant in a criminal case should ever be subject to cross-examination about text messages that the state has not authenticated.

Trial counsel was ineffective in not raising a proper objection to these text messages. Had a proper objection been raised, the State would have ben required to authenticate these messages. The testimony at the Post Conviction relief hearing shows that the messages would not have been admissible as they could not have been authenticated as having been sent by Mr. Gaskins.

From a review of the order, the Post Conviction Relief judge did not rule on this issue. As noted above, Mr. Gaskins testified at length as to alleged text message, which were provided to defense counsel on the eve of the trial. The cross-examination of Mr. Gaskins about these messages, when the source of the messages were not authenticated, was prejudicial to Mr. Gaskins.

Failure of trial counsel to object to text Messages that placed the character of Jerald Gaskins in issue in violation of Rule 404b of the South Carolina Rules of Evidence and which messages were not properly authenticated

The third set of messages introduced at the hearing, applicant's Exhibit № 3, were apparently from October 10, 2014 and present two problems as to their admissibility. The

messages were apparently from a Facebook messenger. They are listed as being between "Jay Fowler" and a minor child under the age of 16. At trial the person named on the messages was represented to be 12 years of age. App. at 444, l 21. At the top of the page is a hand written notation "Jay Fowler - AKA for Gerald [sic] G." Neither at trial nor the Post Conviction relief hearing was any information provided to explain who wrote that notation nor as to how anyone determined how "Jay Fowler" is suppose to be Jerald Gaskins. No records from Facebook or an internet provider were introduced to establish this fact. The minor child mentioned in the messages did not testify to confirm this fact. The determination as to who is "Jay Fowler" is sheer speculation at best. Mr. Gaskins was cross-examined about the "Jay Fowler" messages. App. at 444, l 8 to 445 l 21.

The cross-examination of Mr. Gaskins in reference to the "Jay Fowler" texts was simply devastating to the defense of Mr. Gaskins. The texts imply that while Mr. Gaskins was out on bond for a criminal sexual conduct with a minor charge, he was on Facebook trying to solicit sex from a minor girl. More prejudicial evidence is hard to imagine. Trial Counsel should have objected to this improper cross-examination. The State never attempted at trial or the PCR hearing to introduce any source to verify the "Jay Fowler" in the text messages was in fact Mr. Gaskins.

At the Post Conviction Relief hearing the trial counsel testified he had not seen the "Jay Fowler" messages prior to the PCR hearing. App. at 723, l 24 to 724, l 5. This was the second batch of electronic messages that trial counsel had not seen until the PCR hearing.[4] At trial all

[4] At the Post Conviction Relief hearing the parties stipulated that the electronic messages introduced into evidence were obtain by Post Conviction Relief counsel from the file of Assistant Solicitor Kristie B. Hodge. Copies of these documents were provided to opposing counsel prior

were presented by the state as being messages from Mr. Gaskins and should have been disclosed prior to trial. Trial counsel should not have to wait until the Post Conviction Relief hearing to receive all his discovery.

These messages presented two problems to which no objections were raised by trial counsel. First, trial counsel failed to object and ask for a good faith basis for asking about messages from a "Jay Fowler" and the good faith basis for the State to believe they were from Mr. Gaskins. Second, the messages imply that Mr. Gaskins is having an inappropriate conversation with a 12 year old girl. Such evidence is not relevant. This evidence under Rule 404b of the South Carolina Rules of Evidence would have been excluded as improper character evidence. Even if somehow admissible, the evidence falls far short of the clear and convincing standard imposed by our courts. From this record it is neither clear nor convincing that the messages were in fact from Mr. Gaskins. The failure to object to these messages was certainly prejudicial to Mr. Gaskins. Trial counsel was ineffective in failing to object both as to a good faith basis for the questions and failing to object as to improper character evidence under Rule 404b of the South Carolina Rules of Evidence.

Another unauthenticated text message exchange allegedly occurred involving the 404b witness. During cross examination by the state, Mr. Gaskins was again asked about a Facebook exchange with the 404b witness. He was asked about sitting in a car with her listening to music and about his asking her to call him. App. at 454, l 13 to 455, l 7. In this exchange, the prosecutor sarcastically made the statement "Well, maybe you did it under Jay Fowler?" App. at 454, l 25. The implication from the cross examination was that the Facebook exchange occurred

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to this hearing. App. at 752, ll 4-12.

while he was out on bond as Mr. Gaskins repeatedly said during this cross, he had not been on Facebook since 2012, when he was arrested. Again the implication was made that while Mr. Gaskins was awaiting trial on serious child sex abuse charges he was contacting young girls. The State never offered a basis for this allegation.[5] These alleged text messages were not introduced at trial or at the PCR hearing.

