STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Supreme Court

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES SIMMONS JR.,

PETITIONER

APPELLATE CASE NO 2016-001934

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether testimony by a pediatrician concerning statements made by the alleged child victim beyond the time and place of the alleged sexual assaults, which were not made for the purpose of medical diagnosis or treatment and violated Petitioner's right to a fair trial, was harmless beyond a reasonable doubt?

STATEMENT

On May 30, 2013, a Beaufort County grand jury indicted Petitioner for two counts of criminal sexual conduct with a minor in the first degree (2012-GS-07-1536 & 2012-GS-07-1537). R. 379. The case was called to trial before the Honorable Carmen T. Mullen and a jury on June 18, 2013. R. 7. Mary Jordan Lempesis and Hunter Swanson Deysach represented the state, and Trasi Campbell represented Petitioner. R. 8. After deliberating for several hours, the jurors informed the judge they had reached an "impasse." R. 347, ll. 4-8; R. 370. Thereafter, the judge instructed the jurors pursuant to Allen v. United States, 164 U.S. 492 (1896). R. 348, l. 7 – R. 351, l. 22. Two hours later, the jury found Petitioner guilty as charged. R. 352, l. 12 – R. 354, l. 3. Judge Mullen sentenced Petitioner to life imprisonment on both counts and ordered the sentences to be served concurrently. R. 355, l. 20 – R. 356, l. 5; R. 381; R. 384.

Petitioner filed a motion for new trial. R. 371. Judge Mullen presided over a hearing on the motion on October 31, 2013. R. 357. At the conclusion of the hearing, Judge Mullen orally denied the motion. R. 369, ll. 15-16. Petitioner filed a timely notice of appeal, which was perfected by undersigned counsel. The Court of Appeals heard argument on March 9, 2016. On April 20, 2016, the Court affirmed Petitioner's convictions and sentences in an unpublished opinion. State v. Simmons, 2016-UP-182 (S.C. Ct. App. filed April 20, 2016); App. 1-3. Petitioner filed a timely petition for rehearing. App. 4-13. The Court of Appeals denied the petition on August 18, 2016. App. 14.

On September 29, 2016, Petitioner filed a petition for writ of certiorari, asking this Court to review the Court of Appeals' opinion. Specifically, Petitioner raised two issues. The first concerned the Court of Appeals' analysis regarding erroneously admitted hearsay evidence. The

second addressed the competency of a child witness to testify. This Court granted the petition as to the first question on May 30, 2017, and ordered briefing. This brief of petitioner follows.

ARGUMENT

Testimony by a pediatrician concerning statements made by the alleged child victim beyond the time and place of the alleged sexual assaults, which were not made for the purpose of medical diagnosis or treatment and violated Petitioner's right to a fair trial, was not harmless beyond a reasonable doubt.

Relevant facts

Dr. James Simmons was the pediatrician for Minor 1 and Minor 2. R. 22, l. 11 – R. 23, l. 2. He recalled seeing Minor 1 and Minor 2 in September of 2011. *After* speaking with the adoptive parents, Dr. Simmons met with Minor 1 alone to discuss the disclosure of sexual abuse. R. 27, l. 20 – R. 28, l. 23. The prosecution elicited testimony from Dr. Simmons regarding his conversation with Minor 1 regarding the alleged abuse. Specifically, the doctor testified regarding statements made by Minor 1 concerning the allegation of sexual abuse. The following exchange took place:

Q	And Doctor, can you tell me what - - in talking to [Minor 1] what he told you happened.
Ms. Campbell:	Your Honor, I object. It's hearsay. It's objectionable under *803*. And certainly, he could limit it to the child's disclosure of date and time, and that's it.
Ms. Lempesis:	Judge, we'd say that this is under the hearsay exception, 803. Excuse me, let me pull it up. *803*.
The Court:	For medical diagnosis?
Ms. Lempesis:	For medical - - purpose of medical diagnosis, exactly.
The Court:	You can go ahead.
Ms. Lempesis:	Thank you.
Ms. Campbell:	I did - - well - -
By Ms. Lempesis:	

Q	Dr. Simmons, can you tell me what [Minor 1] told you happened.
A	I asked him, you know, *tell me what happened.* And he said, basically, his - - sorry, I'm a little nervous.
Q	That's okay. Just take your time.
A	Yeah. He said, basically - - basically, he said his - - his father, that he'd been watching porn, and that they had told him not to tell anybody because of their secret pact. And that I believe that his daddy had - - his father had touched his private area.
Q	Touched his private area. Do you recall more specifically what [Minor 1] said?
A	I believe - - I believe he said his penis.
Q	Okay. And if you'd like to refer to your notes to try to refresh your memory as to what was said.
A	I'm sorry. I'm just a little nervous.
Q	That's fine. I think if you look at the front of your notes. Here we go.
A	Okay. Here we go. Okay. That's right. That, he - - we talked, and I asked him what happened, and he said that - - I talked with them separately, and that Dad made them, and I have in quotations, quote/unquote, *Dad made them suck his penis*; and that the episode ended when he was - - when the custody of Mr. Johnnie Simmons. And that, also, they had been watching porno, and he said not to tell them because of the secret pact with Dad.

