STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERICK ARROYO,

APPELLANT

APPELLATE CASE NO. 2013-000694

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant was indicted in Charleston County for two counts of second degree criminal sexual conduct with a minor and one count of lewd act on a minor. On July 9 – 13, 2012, appellant was tried before the Honorable J.C. Nicholson and a jury. Tr. 1. Elizabeth Gordon represented the State. Tr. 1. Andrew Savage represented appellant. Tr. 1. The jury convicted appellant on all three counts. Tr. 929, ll. 3 – 21. The court deferred sentencing. Tr. 933, l. 24 – 938, l. 13. On February 26, 2013, appellant filed a motion for a new trial. R.___(Motion for New Trial; Memorandum in Support of Motion for New Trial). On March 4, 2013, a sentencing hearing was held before Judge Nicholson. Sentencing Tr. 1. The trial court again deferred sentencing and the defendant waived his presence. Sentencing Tr. 32, l. 8 – 33, l. 12. On March 12, 2013, Judge Nicholson signed the sentencing sheets. R.___. He sentenced appellant to concurrent terms of fifteen years' imprisonment on the criminal sexual conduct charges and a consecutive fifteen year sentence on the lewd act charge which was suspended upon the service of five years' probation. R.___. Judge Nicholson wrote on the sentencing sheets that appellant's probation would be tolled until he completed a sexual abuse program. R___. On March 22, 2013, the trial court denied appellant's motion for a new trial. R___(Order Denying Defendant's Motion for a New Trial). Appellant timely filed and served a notice of appeal and this appeal follows.

STATEMENT OF FACTS

Introduction

Four main fact witnesses testified in this child sex abuse case. The defendant, Erick Arroyo ("Arroyo"), a decorated retired Naval officer, testified in his own defense and unequivocally denied abusing the complainant. Tr. 811, l. 15 – 812, l. 15. The State called the complainant ("Minor"), who was sixteen years old at the time of trial and had been treated for psychiatric illnesses before the alleged abuse. Tr. 168, ll. 2 – 3. Tr. 352, l. 10 – 353, l. 20. The State also called Arroyo's wife, Joyce Arroyo ("Joyce") who was suing him for divorce and minor's mother, Melina Arroyo ("Melina"), who had been previously hospitalized for a psychiatric illness, had two of her boyfriends arrested, and had social services involvement regarding Minor. Tr. 690, ll. 1 – 2. Tr. 312, ll. 7 – 14. Tr. 330, l. 21 – 332, l. 4. Tr. 334, ll. 9 – 16. Tr. 310, ll. 12 – 20. Tr. 351, l. 23 – 352, l. 9. These three witnesses' contradicted each other regarding significant details of the alleged abuse. Compare Tr. 208, ll. 7 – 21 and Tr. 222, l. 22 – 226, ll. 6 *(Minor's descriptions)* with Tr. 315, l. 19 – 316, l. 14 *(Melina's description)* and Tr. 692, l. 14 – 698, ll. 7 *(Joyce's description)*. No physical evidence of abuse was introduced. But for the trial court's errors, including two dealing with the State's expert witnesses who were used to bolster Minor's credibility, Arroyo would not have been convicted.

Melina and Minor Move in With the Arroyos

Minor was the oldest of Melina's three children. Minor had a tumultuous upbringing. Her mother, Melina, was hospitalized for a psychiatric illness. Tr. 312, ll. 7 – 14. Melina was bipolar and suffered from depression that sometimes prevented her from getting out of bed. Tr. 356, ll. 15 – 19. Tr. 358, ll. 14 – 16. Melina's former husband was

an alcoholic. Tr. 358, l. 17 – 359, l. 6. Minor observed violence in her home. Tr. 313, ll. 8 – 18. She had been caught looking at pornography. Tr. 337, l. 24 – 339, l. 19. Tr. 365, l. 2 – 366, l. 7. Melina had two of her own boyfriends arrested. Tr. 330, l. 21 – 332, l. 9. Tr. 334, ll. 4 – 16. Minor was treated for psychiatric problems before any alleged abuse occurred. Tr. 335, ll. 10 – 25. Social services had been involved with the family. Tr. 351, l. 23 – 352, l. 9.

Melina and her children moved to Charleston from Florida because Arroyo lived in Charleston and Melina considered Arroyo "like a father." Tr. 248, l. 7 – 249, l. 14. Melina was Arroyo's stepsister. Tr. 655, ll. 17 – 19. Arroyo was a retired naval flight officer, an engineer, and a medal-winning combat veteran. Tr. 804, ll. 20 – 25. Arroyo received a Bronze Star for his service in Afghanistan. Tr. 708, ll. 22 – 24.