The Post Conviction Relief judge never ruled on this issue. In the Rule 59 motion this issue was specifically called to the attention of the PCR judge. App. at 783-784. This improper 404b evidence was completely ignored by the PCR judge. No trial strategy was given for not objecting to this issue. Because the PCR judge did not rule on this issue, this Court should review this issue de novo.

Failure of trial counsel to object improper cross-examination of Jerald Gaskins when he was asked about an alleged violation of a restraining order in violation of Rule 404b of the South Carolina Rules of Evidence.

During the trial, Mr. Gaskins and the prosecuting attorney engaged in what the cold transcript shows to be a heated discussion concerning other unrelated charges against Mr. Gaskins. The testimony involved an alleged charge brought by Angelina Campbell. On cross-examination Ms. Hodge asked Mr. Gaskins if Ms. Campbell were in the courtroom. Upon being told she was, the following exchange occurred between Mr. Gaskins and the prosecutor.

> Q. (By Ms. Hodge) Isn't there a no-contact order between you and Angelina?
> A. (By Mr. Gaskins) There was.
> Q. No. There is, isn't there?

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[5] In the direct testimony of the Rule 404b witness, she was never asked if she had had any Facebook communication with Mr. Gaskins after he was arrested. App. at 306-326.

A. I'm not sure. It's . . .
Q. As a condition of your bond, you're not suppose to have any contact with her; isn't that correct?
A. No, its not correct. It was suppose to have been dissolved.
Q. Am I your prosecutor on that case?
A. I don't know if you are or not - -
Q. Have you not called me numerous times asking me - -
A. No, ma'am, I have not. No. There was a letter sent to you, an affidavit filled out for you.
Q. And have you been instructed by our office that that case is not dropped and you are not to have contact with her?
A. Ma'am, I was once told it was dismissed. So, I don't know what's going on with it - -
Q. Who were you told by?
A. I guess your office.
Q. No, sir. No one from my office - -
A. Well, then - -
Q. - - who were you told that by - -
A. - - I have no idea - -
MR. CHAMBERS: Objection, Your honor. There's arguing at this point.
THE COURT: Sustained.
App. at 446, ll 3 to 447, l 10.

The objection by trial counsel was on the ground of "arguing." He did not argue the cross examination was introducing improper character evidence which would have been excluded under Rule 404b of the South Carolina Rules of Evidence. After the "arguing" objection was sustained by the trial judge, the assistant solicitor again asked about charges against Mr. Gaskins to which he responded he believed it was suppose to have been dismissed. App. at 447, ll 12-16.

Whether Mr. Gaskins had a charge brought against him by Ms. Campbell had no relevancy to the case being tried. Mr. Gaskins certainly did not open the door to such a question. The failure to object to this improper reference to another crime is further compounded by the exchange which pitted the credibility of Assistant Solicitor Hodge against the credibility of Mr. Gaskins. During the exchange, Ms. Hodge stated that Mr. Gaskins was being dishonest in his

testimony about the charges being dismissed and the "no contact" order being dissolved. She made specific reference to telephone calls between her office and Mr. Gaskins. The jury easily could have, and probably did, conclude that if Mr. Gaskins would lie to Ms. Hodge he would lie about any thing. An objection should have been raised to have prevented such an exchange. This exchange improperly pitted the credibility of the prosecuting attorney against Mr. Gaskins.

Trial counsel should have known that such questions by a prosecutor are improper and should have objected. By not objecting to the questions, trial counsel permitted the prosecutor to convey to the jury that Mr. Gaskins was lying about the charges and that the prosecutor knew he was lying. In essence, the prosecutor became a witness to attack the credibility of Mr. Gaskins.

Here, in the cross-examination, the prosecutor had said, based upon her personal knowledge, Mr. Gaskins is a liar. As the United States Supreme Court has said "Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Berger v. United States*, 295 U.S. 78, 88 (1935). The two errors combined deprived Mr. Gaskins of a fair trial. This error is further compounded as this was not the only reference to a prior crime that was un-objected to during the cross-examination. A defendant is entitled to be tried on the charges contained in the indictment. He should not be required to defend other criminal prosecutions not related to the case being tried. The record establishes prejudice against Mr. Gaskins in this case.