R. 29 l. 8 – R. 30, l. 4.

Dr. Simmons examined Minor 1 and Minor 2 looking for signs of sexual abuse, but found none. Both boys had normal physical exams. R. 31, ll. 15-20.

Petitioner is the father of Minor 1 and Minor 2, twin boys. The twins lived with a cousin, Rose Simmons, in a mobile home on heirs' property on Saint Helena Island. R. 87, ll. 3-23; R. 88,

ll. 12-14; R. 153, ll. 16-23. Petitioner lived in the family home on the property as well. Also living in the family home were Petitioner's sister and her husband and their three children. R. 62, ll. 8-15; R. 72, ll. 9-12; R. 89, l. 1 – R. 90, l. 2; R. 92, l. 19 – R. 93, l. 6; R. 153, l. 24 – R. 154, l. 4; R. 242, ll. 1-9; R. 243, ll. 1-25; R. 261, l. 23 – R. 262, l. 22. During the time that Petitioner lived in the family home, Petitioner's girlfriend or the mother of the twins lived with him. R. 97, l. 22 – R. 98, l. 7; R. 102, ll. 20-24; R. 163, ll. 2-19; R. 249, ll. 15-18; R. 250, ll. 7-15; R. 278, l. 1 – R. 279, l. 7. Quite naturally, the twins frequently visited with Petitioner in the family home. R. 88, ll. 22 -25; R. 90, ll. 3-11; R. 91, ll. 18-22; R. 154, ll. 18-25; R. 280, ll. 4-9. The home had no interior doors on the bedrooms; therefore, the family used sheets or blankets for privacy. R. 163, l. 17 – R. 164, l. 4; R. 247, ll. 6-9; R. 254, l. 22 – R. 255, l. 6; R. 257, l. 9 – R. 258, l. 16; R. 264, l. 21; R. 265, l. 23.

After Petitioner moved, his great-uncle and great-aunt, Johnnie and Cynthia Simmons, began to take a more active role in the twins' lives because Rose was unable to care for them on a full-time basis due to their continued behavioral problems. R. 72 , l. 19 – R. 73, l. 13; R. 90, l. 12 – R. 91, l. 11; R. 94, ll. 2-5; R. 95, l. 6 – R. 96, l. 3; R. 99, l. 25 – R. 100, l. 4; R. 143, ll. 1-17; R. 181, ll. 7-9; R. 182, l. 1 – R. 184, l. 7; R. 209, ll. 18-25; R. 210, ll. 14-22. Soon, Johnnie and Cynthia wanted to adopt the boys. R. 96, ll. 4-7; R. 100, ll. 5-8; R. 185, ll. 10-19; R. 211, l. 25 – R. 212, l. 4. However, Johnnie and Cynthia were concerned because one of the twins acted "too feminine" and the other was very dominant. R. 65, ll. 16-19; R. 67, l. 22 – R. 68, l. 8; R. 185, l. 20 – R. 186, l. 5; R. 198, ll. 18-24; R. 216, ll. 2-23. Johnnie described Minor 1 as exhibiting "girlish mannerism[s]." R. 213, ll. 5-12. Additionally, Cynthia suspected the twins had been sexually abused because she examined the anus of Minor 1 and found it to be larger than expected.[1] R. 65, ll. 20-22; R. 137, ll.

[1] No medical personnel found Minor 1's anus to be larger than normal. R. 31, ll. 11-20; R. 227, ll. 1-7.

9-15; R. 189, ll. 2-24. Despite these suspicions, Cynthia did not consult the authorities because she feared Petitioner would stop the adoption based upon the allegations. R. 64, ll. 12-17; R. 64, l. 21 – R. 65, l. 4. However, Cynthia took the twins to a counselor who said there was nothing wrong. R. 66, ll. 1-18; R. 201, ll. 23-25.