Melina lost her job after moving to Charleston. Tr. 249, ll. 17 – 21. She was collecting unemployment. Tr. 250, ll. 4 – 6. Arroyo had extra room in his house because his daughters were away at college. Tr. 249, l. 22 – 250, l. 3. Despite warnings from people against letting Melina move into their home, Melina and her daughters moved in with the Arroyos during the summer of 2008. Tr. 250, ll. 19 – 25. Tr. 709, ll. 12 – 18. Living there were Arroyo, his wife Joyce, Melina, Minor, and Melina's two younger children.

The Abuse Allegations

Minor did not tell anyone of the alleged abuse until after being dramatically confronted by Melina. This confrontation occurred after Melina and her children had moved out of Arroyo's house, but returned to watch an evening football game. Tr. 257, ll. 3 – 23. Melina had two alcoholic beverages and then fell asleep on a couch in the living room after dinner. Tr. 258, l. 9 – 260, l. 15. Melina described what happened next:

> The next thing I remember after falling asleep on the couch, I felt very cold, freezing, but my body was sweaty. I remember something touching me and telling me, wake up, wake up. You need to wake up now.
>
> Q. Like somebody physically touching you to wake up?
>
> A. I don't know. Like God, like some big hands on my body like telling me, you need to wake up. And then I woke up and opened my eyes. When I open my eyes, I see my brother leaning on my daughter like with his face on her chest and her boobs and her head. I saw him, I saw him.

Tr. 261, ll. 6 – 16. Her two younger children were also in the room. Tr. 318, ll. 15 – 17. Minor was laying on her back. Tr. 318, ll. 5 – 6. Arroyo was lying on top of Minor. Tr. 319, ll. 19 – 20. Arroyo "rolled over the couch" and appeared to be looking for something. Tr. 319, ll. 2 – 4.

At trial, Minor described this incident quite differently. Minor said she was laying on the couch covered by a blanket. Tr. 223, ll. 10 – 13. Arroyo was standing over her. Tr. 223, l. 20 – 224, l. 10. Minor said that Arroyo was "[s]tanding totally straight up." Tr. 224, l. 13. Minor's clothes were on, but Arroyo's pants were unzipped. Tr. 225, ll. 8 – 9. Minor said Arroyo "was trying to make me touch his penis." Tr. 224, ll. 21 – 22. Arroyo told Minor "to like put his hand on – my hand on his penis. And I didn't want to move it, and I just laid it there." Tr. 226, ll. 1 – 3.

Melina gathered her children, left the house, and drove to the Mt. Pleasant Police Department. Tr. 261, l. 19 – 263, l. 7. On the drive to the station, Minor denied anything happened. Tr. 263, ll. 8 – 20. Melina was mad. Tr. 263, ll. 17 – 18. She cursed at her daughter. Tr. 263, ll. 18 – 20. Melina was screaming. Tr. 264, ll. 7 – 11. Melina described minor as "scared" and "crying." Tr. 264, ll. 7 – 11. Minor then told Melina that Arroyo had touched her breast. Tr. 264, ll. 14 – 17. Melina testified about how she reacted:

> I kept telling her, you need to tell me more. I told her, if you don't tell me anything, I'm going to put you through a lie detector test in the police department, and it will be very embarrassing for people that don't know you to hear all this stuff. But here I am, your mother. And if I cannot help you, protect you, how we going to get through this. So when we parked there at the police department, she actually realized that I was being serious. And then she started telling me a bunch of stuff.

Tr. 265, ll. 9 – 18. Melina got out of her car and was "out of my mind. I was yelling and screaming." Tr. 265, ll. 19 – 21. The police did nothing that evening and Melina went to her boyfriend's house, one of the men she later had arrested. Tr. 266, ll. 5 – 8. Tr. 334, ll. 4 – 16. This boyfriend tucked Minor into bed that evening. Tr. 218, l. 12 – 219, l. 1.

The next morning, Detective Michelle Bacon ("Bacon") contacted Melina. Tr. 600, ll. 3 – 11. Detective Bacon scheduled a forensic interview for Minor. Tr. 600, ll. 3 – 16. During the interview, Minor's original allegation that Arroyo touched her breast metastasized into ongoing sexual abuse by Arroyo. Tr. 601, ll. 20 – 23. After attending therapy, Minor then claimed penile penetration. Tr. 364, ll. 4 – 17. At trial, Minor alleged that she and Arroyo had sex multiple times.

