THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

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

Opinion No. 2015-UP-262 (S.C. Ct. App. filed May 20, 2015)

Appellate Case No. 2013-000694

The State, ... Petitioner,

v.

Erick Arroyo, ... Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals improperly conclude "the circuit court erred in admitting unredacted portions of a forensic interviewer's report" and err in reversing Respondent's conviction where it failed to address critical error preservation issues and conducted no substantive analysis whatsoever in support of why it concluded those portions of the report constituted a comment on the victim's believability?

STATEMENT OF THE CASE

Erick A. Arroyo (Respondent) was indicted at the January 2010 term of the grand jury for Charleston County for one count of second-degree criminal sexual conduct (CSC) with a minor (2010-GS-10-522) and one count of lewd act upon a child (2010-GS-10-529). He was subsequently indicted at the July 2011 term of the grand jury for a second count of second-degree CSC with a minor (2011-GS-10-4790). (App.p.949-p.954). He was represented by Andrew J. Savage, Esquire, of the Charleston County Bar. The State was represented by Assistant Solicitor Elizabeth Gordon of the Ninth Circuit Solicitor's Office. On July 9-13, 2012, Respondent proceeded to trial by jury before the Honorable J.C. "Buddy" Nicholson, Jr., pursuant to which he was found guilty as indicted. Following the verdict, the trial judge deferred sentencing until Respondent could be given an evaluation by a forensic psychiatrist. (App.p.842, line 24-p.847, line 16; p.955-p.957). On February 26, 2013, Respondent filed a motion for a new trial. (App.p.884-p.899). On March 4, 2013, the trial court reconvened for a sentencing hearing but again deferred imposing sentence until further review of the psychiatrist's report. (App.p.850-p.883). On March 12, 2013, the trial court sentenced Respondent to fifteen (15) years' concurrent imprisonment on the two counts of second-degree CSC with a minor, and fifteen (15) years' consecutive imprisonment suspended upon the service of five (5) years' probation on the lewd act charge. The court ordered to "toll probation until the defendant can complete a sexual abuse program." (App.p.955-p.957). On March 22, 2013, the trial court issued an order denying Respondent's motion for a new trial. (App.p.900). Respondent timely filed a notice of intent to appeal his convictions and sentence and the parties submitted briefs addressing five issues raised by

Respondent on appeal. (App.p.959-p.1060). On May 20, 2015, the Court of Appeals issued an unpublished opinion that reversed Respondent's convictions based on one of those five grounds. State v. Arroyo, Op. No. 2015-UP-262 (S.C. Ct. App. filed May 20, 2015). (App.p.1061-p.1062). The State submitted a petition for rehearing on June 1, 2015, and by order filed June 22, 2015, the petition was denied. (App.p.1063-p.1084). This Petition for a Writ of Certiorari to the Court of Appeals, submitted on behalf of the State, now follows.

STATEMENT OF FACTS

The full statement of facts recited in the Final Brief of [the State] is hereby incorporated by reference; however, an abbreviated version which is more narrowly tailored to the sole issue in the State's Petition appears below. During pretrial arguments, Respondent advised the court he would be objecting during trial to any analysis by any forensic interviewer that would bolster the credibility of the victim. He argued: "Any opinion of a so-called expert as to truthfulness, believability, symptoms of post-traumatic stress syndrome, symptoms of child abuse, it's all impermissible under the current case law in South Carolina." (App.p.55, line 24-p.57, line 25).

At trial, the victim gave detailed testimony about the sexual abuse committed by Respondent when she was twelve and thirteen years old. She explained how he started by rubbing her back and slowly progressed to rubbing her front through her clothes, including the front of her pants near her zipper. Respondent later started touching the victim inside her underwear and putting his hands inside her "privacies." Eventually, Respondent progressed to putting his penis in the victim's vagina and using his tongue

and mouth to perform oral sex on her on multiple occasions. Respondent told the victim he was doing these things so she would not experiment with other boys and he said that he loved her. (App.p.72, line 23-p.86, line 23).