After repeated behavior problems from the twins and the finalization of the adoption, Cynthia and Johnnie confronted them about the cause of their acting out. R. 192, ll. 5-7; R. 193, ll. 20-25; R. 213, l. 19 – R. 214, l. 8. Allegedly, the twins disclosed sexual abuse during this confrontation. After the confrontation, Cynthia took the twins to the pediatrician. R. 193, ll. 3-13

Minor 1, who had practiced his testimony with the prosecutor, claimed Petitioner touched Minor 1's penis and butt with his hands and made Minor 1 touch Petitioner's penis. R. 131, ll. 1-20; R. 135, l. 25 – R. 136, l. 8. Minor 1 claimed this occurred more than once in Petitioner's room and that Minor 2 watched. R. 132, l. 2 – R. 132, l. 13. In response to leading questions by the prosecutor, Minor 1 claimed Petitioner touched Minor 1's penis with his mouth and put his penis in Minor 1's butt. R. 134, l. 25 – R. 134, l. 19. Minor 1 previously claimed Petitioner made him suck the penises of other men, but he told the prosecutor prior to trial that this never happened; however, Minor 1 told the jurors that he had remembered the night before that this had in fact occurred. R. 140, l. 12-23.

Minor 2, who also practiced his testimony with the prosecutor, claimed Petitioner touched his penis with his hands. Minor 2 denied being touched anywhere else or with anything other than Petitioner's hands. R. 155, l. 10 – R. 156, l. 6; R. 157, ll. 9-11; R. 159, ll. 4-7; R. 162, l. 19 – R. 163, l. 1. Minor 2 claimed this touching occurred in Petitioner's bedroom, but he was unsure if it occurred at night or during the day. R. 156, ll. 13-24. Dissatisfied with Minor 2's testimony

regarding the allegations of abuse, the prosecution introduced the video of his speaking with an interviewer at Hope Haven. R. 170, l. 16 – R. 171, l. 15; R. 175, l. 7 – R. 178, l. 11.

Discussion

All criminal defendants are entitled to a fair trial. U.S. Const. Amend. VI; S.C. Const. Art. 1, § 14. The Rules of Evidence are designed to ensure a fair trial occurs. One of the most important Rules of Evidence concerns the rule against hearsay; however, many exceptions to hearsay exist. A statement is not hearsay if the declarant testifies at the trial, is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony in a criminal sexual conduct case ... where the declarant is the alleged victim and the statement is limited to the time and place of the incident." SCRE 801(d)(1)(D). This Court made clear the necessity of the statement remaining limited to time and place of the alleged incident. Jolly v. State, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994). If the statement goes beyond time and place, then it is hearsay and in order to be admissible, it must fall within one of the exceptions to the general rule against hearsay. State v. Burroughs, 328 S.C. 489, 497, 492 S.E.2d 408, 412 (Ct. App. 1997)(citing Rule 802, SCRE).

One of those exceptions to the general rule against hearsay is when a statement is "'made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.'" Id. at 501, 492 S.E.2d at 414 (quoting Rule 803(4), SCRE). "A physician's testimony as to a patient's history should only include those statements related to him by the patient upon which the physician relied in reaching medical conclusions." State v. Camele, 293 S.C. 302, 304-305, 360 S.E.2d 307, 308 (1987). See also State v. Watkins, 92 A.3d 172, 187-188 (R.I. 2014)(providing that whether a statement is

admissible under the medical diagnosis exception depends on whether what was related by the patient "will assist or is helpful in the diagnosis or treatment" of the patient's illness and holding "the simple fact that a statement could be helpful in diagnosis is not in itself sufficient for admission under Rule 803(4); there must be a proper foundation establishing that the challenged statements were in fact made for purpose of treatment or diagnosis"). "The rationale for the exception is that a patient has a strong motivation to be truthful about information that will form the basis of his diagnosis and treatment, making statements in this regard inherently trustworthy." Tracy A. Bateman, Admissibility of Statements Made for Purposes of Medical Diagnosis or Treatment as Hearsay Exception under Rule 803(4) of the Uniform Rules of Evidence, 38 A.L.R.5th 433; see also United States v. Iron Shell, 633 F.2d 77, 83-84 (8th Cir. 1980)(explaining the "rationale behind the rule" is its focus on the patient and its reliance "upon the patient's strong motive to tell the truth because diagnosis or treatment will depend in part upon what the patient says. It is thought the declarant's motive guarantees trustworthiness sufficiently to allow an exception to the hearsay rule").

This Court explained that a patient's history as told to the doctor is admissible only as to the information upon which the doctor relied in reaching his professional opinion. State v. Brown, 286 S.C. 445, 446, 334 S.E.2d 816, 816-817 (1985)(citing Gentry v. Watkins-Carolina Trucking Co., 249 S.C. 316, 154 S.E.2d 112 (1967)). In Brown, the doctor told the jury that the child-patient stated "Mr. Carl" performed certain sex acts on her. This Court held defense counsel's objection to the perpetrator's identity as unnecessary for diagnosis or treatment should have been sustained. Id. at 446, 334 S.E.2d at 817. Further, this Court stated "[t]he perpetrator's identity would rarely, if ever, be a factor upon which the doctor relied in diagnosing or treating the victim." Id. at 447, 334 S.E.2d at 817. Therefore, "[a] doctor's testimony as to history should include only those facts

related to him by the victim upon which he relied in reaching his medical conclusions. The doctor's testimony should never be used as a tool to prove facts properly proved by other witnesses." Id.