One of the specific allegations involved Joyce. One night, Minor and Arroyo were in his garage. Tr. 206, l. 23 – 208, l. 6. Minor said Arroyo "had his pants down and his penis out." Tr. 208, ll. 7 – 10. Arroyo's pants were down to "just below his waist." Tr. 233, ll. 23 – 25. The lights were on. Tr. 205, ll. 18 – 25. Minor's pants were not all the way down, but Arroyo was trying to take them off. Tr. 208, ll. 7 – 21. Her zipper was undone. Tr. 233, ll. 12 – 15. She was standing. Tr. 208, l. 17 – 18. Arroyo was trying to penetrate her with his penis. Tr. 208, ll. 19 – 21. At this point Joyce walked into the garage. Tr. 234, ll. 1 – 8. She started zipping up her pants and Arroyo walked to the freezer. Tr. 234, ll. 1 – 16.

In Joyce's version, the "lights were not on." Tr. 692, ll. 14 – 16. Arroyo did not have his pants "unbuttoned in any way or in any fashion." Tr. 693, ll. 14 – 16. Joyce affirmed that she was "sure of that." Tr. 693, ll. 17 – 18. Joyce did not turn on the light. Tr. 696, ll. 2 – 6. Joyce had a clear view of Arroyo. Tr. 698, ll. 1 – 7. Joyce claimed that she could see through a crack of the refrigerator door and saw Minor zip up her pants. Tr. 660, ll. 14 – 21.

Arroyo denied that anything untoward was happening. Tr. 660, l. 25 – 662, l. 12. Joyce went to Minor's room and asked her "if anything was going on between her and [Arroyo], and she denied it. She said, no." Tr. 684, ll. 6 – 18. That night, Joyce did not tell Melina what she saw. Tr. 662, ll. 4 – 12. Joyce instead went to Texas to visit family. Tr. 684, ll. 19 – 25. She later came back to South Carolina and made an attempt to reconcile with Arroyo. Tr. 684, l. 19 – 685, l. 2.

During the separation, Joyce wrote a letter on Arroyo's behalf to help him obtain a bond. Tr. 687, ll. 9 – 19. Joyce wrote that they were separated due to problems "with my husband's sister, Melina, who fled to South Carolina from Florida threatening to commit suicide due to an abusive relationship with a man she left, the husband [sic] of her two children." Tr. 709, ll. 3 – 11. She wrote that Arroyo was "a well-respected retired naval officer." Tr. 709, ll. 12 – 18. Joyce stated in the letter that she was sad that their dream of retiring in Mount Pleasant "would not come true due to a person that we took into our home and cared for even when others warned us against it." Tr. 709, ll. 12 – 18.

Defense counsel intended to impeach Joyce for bias with communications she made to Arroyo after he successfully contested jurisdiction in a divorce proceeding Joyce filed in Texas. Tr. 672, l. 11 – 680, ll. 6. R___(Court's Ex. 12). The Texas action was dismissed

and Joyce had to file for divorce in South Carolina. Tr. 672, l. 11 – 680, ll. 6. R___(Court's Ex. 12). Joyce left Arroyo a voicemail stating:

> You got your jurisdiction over there in South Carolina, at least temporarily because I will appeal because I have the right to fight you here in Texas. But if you want to fight there in South Carolina, that is going to be the worst thing that you could have done for your case because I will make everything and blow it up so badly over there in South Carolina that you are going to wish that you never, never crossed paths with me.

R___(Court's Ex. 12). On April 15, 2011, Joyce sent Arroyo an email stating:

> I'll contact the Newspaper there in Charleston tomorrow to discuss with them doing a story on preditors in your own backyard..... I think this jurisdiction thing needs some light shined on it

R. ___ (Court's Ex. 12). On May 26, 2011, Joyce sent Arroyo another email stating:

> Funny how when I sent you the below email you responded quickly. But when I sent you an email recently requesting the agreement you are quiet. That's okay... You will have a surprise waiting for you very soon. What is the saying "don't bend over to get the soap" just stay dirty.... it will be safer than having to watch your backside. This will be my last correspondence till you receive the divorce papers when you are in prison, unless the judge will sign off on them at your trial? See you in August at the trial... At least that is what the solicitor is stating?

R___(Court's Ex. 12).

The court had previously ruled under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) that a twenty-year-old allegation of sexual abuse by another child was inadmissible. Tr. 677, ll. 12 – 17. The trial judge then ruled that if Arroyo impeached Joyce with these communications, it would open the door to the inadmissible Lyle evidence. Tr. 677, l. 18 – 678, l. 14.

