

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JOHN EDWARD HAYNES,

APPELLANT

APPELLATE CASE NO. 2013-000468

Appeal from Calhoun County

Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 2015-UP-228

PETITION FOR REHEARING

Appellant asks this Court to re-examine its opinion in this case and grant rehearing. Respectfully, the Court's opinion errs and does not address crucial portions of appellant's arguments.

First, the Court did not address appellant's argument that Dr. Salas should have been allowed to testify as an informational expert. The Court cited State v. Burton, 302 S.C. 494, 499, 397 S.E.2d 90, 92 (1990) for the proposition that experts may testify based on hypothetical questions, but that the questions must be based on facts in the record. In Burton, the pathologist was prevented from giving an opinion on the cause of death based on facts not in the record. Id. Contrast this with the cases cited by appellant, which allow an expert to simply provide information

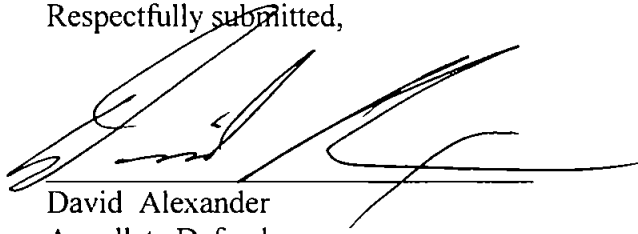
to assist the trier of fact. Jenkins v. Few, 391 S.C. 209, 220, 705 S.E.2d 457, 463 (Ct. App. 2010). Kilby v. Commonwealth, 663 S.E.2d 540, 547 (Va. Ct. App. 2008) (holding testimony regarding the general subject of delayed disclosure was admissible expert testimony). Indeed, this Court has previously ruled in child sex cases that experts who testify generally about subjects like delayed disclosure without examining the complainant or offering any opinions about the complainant are allowed. State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015). Without Dr. Salas' testimony, the jury had no information about automatism and the solicitor was free to argue that appellant's defense was "ludicrous." R. 199, ll. 1 – 4. Precisely because automatism is outside most people's common sense and general life experience is why the defense needed Dr. Salas to testify and explain that males can perform sexually while they are unconscious.

Furthermore, expert testimony about automatism was warranted because it was the complainant who claimed she had sex with appellant while he was unaware of what was happening. Two witnesses testified that complainant told them she had sex with appellant while he was unaware of what was happening. R. 113, l. 20 – 114, l. 5. R. 126, l. 5 – 127, l. 20. Respectfully, the Court's conclusion that Dr. Salas' testimony was not based on facts in the record is erroneous.

Finally, the Court misapprehended appellant's argument concerning intent. While the Court is correct that diminished capacity is not a defense, appellant's defense was no capacity. Intent is an element of the crime. If appellant was unconscious, then he could not have the requisite intent. Finding otherwise would make this a strict liability offense and negate the State's burden to prove intent beyond a reasonable doubt.

Excluding Dr. Salas' testimony regarding automatism deprived appellant of the opportunity to present a complete defense. The issue of intent was for the jury, and without expert testimony about automatism, the jury could not render a reliable verdict. The Court should re-examine these errors in its opinion, grant rehearing, and reverse.

Respectfully submitted,



David Alexander
Appellate Defender

This 20th day of May, 2015.

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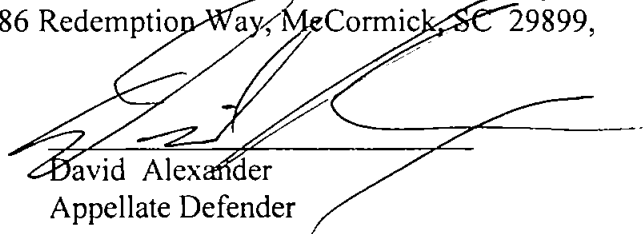
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CERTIFICATE OF SERVICE

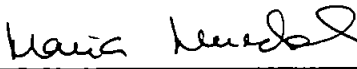
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. John Edward Haynes, #354464, McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 20th day of May, 2015.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 20th day
of May, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.