In regard to the emotional impact and how it affected her disclosure, the victim testified the sexual abuse made her feel like she was "a nothing" and that she avoided telling anybody because she thought people were going to judge her and not believe her. (App.p.84, lines 1-13). She testified that during the sexual abuse she felt like something was "wrong" with her and that she "just froze." (App.p.84, lines 24-25; p.86, lines 14-18). The victim testified that even after her Aunt Joyce "caught" Respondent trying to do things to her in the garage, she did not tell what happened because she was afraid her aunt would not believe her and would not say anything to help. (App.p.86, line 24-p.89, line 6). The victim admitted that sometimes the sexual contact felt good but testified she thought she was "disgusting for feeling that way" and that she was "sinning." She said it caused her to stop praying and going to church. She became mean and bitter, but she did not show it to people. The victim acted nice and smiled all the time, but her mother still noticed something was wrong. (App.p.91, line 14-p.92, line 9). The victim testified she knew Respondent's penis was inside her vagina during the abuse because she could feel it moving as he started slowly and then would start going faster. She said it hurt physically the first time his penis was inside her, and that it hurt emotionally every time she was raped. (App.p.93, lines 6-20).

Next, the State called Melina Arroyo (Melina) to the stand. She explained the victim is her daughter and Respondent is her older brother. Melina described her relationship with Respondent, her relationship with Respondent's estranged wife Joyce

Arroyo (Joyce), and the events that led her to report the sexual abuse of the victim to the Mount Pleasant Police Department. (App.p.153, line 3-p.158, line 25). In particular she described an incident when Respondent called her at work to tell her Joyce had "left him" and was accusing him of molesting the victim. Melina testified that when she called the victim to ask if Respondent had touched her, the victim was "very jumpy" but denied anything inappropriate happened. (App.p.159, line 1-p.161, line 8). Next, she described an incident on September 20, 2009, where she had fallen asleep in Respondent's living room while watching football on TV. She awoke to discover Respondent leaning over the victim with his face on her chest and breasts. She gathered up the victim and her younger siblings and drove directly to the Mount Pleasant Police Department. (App.p.162, line 8-p.168, line 7). Melina testified the victim was "in shock" during the car ride, but insisted "nothing happened." She begged the victim to tell her the truth and although the victim was "scared," "crying," and "frozen," she eventually acknowledged Respondent had been touching her breasts. After arriving at the police department, Melina told the victim to tell her more or she would ask the police to put her through a lie detector test. Melina reminded the victim she was her mother, and if the victim thought her own mother could not help and protect her she would not get through this. The victim then started telling Melina "a bunch of stuff," which Melina relayed to the police. (App.p.168, line 8-p.171, line 1). Melina testified her relationship with the victim suffered as a result of the sexual abuse and that it had been a hard road because the victim was no longer a sweet, innocent child. (R.p.173, lines 20-24). She testified that when she woke up and saw Respondent molesting the victim, the victim was "panicked," had "big eyes," and looked "very frightened." (R.p.174, lines 15-21).

The State later called Joyce to the stand. She explained she was married to Respondent and they have three biological daughters together. Joyce testified the victim is the daughter of Respondent's stepsister, Melina Arroyo. She explained how Melina and her children moved in with Respondent and the unusually close relationship Respondent developed with the victim. Joyce described an occasion when she was looking for a television remote control when she discovered a bottle of massage oil in the couch. She asked Respondent why it was there and he turned pale and said not to tell the victim. Joyce also described a particular incident when she got up late at night and found Respondent and the victim standing face-to-face together in the dark garage. They quickly moved apart and she saw the victim zipping up her pants. When Joyce asked Respondent why the victim's pants were unzipped, he said he did not know. She also asked what they were doing together in the garage so late at night and he said nothing was going on and that he was tutoring the victim. Joyce testified: "I told him that this wasn't the first time that I had caught him in the middle of the night with a child and that it doesn't look good and that I'm not going to put up with it and that I wanted him to leave." She said he started crying and said he should not have put himself in that position, but maintained she has a dirty mind and that nothing was going on. Respondent did not object to this testimony. (App.p.563, line 13-p.571, line 7). Joyce then answered questions about her plans to leave Respondent. She said Respondent insisted they work on the marriage and told her not to tell anybody about the incident. He told her if she did no one would believe her because of "who he was." Joyce said the thought of working on their marriage "was very hard for me because of his past record with me." (App.p.571, line 21-p.573, line 4).