Earlier in the trial, Joyce twice attempted to testify during direct examination about the inadmissible Lyle evidence. Tr. 661, ll. 10 – 18. Tr. 664, ll. 3 – 4. During an in-camera

discussion, Joyce herself argued with the trial judge that the Lyle evidence needed to be admitted. Tr. 664, l. 5 – 671, l. 25. Judge Nicholson had to forcefully instruct Joyce not to mention the Lyle evidence and after she continued to argue with him, had to threaten her with "consequences" and directed the solicitor to further instruct her off-the-record. Tr. 670, l. 2 – 671, l. 25. After the Court's ruling on opening the door to the Lyle evidence, Arroyo did not use the communications to impeach Joyce, objected to the court's ruling, and proffered the communications in the divorce pleadings and made them a court's exhibit. Tr. 678, l. 15 – 680, l. 6. R.___(Court's Ex. 12).

Minor did not testify regarding any description of Arroyo's unusual penis. Melina, nor any of the police witnesses, nor any of the three expert witnesses the State called to bolster Minor's credibility testified that Minor told them Arroyo had an unusual penis. Arroyo had surgery on his penis when he was approximately sixteen. Tr. 815, ll. 24 – 25. The surgery caused scars on the head of his penis that Arroyo said were easily visible. Tr. 815, l. 10 – 816, l. 4. His penis also has an unusual discoloration and pigmentation problem which he described as "speckled, mottled." Tr. 815, l. 5 – 816, l. 10. The "blotches" cover the entire penis. Tr. 816, ll. 8 – 10. The discolorations and scarring was sufficiently noticeable that people in the Navy made fun of Arroyo in the showers. Tr. 814, ll. 23 – 25. Trial counsel wanted to have Arroyo show his penis to the jury during surrebuttal, but the trial judge refused to allow it. Tr. 860, ll. 4 – 18. Even though these discolorations were so distinctive and easily visible to other males who only showered with Arroyo, Minor never mentioned them. This was despite the fact that, if her allegations were true, she would have seen these distinguishing characteristics and describing them would have been an easy way to prove the truth of her allegations.

ARGUMENT

1.

The trial court erred in admitting the testimony of a psychologist who testified that the complainant suffered from post-traumatic stress disorder where this evidence was irrelevant and only served to improperly bolster the complainant's credibility.

Prior to trial, Arroyo moved *in limine* to exclude the testimony of Dr. Maria Steenkamp. R. ___ (Motion in Limine to Exclude the Testimony of Maria Steenkamp). Arroyo cited Rules 702, 401, and 403 of the South Carolina Rules of Evidence. R. ___ (Motion in Limine to Exclude the Testimony of Maria Steenkamp). The court heard Dr. Steenkamp's testimony *in-camera*. Tr. 399, l. 5 – 7. Dr. Steenkamp treated veterans and had only seen eight child patients for sexual abuse. Tr. 423, l. 21 – 424, l. 1. Despite this lack of experience with children, the State offered her as an expert on "the effects of trauma" and the court indicated it would qualify her as such. Tr. 396, ll. 14 – 17. Tr. 435, ll. 5 – 7.

The *in-camera* examination continued and Dr. Steenkamp revealed she would testify that she treated Minor for post-traumatic stress disorder ("PTSD") following the alleged abuse. Tr. 440, l. 1 – 441, l. 22. After this examination, Arroyo objected to her entire testimony. Tr. 450, l. 23 – 451, l. 18. Defense counsel argued that her testimony was irrelevant except to "bolster the testimony of Minor." Tr. 450, l. 23 – 451, l. 18. He further argued that it was "a back door way" of bolstering Minor's credibility by stating that she diagnosed her with PTSD. Tr. 450, l. 23 – 451, l. 18. Trial counsel cited State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012) (State's Pet. Cert. Withdrawn October 17, 2012) and argued that, based on McKerley, it was "impermissible to do an end-run around the bolstering." Tr. 453, ll. 6 – 25. The trial court denied the motion and

cited McKerley in its reasoning. Tr. 454, l. 20 – 456, l. 24. Following the close of the State's case, Arroyo renewed this motion and asked to strike Dr. Steenkamp's testimony because of improper bolstering and relevancy. Tr. 765, l. 1 – 766, l. 1. The trial court again denied the motion. Tr. 766, ll. 2 – 3.

When Dr. Steenkamp testified before the jury, she stated that Minor was referred to her "to do an assessment for trauma related symptoms given alleged child sexual abuse." Tr. 464, ll. 10 – 14. When asked "the result of the assessment," Dr. Steenkamp stated, "The assessment revealed a diagnosis of post-traumatic stress disorder, and we recommended that she receive therapy in our clinic." Tr. 464, ll. 15 – 18.