As to this issue, the Post Conviction Relief judge incorrectly concludes that trial counsel properly objected to the accusation that Mr. Gaskins was violating a restraining order. App. at 772. Trial counsel only objected to the questions as "arguing." No objection was made as to the fact the cross examination introduced improper character evidence under Rule 404b. No

evidence in the record exists to sustain the conclusion of the PCR judge that a proper objection was made. As the PCR judge failed to rule on the issues, this Court should review the issue de novo.

Cumulative error

This Court has not addressed the issue of cumulative error in a Post Conviction Relief hearing. Logic would seem to dictate that when numerous errors of improper character evidence are introduced, then the cumulative effect is greater than one isolated incident and therefore should be considered cumulatively. As the Alabama Supreme Court has said "In determining the question before the court, we do not think that each of the above statements must be analyzed separately to see whether or not, if standing alone, it would create an ineradicable bias or prejudice. We think, on the contrary, that these various statements should be considered together to determine whether or not, in their cumulative effect, they created a prejudicial atmosphere." *Blue v. State*, 246 Ala. 73, 79, 19 So. 2d 11, 16 (1944). The same principle should be applied in this case.

The cumulative error analysis is appropriate here because the assistant solicitor used all the unverified text messages in her closing argument to claim Mr. Gaskins is a liar. App. at 494, l 16-21. The failure of trial counsel to object to the unverified text messages permitted the solicitor to make reference to the text messages in her closing argument. The record only contains Mr. Gaskins' denial of the authenticity of the text messages. In her closing, the assistant solicitor treated every denial of the unauthenticated text messages as a lie by Mr. Gaskins. A timely and proper objection by defense counsel would have prevented such an argument. As the closing argument was cumulative, the analysis of the errors should be cumulative.

Question II

Did the Post Conviction Relief Judge err in failing to find that trial counsel was ineffective for his failure to object to the expert testimony of Officer Robert Perry as to delayed disclosure when the officer had not been qualified as an expert?

During the trial Officer Robert Perry was asked for his expert opinion about delayed disclosure of sexual abuse. The question and answer were as follows:

> Q. (By Ms. Hodge) And in your experience investigating those cases is - - what we called delayed disclosure or the child coming forward much after the events have, actually, occurred, is that common or uncommon?
> A. (By Officer Perry) Oh, yeah. It's such a rarity for me to see a case that a child has immediately told that it's like, you know, maybe one out of a hundred, you know. So that is a very common thing, very common.
> Tr. at 357, ll 3-10.[6]

Officer Perry was never qualified as an expert of any type. The question asked of him called for an expert opinion. This Court has said "Though she was admitted generally as an expert in child sex abuse dynamics, Galloway-Williams' testimony concerned two distinct concepts: delayed disclosure by sexual abuse victims and the behavior of nonoffending caregivers. As to the first area, the law in South Carolina is settled: behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized." *State v. Jones*, 423 S.C. 631, 636, 817 S.E.2d 268, 270–71 (2018). This Court has held such

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[6] Immediately after this statement, the officer then explains at length how the delayed disclosure hampers their investigation. He even went so far as to explain how he could have obtained the text messages from a phone, but this was not an option in this case. App. at 357, l 11 to 358, l 9. Again, according to the sister, this information was available on her Ipad in the form of pictures. These pictures for some unexplained reason would not be turned over for more than two years.

testimony is only admissible through an expert. Officer Perry was not such an expert. Nor did he testify as to the source of his information. The assumption is his personal experience.

Rule 701 of the South Carolina Rules of Evidence provides, "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the *perception* of the witness, (b) helpful to a clear understanding of the witnesses testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other *specialized knowledge within the scope of Rule 702.*" (emphasis added). The testimony of the officer in this case, to which no objection was raised, falls within Rule 702. The testimony is specialized knowledge of an expert within Rule 702. This Court has explained the difference between expert testimony under Rule 702 and lay opinion testimony under Rule 701. "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions. . . . On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445–46, 699 S.E.2d 169, 175 (2010).

Trial counsel was ineffective in failing to object to such testimony. Had an objection been raised by trial counsel, the trial judge would have been required to sustain the objection and hold the testimony improper. Another piece of inadmissible evidence would have been excluded. This Court should find that Mr. Gaskins was prejudiced by the admission of this evidence. This inadmissible evidence helped advance the case for the State and was therefore prejudicial to Mr.