The State subsequently announced it planned to call Dr. Don Elsey to the stand. The jury was sent out and the trial court heard arguments regarding Respondent's motion to restrict Dr. Elsey's testimony. Respondent said he had no issue with Dr. Elsey's expertise and that his challenge was solely to the nature of the testimony being offered. The solicitor explained Dr. Elsey is a licensed professional counselor and conducted a forensic interview of the victim after the sexual abuse was reported to the police. She said the State intended to elicit testimony about the time and place of the sexual assaults as disclosed by the victim, and expert testimony about delayed disclosure, grooming, and why children do not tell about the abuse. The solicitor said Dr. Elsey would not give any opinion on whether he believed the victim was telling the truth. Respondent continued to object on two grounds. First, he argued the testimony would be cumulative to testimony already elicited from Dr. Steenkamp and Dr. Amaya about PTSD and the effects of child abuse and delayed disclosure. Second, he argued the testimony sought would be improper vouching and equivalent to Dr. Elsey saying he believed the victim. The trial court deferred ruling on whether the testimony was cumulative until the witness took the stand but held Dr. Elsey would not be allowed to testify he reached a conclusion that the victim was telling the truth. The judge agreed with Respondent that any such conclusion, as well as any testimony that the disclosure was compelling, detailed, or consistent with sexual abuse was improper and would not be allowed. (App.p.620, line 5-p.629, line 23).

The State then called Dr. Elsey to the stand. He was admitted as an expert in child abuse and forensic interviewing, without objection. Dr. Elsey interviewed the victim on September 22, 2009, two days after the police were contacted by the victim's

mother. During that interview she told him she had been sexually abused more than one time over the past year, and the abuse happened in her uncle's house. Over Respondent's continuing objections, Dr. Elsey gave detailed testimony about delayed disclosure, tentative disclosure, accidental disclosure, and grooming. He also noted that a primary attribute of PTSD is avoidance, which can contribute to a child not wanting to talk about abuse. (App.p.632, line 8-p.638, line 21).

On cross-examination, **Respondent asked Dr. Elsey if he ever wrote a report** concerning the observations he made and the information he gathered from the victim and her mother. Dr. Elsey produced a copy of his written report and showed it to Respondent's counsel. (App.p.643, lines 4-23) (emphasis added). Respondent then questioned Dr. Elsey extensively about the interviews and the written report, asking whether the process he used during the interviews was "to identify whether or not this child had experienced abuse." Respondent asked Dr. Elsey whether "the role of the Lowcountry Children's Center was to assist the police in identifying criminal conduct." He also asked: "But part of that is also to have your resources used to engage in scientific hardcore evidence **to verify the credibility and believability of the child**?" Dr. Elsey answered: "Well, the credibility and believability is usually left up to the court to decide. We certainly do ask questions. Can the child really know what tell the truth means? Can they give us accurate information about things we do know? Where they go to school, who lives in their house, those type of things." (App.p.643, line 24-p.645, line 12) (emphasis added). Respondent then **specifically asked Dr. Elsey to refer to the written report** before answering whether the victim

and her mother denied the victim had been exposed to pornography from someone other than Respondent. (App.p.647, line 9-p.648, line 22).

On re-direct examination, the solicitor had the written report marked for identification as State's Exhibit Number 9. Dr. Elsey identified the report as one he prepared regarding his interview with the victim and testified it was a fair and accurate representation of the interview. The State moved to place the report into evidence and, after Respondent asked for confirmation it was the same report Dr. Elsey testified about on cross-examination, **Respondent stated: "I don't have any objection." The entire written report was then admitted into evidence**. (App.p.654, line 6-p.655, line 10) (emphasis added).

During a subsequent discussion regarding whether the videotape of the interview should be admissible, Respondent acknowledged he had questioned Dr. Elsey about the report, but he never mentioned the video. The solicitor argued the video should be admitted as the "complete statement" because the report was merely a summary of the interview. She, however, noted the report contained information about a "prior bad act" the court had previously ruled inadmissible. Respondent asked that the prior bad act information be redacted and the trial judge agreed to the request. (App.p.660, line 23-p.668, line 18).