After being asked to explain PTSD, Dr. Steenkamp told the jury it "develops after someone has experienced a traumatic event" and used "being raped" as an example. Tr. 464, ll. 19 – 25. She described three "clusters" of symptoms. Tr. 464, l. 1 – 466, l. 1. She said Minor had symptoms in each cluster and described Minor's symptoms. Tr. 466, ll. 6 – 7.

The solicitor also directly linked the diagnosis of PTSD to the alleged abuse. Tr. 466, l. 24 – 468, l. 6. She said "there has to be first a trauma" to which Dr. Steenkamp affirmatively responded. Tr. 466, ll. 24 – 25. She had Dr. Steenkamp rule out other past traumas in Minor's life as the source of her PTSD. Tr. 467, ll. 4 – 18. Dr. Steenkamp said "what we do with a diagnosis of PTSD is that we tie each diagnosis to a specific traumatic event." Tr. 467, ll. 13 – 16. The following exchange then occurred:

> Q. And what was her diagnosis and her treatment with you, related to her treatment with you?
>
> A. Related to her treatment with me **was PTSD due to child sexual abuse.**

Q. And how did you tie the sexual abuse to her current PTSD diagnosis?

A. You typically look, for example, at the re-experiencing symptoms. So what is it that they're having nightmares about it? What is it? You know, what are the bad memories that keep popping into their mind? **In this case, it was the child sexual abuse.**

Q. Based on her diagnosis what was your recommendation?

A. We recommended trauma-focused therapy.

Tr. 467, l. 19 – 468, l. 6 (emphasis added).

The above testimony was irrelevant and improperly bolstered Minor's credibility. It is impossible to construe Dr. Steenkamp's diagnosis as anything other than she believed the child's testimony regarding the abuse and believed it caused PTSD. As such, it is indistinguishable from the current line of cases from this Court and the Supreme Court finding such testimony inadmissible. See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013); State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012) (State's Pet. Cert. Withdrawn October 17, 2012). State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012); see also State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding there is no need to qualify a forensic interviewer as an expert and Pleicones, J., calling forensic interviewers "human 'truth detectors'" in dissent).

In Kromah, a forensic interviewer was qualified as an expert witness. Discussing the qualification of the forensic interviewer in Kromah, the Supreme Court said, "[W]e state today that we can envision no circumstance where [a forensic interviewer's] qualification as an expert at trial would be appropriate." Id. at 357, n.5, 737 S.E.2d at 499 n.5. In McKerley, there was no other way "to interpret the interviewer's testimony other than as

her opinion that the victim was telling the truth." McKerley at 465, 725 S.E.2d at 142. The McKerley interviewer used her testimony regarding the work of forensic interviewers as a trojan horse to lead the jury to her inevitable, "expert" conclusion that the victim told the truth about the abuse. Id. The McKerley court gave numerous examples of improper statements made by the interviewer. Id. at 142-43, 725 S.E.2d at 465-66.

Just as in McKerley, Dr. Steenkamp's diagnosis cannot be interpreted as having any function other than providing an expert opinion to the jury on whether Minor was telling the truth. See also, Jennings at 482-83, 716 S.E.2d at 95-96 (Kittredge, J., concurring, criticizing the "State's regrettable desire to admit patently inadmissible evidence."). "The purpose of [this kind of] testimony is to convince the jury that the interview was done properly, thus bolstering the child's credibility." John E. B. Myers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y 1, 55 (2010). "[A]llowing the prosecution to offer expert testimony during the state's case-in-chief violates the rule that a party may not bolster the credibility of its own witnesses unless credibility is attacked." Id. at 55-56. "Any testimony beyond that, especially expert testimony, is improper bolstering and is unfair to the defendant." Id.; see also Richardson v. State, 43 A.3d 906, 910-11 (Del. 2012) (reversing because of admission of opinion testimony from a forensic interviewer stating that their "sole role" was to authenticate the recording of the interview and anything further constituted impermissible bolstering).

Dr. Steenkamp's testimony was also irrelevant. SCRE 401. She was not a fact witness. She was not a crime scene expert. Her only knowledge of the case was based

on hearsay. Her only interaction with the case was after the alleged crime occurred. The treating psychiatrist of a victim of armed robbery would not be allowed to testify that the victim had PTSD as a result of the robbery. It would be irrelevant. See, e.g., State v. Bennett, 369 S.C. 219, 632 S.E.2d 281 (2006) (discussing that victim impact evidence is only allowed during the sentencing phase of a capital trial). Such evidence is just as irrelevant in a child sex case. The admission of this testimony in this case, where no physical evidence was introduced and the jury's decision depended upon the child's credibility, was prejudicial error that requires reversal.

2.