Gaskins.

As the Post Conviction Relief judge failed to discuss this issue, this issue should also be reviewed de novo. See, Rule 59 Motion, App. at 787.

Question III

Did the Post Conviction Relief judge err in failing to hold trial counsel to be ineffective when trial counsel failed to object to the improper vouching for the credibility of the complaining witness?

During the testimony of Officer Robert J. Perry, the following testimony occurred:

> Q. (By Ms. Hodge) And was it pretty easy for her to tell you what was - - to give you the statement, or were you having to prompt her a lot, or how was that going?
> A.(By Officer Perry) I felt like she was a little bit ashamed and kind of embarrassed, not necessarily talking to me as a male, but talking about what had occurred to her. She presented herself as bright and intelligent. And she presented herself, to me, as being a pretty articulate young lady, and kind of embarrassed that she got manipulated by Mr. Gaskins.
> Tr. at 351, ll 5-14.

These comments were simply a statement as to the credibility of the minor witness.

Subsequently Dr. Mary Fran Ratchford Croswell testified as an expert in "pediatric medicine and in child abuse pediatrics." App. at 332, ll 10-11. She conducted a sexual assault exam. App. at 333, ll 9-11. Trial Counsel asked a very simple yes or no question to start his cross examination.

> .Q. (By Mr. Chambers) Your testimony is not that there was sexual abuse, just that there could have been?
> A. (By Dr. Crosswell) My testimony is that my patient provided me a history of sexual abuse, and her exam was consistent with the history provided.
> App. 339, ll 13-17.

He further asked another simple yes or no question.

> Q. So, in other words, you - - through this exam that you did, you didn't make any independent findings of your own?
> A. I made findings based on the history and the physical exam of what she needed as a result.
> App. 340, ll 13-16.

These comments by Officer Perry and Dr. Croswell were in fact simply improper vouching that has been condemned by our courts.[7] *State v. Dawkins,* 297 S.C. 386, 377 S.E.298 (1989). As our Supreme Court has said "[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). *See, also, State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011)(" For an expert to comment on the veracity of a child's accusations of sexual abuse is improper.") When a finding of sexual abuse is based solely on the interview of the minor child, that is expressing an opinion as to the credibility of that child. The principles established in these two cases are followed by numerous courts in our country. *See Hamilton v. State,* 49 N.E.3rd 554 (Ct. App. Ind. 2015); *State v. Dudley*, 856 N.W.2d 668 (Iowa 2014); *Commonwealth v. Quinn*, 469 Mass. 641, 15 N.E.3rd 726 (2014); *State v. Lupoli*, 348 Or. 346, 234 P.3d 117 (2010); *State v. Churchill,* 98 S.W.3d 536 (Mo. 2003); *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986).

This same rule would apply to non-expert testimony such as Officer Perry. His statement

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[7] Sometimes the words "vouching" and "bolstering" are used interchangeably. As one court has noted, "In *State v. Higham*, 865 A.2d 1040, 1044 (R.I.2004), we used the term 'vouching,' rather than 'bolstering.' While these terms are technically distinct, they are frequently used interchangeably, and it is unnecessary to expound upon the differences here. *State v. Rushlow*, 32 A.3d 892, 900 (R.I. 2011). Vouching generally means supporting the credibility of the witness while bolstering means to lend support to the facts a witness has told.

about the minor child being bright and articulate and embarrassed at having to tell the details to him, was simply vouching for her credibility. As the supreme court has said, "[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). The statement to the jury both directly and indirectly gave the jury the opinion that Officer Perry believed the minor child. The testimony served no other purpose. Trial counsel failed to object to this improper vouching. Had an objection been raised, the trial judge would have been required to sustain it. Mr. Gaskins was prejudiced by the failure to object to this testimony. Had this improper bolstering been excluded, there is a reasonable likelihood that the result in this trial would have been different.

The Post Conviction Relief Judge failed to address this issue in his order. This was brought to the attention of the PCR judge in the Rule 59 Motion. App. at 786. As the PCR judge did not rule upon this issue, this Court should also review this issue de novo.

CONCLUSION

For the foregoing reasons this Court should reverse the decision of the Post Conviction Relief judge and grant Jerald Gaskins a new trial.

April 21, 2022

C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
Rauchwise@gmail.com
S. C. Bar № 06188

Attorney for Jerald Gaskins