After the State rested, Respondent moved to strike the entire testimony of Dr. Elsey on grounds that it violated Rule 403, SCRE, and that it improperly inferred the victim was telling the truth. He made no mention of the written report that had been admitted into evidence. The motion was denied. (App.p.673, line 18-p.675, line 3). Before breaking for the day, the trial judge reminded the solicitor to take State's

Exhibit Number 9 and redact the information referencing the prior bad act. (App.p.683, lines 2-25). **The following morning, counsel for Respondent went on record to note he had failed to object to Dr. Elsey's report when it was offered by the State**. He said he could not give an explanation for this because he had consistently objected to that type of evidence throughout the trial. Counsel argued his "non-objection" was clearly erroneous and would be reversed if challenged in a post-conviction hearing. Despite the earlier failure to object, the trial judge allowed Respondent to make any objections he had to the report because the jury had not yet seen it. The judge also suggested redacting any objectionable material rather than excluding the entire report, and asked the parties to see if they could reach an agreement before the end of the trial. (App.p.687, line 14-p.690, line 20).

After Respondent presented a defense and the State presented evidence in reply, Respondent moved to exclude Dr. Elsey's written report in its entirety. He argued it was not possible to redact the report sufficiently to exclude the things that would be in violation of Jennings,[1] and argued it was inevitable the case would be reversed on appeal or post-conviction relief if he was not allowed to remedy his earlier failure to object. The court repeated the decision to allow Respondent to ask that the report be excluded despite the fact it had already been admitted without objection. The State argued the complete report (minus the redaction of any reference to the prior bad act) was admissible under Rule 106, SCRE, and as a prior consistent statement under Rule 801, SCRE. Respondent responded that even if Rule 106 applied, it would not trump Jennings and this Court's decision that hearsay statements from the victim are

[1] State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011).

inadmissible.[2] The trial judge denied Respondent's request to remove the entire report from evidence and instead elected to redact the particular questions from the interview that concerned the interviewer's opinion regarding the truthfulness of the victim. The court then asked Respondent if he believed any additional portions should be redacted. Respondent requested a host of additional redactions, most of which were granted by the trial court. The solicitor argued Respondent had opened the door to introduction of the report, including the portions touching on credibility, because he asked questions about it during his cross-examination of Dr. Elsey. The court acknowledged the solicitor's argument but nevertheless decided to redact the portions of the report the judge determined might constitute vouching. The trial judge also agreed to redact additional portions of the report at Respondent's request, but eventually denied any further redactions and held the heavily redacted version would be substituted as State's Exhibit Number 9 when the report went to the jury. (App.p.752, line 25-p.767, line 25). Respondent said he was still concerned about the redactions not going far enough. (App.p.770, lines 8-24).

After presentation of all evidence, closing arguments, and the jury charge, the trial court asked the parties to review the exhibits that would be sent to the jury, including State's Exhibit Number 9, the redacted copy of Dr. Elsey's written report. The original exhibit was replaced with a redacted copy, marked, and admitted into evidence. Respondent continued to object to the extent of redaction the Court had proposed. The trial judge noted he had redacted everything Respondent requested,

[2] This was the first time Respondent made an argument that any portion of Dr. Elsey's report was inadmissible on grounds that it included hearsay. His pretrial argument and the argument articulated throughout the trial was that portions of the report would constitute improper vouching for the victim's credibility.

except the things he previously refused to redact as described in the record. (App.p.834, line 5-p.836, line 3).

At the conclusion of trial, the jury convicted Respondent as indicted. On February 26, 2013, Respondent filed a motion for a new trial. He argued the admission into evidence of Dr. Elsey's report constituted error because it contained inadmissible hearsay bolstering the trial testimony of the victim and improperly gave the forensic interviewer's expert opinion on the veracity of the child. (App.p.884-p.899). On March 22, 2013, the trial court issued an order denying Respondent's motion for a new trial. (App.p.900).