The trial court erred in admitting the report of a forensic interviewer, and alternatively, the admission of the unredacted portions of the report constituted an improper bolstering of the complainant's credibility.

The third of the State's three expert witnesses to testify was Dr. Donald Elsey ("Elsey"). Dr. Elsey conducted the forensic interview of Minor. Arroyo moved pre-trial to exclude his testimony. R. __ (Amended Motion in Limine to Exclude the Testimony of Donald (Don) Elsey). Arroyo renewed this motion before Elsey's testimony, stating that he objected to "the nature of his testimony." Tr. 713, ll. 2 – 7. This motion was denied and the trial judge stated he would rule on any 403 or objections to cumulative testimony as it arose. Tr. 719, ll. 8 – 16.

During redirect, the solicitor offered the report of Elsey's forensic interview into evidence. Tr. 745, l. 8 – 746, l. 10. Originally, Arroyo did not object to the entry of the report. Tr. 746, ll. 7 – 10. However, trial counsel admitted the failure to object was a mistake and Judge Nicholson allowed him to make an objection to the admission of the

report. Tr. 757, ll. 3 – 16. Tr. 778, l. 18 – 781, l. 24. Citing Jennings, Arroyo then objected to the admission of the report in its entirety on the ground that it commented on Minor's veracity. Tr. 779, ll. 10 – 24. Tr. 843, l. 21 – 849, l. 21.

Judge Nicholson then ruled he would redact the report to remove any comment on Minor's veracity. Tr. 849, ll. 5 – 15. Arroyo then made specific objections to portions of the report that remained that still referred to Minor's veracity. Tr. 850, l. 1 – 859, l. 3. The trial court overruled a number of these objections and admitted a redacted version of the forensic interviewer's report into evidence. Tr. 858, l. 6 – 859, l. 1. R. ___ (State's Ex. 9). Arroyo filed a written motion for a new trial regarding the admission of Elsey's report. R. ___ (Motion for New Trial; Memorandum in Support of Motion for New Trial). Judge Nicholson did not hear oral argument on the motion and denied it in a written order. R. ___ (Order Denying Defendant's Motion for a New Trial).

In addition to multiple sentences violating the time and place restriction of Rule 801(d)(1), the redacted Elsey report still contains information vouching for Minor's credibility. It states, "Did the child present as an accurate reporter regarding verifiable information?" with a box indicating Elsey's answer of "Yes." R. ___ (State's Ex. 9). It asks, "Was the child able to respond to trauma specific questions?" and shows Elsey's answer of "Yes." R. ___ (State's Ex. 9).

It asks whether the child presented "as being impacted by external factors?" with the box checked "Yes." R. ___ (State's Ex. 9). This question has several sub-boxes. R. ___ (State's Ex. 9). Two were checked: "Injunctions not to tell" and "Family response." R. ___ (State's Ex. 9). More significant was the box left unchecked, "Coaching." R. ___ (State's

Ex. 9). The remainder of the unredacted report repeats the hearsay allegations made by Minor during the interview. R. ___ (State's Ex. 9).

Admission of the report was clearly error under Kromah and Rule 801(d)(1). Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010). Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001) (granting a new trial in a PCR case because defense counsel failed to object to hearsay testimony about details of a sexual assault); Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994) (granting a new trial in a PCR case because defense counsel failed to object to hearsay testimony about details of a sexual assault).

The statements concerning Minor being an "accurate reporter" violates the dictate of Kromah that forensic interviewers cannot offer opinions on the credibility of others. Kromah at 357, n.5, 737 S.E.2d at 357, n.5. Elsey was improperly qualified as an expert witness, which increases the prejudicial impact of the report. Id. Jennings at 482-83, 716 S.E.2d at 95-96. Minor's credibility was the central concern of the case and the most important fact for the jury to consider. Therefore, the admission of the report is not harmless and Arroyo's convictions must be reversed.

3.

The trial court improperly limited cross-examination of the defendant's ex-wife by ruling that threatening communications she made to the defendant for challenging jurisdiction in their divorce would open the door to Rule 404(b) evidence previously ruled inadmissible.

The trial court erred in ruling that impeaching Joyce with the threatening emails would open the door to inadmissible Rule 404(b) and Lyle evidence. "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination

of the witness or by evidence otherwise adduced." SCRE 608(c). "Rule 608(c) . . . permits a party to impeach a witness by establishing bias or prejudice wither through examination or otherwise." State v. Starnes, 340 S.C. 312, 325, 531 S.E.2d 907, 914-15 (2000). "On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." Id.

Joyce's threatening emails were evidence of her bias against Arroyo. She wrote the emails in response to an adverse ruling in their divorce. R. ___ (Court's Ex. 12). In her April 15, 2011, email she said, "I'll contact the Newspaper there in Charleston tomorrow to discuss with them the doing a story on preditors in your own backyard..... **I think this jurisdiction thing needs some light shined on it**". R. ___ (Court's Ex. 12) (emphasis added). Her voicemail threatened to "blow it up so badly over there in South Carolina" because of the jurisdiction ruling. R. ___ (Court's Ex. 12). She again linked the divorce proceedings to her testimony in Arroyo's criminal case in her April 2011 email. R. ___ (Court's Ex. 12).

The trial judge found that the emails and Joyce's veracity were linked to the Lyle evidence. Tr. 677, l. 18 – 678, l. 14. Judge Nicholson stated "the Court also has an obligation under the rules not to allow misleading evidence to be submitted to the jury." Tr. 677, ll. 18 – 20. He ruled it was unfair to allow Arroyo to "insinuate things about the divorce and not give a full picture." Tr. 677, l. 24 – 678, l. 1. He specifically stated it was unfair to Joyce. Tr. 677, l. 23 – 678, l. 1. The court found that the emails were "probably threatening, but they're threatening for a reason. She wanted to bring out the abuse on both children." Tr. 679, ll. 10 – 12. Defense counsel contested this finding and

pointed out there was nothing in the communications or divorce pleadings about the Lyle evidence.

The trial judge improperly linked the threatening communications to the Lyle evidence. The communications clearly were the result of Joyce's anger over Arroyo contesting jurisdiction. The communications specifically mention jurisdiction. They do not mention anything about the Lyle evidence. In State v. Page, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008), this Court held that counsel's "zealous" cross-examination of a detective did not open the door to an unredacted statement of a co-defendant. See also State v. Young, 378 S.C. 101, 661 S.E.2d 387 (2008) (finding that defendant's statement that he hated to see a woman cry did not open the door to prior CDV convictions previously held inadmissible). Joyce would not have needed to mention the Lyle evidence to answer questions regarding the emails. The trial court erred in finding that this important evidence of bias could opened the door to the Lyle evidence.

4.

The trial court erred in refusing to charge that evidence of good character alone may create reasonable doubt.

Arroyo submitted the following request to charge:

> When a person is charged with a crime, the law permits the proof of his good character and reputation, because under some circumstances, a person might be entitled to a verdict of not guilty, in taking into consideration his good character and reputation, when without it, a verdict of guilty might be authorized. Evidence of good character and good reputation may alone create a doubt sufficient to acquit the accused and should be considered by the jury. The weight you give to that testimony, like all other testimony in the case, is for you to determine and decide, in your good judgment.

R.___ (Court's Ex. 13). After Judge Nicholson charged and the jury, he excused the jury and asked for exceptions from the parties. Tr. 918, ll. 19 – 22. The court said, "Now, you had a request for a character charge which I said I would not charge. Do you still want that charge?" Tr. 921, l. 24 – 922, l. 1. Arroyo answered, "Yes, sir," and the trial judge had Arroyo's request marked as a court's exhibit. Tr. 922, ll. 2 – 10. The trial judge did not give the charge.

"The law to be charged to the jury is determined by the evidence presented at trial." State v. Lee-Grigg, 374 S.C. 388, 405, 649 S.E.2d 41, 50 (Ct. App. 2007). "A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." Id. at 406, 649 S.E.2d at 50. Moreover, when determining whether the evidence requires a charge, the court views the facts in the light most favorable to the defendant. See State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (requiring the trial court to view facts in the light most favorable to a defendant when determining whether to charge involuntary manslaughter).

In this case, evidence of Arroyo's good character was introduced. He was a naval flight officer, an engineer, and a medal-winning combat veteran. Tr. 804, ll. 20 – 25. Arroyo received a Bronze Star for his service in Afghanistan. Tr. 708, ll. 22 – 24. His wife testified about a letter she wrote when Arroyo was considered for bond that Arroyo was a "well respected retired Naval officer." Tr. 709, ll. 12 - 18. She wrote about Arroyo's character and willingness to help family members. Tr. 710, ll. 1 – 7. Arroyo testified that his mother, father, and two daughters were in court with him. Tr. 812, ll. 18 – 25.

"A defendant is entitled to a jury instruction regarding evidence of good character

and reputation when this type of evidence is presented and the defendant requests the charge." State v. Harrison, 343 S.C. 165, 175, 539 S.E.2d 71, 76 (Ct. App. 2000). In Harrison, this Court reversed because of the trial court's failure to give a good character instruction. Id. This Court found that failure to give the charge was not harmless. Id. The evidence of the defendant's character in Harrison was that he worked at a charity counseling adolescents and presented a character witness. Id. at 168-69, 539 S.E.2d at 72-73.