CERTIORARI

The State submits there are special and important reasons for this Court to exercise its discretion to grant certiorari and to review the decision of the Court of Appeals in this matter pursuant to Rule 242(b), SCACR. Specifically, the State submits that in addition to lacking any substantive analysis, the decision of the Court of Appeals in this matter is in conflict with prior decisions of this Court in regard to the admission of testimony or other evidence which effectively vouches for the credibility of a child victim in a sexual abuse matter. Although the Court of Appeals appropriately references several appellate court opinions relevant to this issue, it then misapplies those opinions under the specific facts and circumstances of this case. For this reason, the State respectfully asks this Court to grant this petition for a writ of certiorari and issue an opinion which reverses the Court of Appeals' decision and reinstates Respondent's conviction.

ARGUMENT

The Court of Appeals improperly concluded "the circuit court erred in admitting unredacted portions of a forensic interviewer's report" and erred in reversing Respondent's conviction where it failed to address critical error preservation issues and conducted no substantive analysis whatsoever in support of why it concluded those portions of the report constituted a comment on the victim's believability.

In its unpublished opinion, the Court of Appeals reversed and remanded Respondent's convictions for a new trial pursuant to Rule 220(b), SCACR, and a brief list of authorities. The Court of Appeals found the circuit court erred in admitting unredacted portions of a forensic interview's written report "because those portions improperly commented on the victim's believability," yet it failed to identify what those portions of the report actually stated, and then failed to explain how that language constitutes a comment on the victim's believability. The State respectfully submits this is likely because such an explanation would be nearly impossible and would have made it more difficult for the Court of Appeals to achieve its desired result.

The Court of Appeals included parenthetical conclusions from the three authorities cited; however, it failed to include any analysis or explanation of how those parenthetical conclusions apply to the very different procedural posture and facts presented by Respondent's case. The State submits that without providing the relevant context that would have been supplied by a reasoned analysis of the procedural posture and facts, the parenthetical conclusions are misleading in regard to the Court's ultimate decision. Indeed, when those parenthetical conclusions are actually considered in the context of Respondent's case, their tenuous connection to the Court of Appeals' decision becomes apparent.

First, the Court of Appeals cited State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), for its conclusions that (1) 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 and (2) it is improper for a forensic interviewer at trial to offer any statement that indirectly vouches for the child victim's believability or indicates the interviewer believes the child victim's allegations in the matter. Yet here, on direct examination, Dr. Elsey did not testify as to his opinion about the credibility of the victim, did not offer any statement that indirectly vouched for the victim's believability, did not indicate he believed the victim's allegations, and never mentioned his written report. Indeed, the written report was first referenced on cross-examination in questions raised by Respondent's counsel. (App.p.643, lines 4-23). Using the report, counsel then actively attempted to bait Dr. Elsey into offering an opinion on the victim's credibility. Instead of taking the bait, Dr. Elsey answered: "Well, the credibility and believability is usually left up to the court to decide." (App.p.643, line 24-p.645, line 12). Thus, though the conclusions from Kromah are accurate, they do not apply to the circumstances of Respondent's trial.

Next, the Court of Appeals cited State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), for its conclusion that "the circuit court abused its discretion in allowing the State to introduce a forensic interviewer's reports because the reports improperly vouched for the child victims' veracity, **as the only way to interpret the language used in the reports was the forensic interviewer believed the child victims were being truthful.**" (emphasis added). Similarly, the Court of Appeals cited State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012), for its conclusion that "the **only interpretation** of the language of the testimony was the forensic interviewer believed the child victim was

being truthful." (emphasis added). Yet in Jennings, the two problematic comments from the interviewer were (1) "that during the interviews, each child had 'provided a compelling disclosure of abuse by [Respondent]'" and (2) her conclusion "that each of the children provided details consistent with the background information received from their mother, the police report, and the other children." In McKerley, the problematic comments were more numerous than in Jennings and ranged from the forensic interviewer's "opinion as to whether [she thinks] something happened," to testimony that she "found [both interviews with the victim] to be compelling for sexual abuse," to her comments that she was "looking for accuracy of information" given by the victim and that she was "looking at . . . are there other possible reasons, are there other possible explanations."