Similarly, in this case, there was testimony concerning Arroyo's military service, that he was respected, and his family supported him. The State argued that Arroyo's character should not matter. Tr. 903, ll. 17 – 24. The solicitor argued, "He might be a Navy veteran and a bronze medal winner, but it doesn't give him a free pass. It does not become a free pass to molest Minor." Tr. 903, ll. 17 – 24. During her opening statement, the solicitor called Arroyo a "wolf in sheep's clothing." Tr. 157, ll. 16 – 17. She stated that, "To the outside world, he was the model citizen. A navy veteran, an engineer, a husband, a father, a decent neighbor. No one thought bad of him. He was a good guy." Tr. 157, ll. 16 – 21. The charge on good character was necessary to counter the solicitor's use of Arroyo's reputation against him. Failing to give this charge constitutes reversible error.

5.

The trial judge erred in tolling appellant's probation until appellant completes a sexual abuse program.

The trial judge ordered Arroyo's probation on the lewd act charge tolled while he completed a sexual abuse program. R. ___ (Sentencing Sheet). This ruling anticipates that

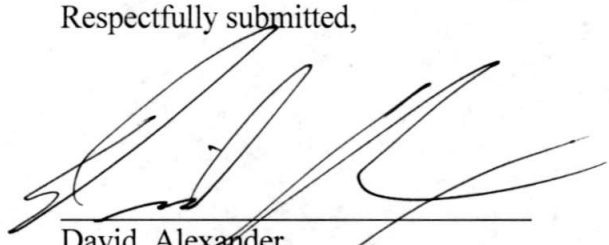
Arroyo will be civilly committed under the sexually violent predator program. See S.C. Code Ann. § 44-48-20, et seq. In State v. Miller, 404 S.C. 29, 38, 744 S.E.2d 532, 537-38 (2013), the Supreme Court decided that probation could not be tolled for persons committed in the sexually violent predator program. Therefore, the trial court erred in imposing this sentencing condition.

The State may argue this issue is not preserved for appeal, but, after Miller, cannot seriously contend this term of Arroyo's sentence is not invalid. The Supreme Court decided Miller approximately three months after Arroyo was sentenced. In Miller, the issue did not arise until a probation officer issued a citation and asked the circuit court to toll the probation. Id. at 32-33, 744 S.E.2d at 534. Here, judicial economy is best served by striking this term from Arroyo's sentence now. See State v. Bonner, 400 S.C. 561, 565-67, 735 S.E.2d 525, 527-28 (Ct. App. 2012) (addressing the admittedly unpreserved issue of an illegal LWOP sentence for a juvenile in the interest of judicial economy). It would make little sense to require Arroyo to litigate this issue either in a probation hearing in circuit court or in a post-conviction relief action. Id. In the event this case is not remanded for a new trial, the Court should modify Arroyo's sentence by striking the tolling provision and allowing him to serve his probation during any civil commitment in the SVP program.

CONCLUSION

For the foregoing reasons, Arroyo's convictions should be reversed and this case remanded for a new trial. In the alternative, the invalid sentencing provision should be struck.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of April, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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APR 18 2014

SC Court of Appeals

Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERICK ARROYO,

APPELLANT

APPELLATE CASE NO. 2013-000694

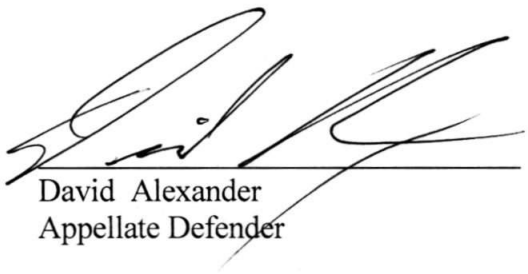
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment(s);
(2) Sentencing sheets;
(3) Trial Transcript pages 1-55; 157-940;
(4) Transcript of hearing March 4, 2013;
(5) Motion for New Trial;
(6) Memorandum in Support of Motion for New Trial;
(7) Order Denying Motion for New Trial;
(8) Court's Exhibit 12
(9) Motion in Limine to Exclude the Testimony of Maria Steenkamp
(10) Amended Motion in Limine to Exclude the Testimony of Donald (Don) Elsey
(11) State's Exhibit 9
(12) Court's Exhibit 13

I certify that this designation contains no matter which is irrelevant to this appeal.

April 16th, 2014



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THE STATE,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, by mailing it to her at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, by depositing it in the U. S. Mail, in an envelope with sufficient postage affixed, this 16th day of April, 2014.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of April, 2014.

Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021 .