As explained in greater detail below, the three allegedly objectionable portions of the "language" in Dr. Elsey's report are simply not equivalent to the improper comments from Jennings and McKerley. Instead, not only do they NOT lend themselves to a singular interpretation that Dr. Elsey believed the victim, they actually say nothing about Dr. Elsey's opinion of the victim's credibility. Furthermore, when considered in the context of Dr. Elsey's trial testimony that "credibility and believability is usually left up to the court to decide," any support for finding that "the only way to interpret the language used in the reports was [Dr. Elsey] believed the victim [was] being truthful," is significantly diminished. Where, as here, a jury's determination of guilt was overturned by an appellate court, the State submits the parties and the victim deserve a thorough analysis of these distinctions, even if this Court ultimately reaches the same conclusion as the Court of Appeals.

The Court of Appeals also cited Jennings in regard to rejecting the possibility that any error regarding admission of the report was harmless. In Jennings this Court noted that: "The only evidence presented by the State was the children's accounts of what occurred and other hearsay evidence of the children's accounts." In Respondent's case, the evidence went beyond just the victim's testimony, which itself was very strong. Instead, there were two eyewitnesses who "caught" Respondent in compromising positions with the victim during the time frame of the alleged sexual abuse. One witness testified she saw Respondent's face on the victim's breasts and the other witness testified she saw the victim zipping up her pants after she was discovered standing face-to-face with Respondent in a dark garage. Thus, the extent of the evidence alone deserves further analysis for harmless error.

In this appeal, Respondent argued the trial court erred in admitting the written report of forensic interviewer Dr. Don Elsey even though the report was partially redacted, because the unredacted portions constituted an improper bolstering of the victim's credibility. The State disagreed and argued Respondent's claim was entirely without merit for several reasons, both procedural and substantive. First, Respondent opened the door to introduction of the entire report by asking extensive questions about Dr. Elsey's forensic interview during cross-examination. Second, Respondent effectively waived any right to complain where the entire unredacted report was first admitted into evidence without objection and was subsequently redacted by the trial court in an effort to remove any comments on the victim's veracity. Third, the remaining unredacted comments do not constitute direct opinions on the victim's veracity and are sufficiently vague so as not to constitute indirect vouching for the victim's believability. Fourth, any

error in the admission of the remaining unredacted comments was harmless beyond a reasonable doubt.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Jennings, 394 S.C. 473, 477, 716 S.E.2d 91, 93 (2011). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. Id. at 477-78, 716 S.E.2d at 93. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." State v. Singleton, 395 S.C. 6, 13-14, 716 S.E.2d 332, 335-36 (Ct. App. 2011) (quoting Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

The trial court properly admitted Dr. Elsey's written report because Respondent opened the door to that report by asking extensive questions about the forensic interview and the report itself during cross-examination. State v. White, 361 S.C. 407, 415-16, 605 S.E.2d 540, 544 (2004) (ruling expert in post-traumatic stress disorder and assessment and treatment of sexual abuse could testify that she believed the victim in this case because defendant opened the door by cross-examining expert about other cases in which she did not believe victim); State v. Taylor, 333 S.C. 159, 175, 508 S.E.2d 870, 878

(1998) ("[B]ecause appellant opened the door about his relationship with his wife, the solicitor was entitled to cross-examine him regarding the relationship, even if the responses brought out appellant's prior criminal domestic violence conviction."); State v. Page, 378 S.C. 476, 482-83, 663 S.E.2d 357, 360 (Ct. App. 2008) ("It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence."). The trial court likewise committed no error in admitting a heavily redacted copy of the written report where the entire unredacted report was first admitted into evidence without objection from Respondent. It was subsequently redacted by the trial court solely as an effort to help remedy Respondent's initial failure to object by attempting to remove all potentially prejudicial parts which would arguably vouch for the victim's veracity. Even if the trial court's efforts fell short in some regard, Respondent should have been precluded from claiming error on appeal where the circumstances leading to that alleged error were a product of Respondent's own actions. He should not benefit from his own wrongdoing. See, e.g., Delahoussaye v. State, 369 S.C. 522, 633 S.E.2d 158 (2006) (holding that when a prisoner escapes from prison, he should not be given credit against his South Carolina sentence for time served in another jurisdiction on a subsequent crime); State v. Hackett, 363 S.C. 177, 609 S.E.2d 553 (Ct. App. 2005) (holding that where a probationer absconds from supervision, the probationary period is tolled until he is once more placed under probationary supervision).

The trial court also properly exercised its discretion in admitting the heavily redacted copy of Dr. Elsey's written report where the remaining unredacted comments do not constitute direct opinions on the victim's veracity and are sufficiently vague so as not

to constitute indirect vouching for the victim's believability. Respondent complained that a box on the report is marked "Yes" in response to the question: "Did the child present as an accurate reporter regarding verifiable information?" This question does not suggest the sexual abuse itself was "verifiable information." Indeed, it gives no indication of what "verifiable information" was used to find the victim presented as "an accurate reporter." As a consequence, it says nothing to the jury about Dr. Elsey's opinion of the victim's credibility in regard to the sexual abuse allegations themselves. At most the question and answer merely imply the child was telling the truth about something, but they imply nothing about whether Dr. Elsey believed the victim was telling the truth about the abuse.

Next, Respondent complained that a second box on the report is marked "Yes" in response to the question: "Was the child able to respond to trauma specific questions?" Again, this question and answer do not in any way, shape, or form, constitute an opinion from Dr. Elsey that he believes the child is telling the truth about the abuse. Knowing the victim was able to respond to trauma specific questions does not tell the jury what questions were asked or what responses were given, and it certainly does not tell the jury whether Dr. Elsey believed the allegations of abuse.

Finally, Respondent complained that a third box on the report is marked "Yes" in response to the question: "Did the child present as being impacted by external factors?" He particularly complained because the sub-boxes for "Family response" and "Injunctions not to tell" are checked while the sub-box for "Coaching" is not checked. As with the other boxes, the question and answer do not constitute a direct or indirect opinion as to a child's veracity or tendency to tell the truth. Also, because no testimony

was offered at trial about coaching, it was pure speculation on Respondent's part to attach any significance to the absence of a check mark in the "Coaching" sub-box. Even if the three portions of the report identified by Respondent do somehow suggest Dr. Elsey believed the victim was telling the truth about the sexual abuse, any such suggestion was disabused by Dr. Elsey himself when he testified that credibility and believability are matters left up to the court to decide, not the forensic interviewer. (App.p.643, line 24-p.645, line 12). Thus, the trial court committed no error in refusing to redact any remaining portions of the written report.

Finally, any error in the admission of the remaining unredacted portions of Dr. Elsey's written report was harmless beyond a reasonable doubt given the overwhelming evidence of Respondent's guilt. See State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). As noted above, and unlike the situation in Jennings, the evidence against Respondent consisted of more than simply the victim's account of what occurred.

CONCLUSION

For all of the foregoing reasons, the State submits the Court of Appeals misapprehended, overlooked, or failed to address several crucial points raised by the parties which bear directly upon its ultimate conclusion that "the circuit court erred in admitting unredacted portions of a forensic interviewer's report." The State respectfully requests that this Court grant the petition for a writ of certiorari and issue an order reversing the decision of the Court of Appeals and affirming Respondent's conviction

and sentence. Alternatively, the State would ask this Court to remand to the Court of Appeals with directions to specifically address the error preservation issues and the unique facts of Respondent's case in reconsidering this issue. If the Court grants the petition for a writ of certiorari, the State would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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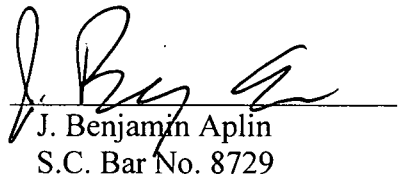
BY: 
J. Benjamin Aplin
S.C. Bar No. 8729

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ATTORNEYS FOR PETITIONER

Columbia, South Carolina
July 22, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

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

Opinion No. 2015-UP-262 (S.C. Ct. App. filed May 20, 2015)

Appellate Case No. 2013-000694

The State, ... Petitioner,

v.

Erick Arroyo, ... Respondent.

PROOF OF SERVICE

I, Angela Bennett, Executive Legal Assistant, hereby certify that I have served the within *Petition for a Writ of Certiorari*, and the *Appendix*, both dated July 22, 2015, on Respondent by depositing two copies of the Petition and one copy of the Appendix in the United States mail, postage prepaid, addressed to his attorney of record:

David Alexander, Appellate Defender
South Carolina Commission on Indigent Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 22nd day of July, 2015.

Angela Bennett
Legal Assistant

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