In another case similar to Brown, this Court held a doctor's testimony that the alleged victim of a sexual assault told the doctor that the defendant committed the assault was error "because the statement implicating the [defendant] did not assist in her finding that the child had been sexually abused." Camele, 293 S.C. at 305, 360 S.E.2d at 308. This Court also held the doctor's "recitation of the victim's statement that neither his mother nor stepfather sexually assaulted him" was not admissible because the statement "could not conceivably have assisted in the doctor's finding that the child had been sexually abused." Id. In this Court's opinion, the testimony "was elicited solely to establish the perpetrator's identity, which would rarely, if ever be a factor upon which a physician would rely in treating a patient." Id.

The Court of Appeals held that "a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim." Burroughs, 328 S.C. at 501, 492 S.E.2d at 414. However, the testimony of a nurse that the alleged victim of a sexual assault told the nurse that her assailant asked for a hug before the assault "in no way can be viewed as 'reasonably pertinent' to the victim's diagnosis or treatment." Id.

The Court found the testimony of the nurse prejudicial to the defendant because it corroborated the victim's testimony in an extremely important way – the prosecution had presented two witnesses to testify the defendant had assaulted them after asking for a hug. Id. at 414-415, 328 S.C. at 502-503. The Court recognized that "[w]hile the victim's statement that Burroughs asked her for a hug might be an insignificant detail when considering her story alone, it becomes a very important detail after considering the stories of the other victims." Therefore, the improper

corroboration of the alleged victim's testimony resulting from the erroneous admission of the testimony of the nurse was not harmless. Id. at 415, 328 S.C. at 503.

South Carolina is not alone in holding that statements made to doctors in which an alleged perpetrator is identified are not admissible under the medical diagnosis exception to hearsay. See Sluka v. State, 717 P.2d 394, 399 (Alaska 1986)(finding statements made by an alleged sexual assault victim to the doctor regarding the identity of the perpetrator were not admissible under the medical diagnosis exception to hearsay); State v. Jones, 625 So.2d 821, 826 (Fla. 1993)(holding statements identifying the assailant were not admissible under the state's medical diagnosis hearsay exception); Alford v. Com., 338 S.W.3d 240, 247 (Ky. 2011)(stating "[i]t is well settled that the identity of the perpetrator is rarely, if ever, pertinent to medical diagnosis or treatment"); Colvard v. Com., 309 S.W.3d 239, 247 (Ky. 2010)(holding statements by a young child to a doctor identifying the defendant as the perpetrator of sexual abuse were not admissible under the medical diagnosis or treatment exception); People v. LaLone, 437 N.W.2d 611, 615 (Mich. 1989)(holding statements by an alleged victim as to the identity of a sexual assault perpetrator to her psychologist were not admissible under the medical diagnosis exception); Jones v. State, 606 So.2d 1051, 1056-1057 (Miss. 1992)(providing that "[s]tatements concerning who committed the act seldom sufficiently relate to the diagnosis or treatment," and further finding that even under an expansive reading of the medical diagnosis hearsay exception, the testimony by the doctor recounting the alleged victim's identity of her perpetrator were not admissible because the alleged abuser was not a member of the household and there was no indication that the doctor gathered the information in the treatment of emotional and psychological injuries or to prevent further abuse); State v. Veluzat, 578 A.2d 93, 96 (R.I. 1990)(holding a child's statement identifying her alleged attacker and a further statement that

the child was asked to commit sexual acts that were never perpetrated did not in any way assist the physician in the diagnosis and treatment of a sexual-assault victim).

In Jolly v. State, 314 S.C. 17, 19, 443 S.E.2d 566, 568 (1994), this Court found trial counsel provided ineffective assistance by failing to object to testimony by an uncle that the alleged child victim told the uncle that Jolly had abused her. Trial counsel had objected to a social worker testifying that the alleged victim made a prior statement that Jolly had abused her, but failed to object to the uncle's testimony. Id. On direct appeal, Jolly challenged the trial judge's decision to allow the social worker to testify to the hearsay statement. No decision was made as to the error of the ruling because no objection had been made to the uncle's testimony making the social worker's testimony cumulative to the uncle's testimony and the alleged victim's testimony. Id. In the post-conviction relief case, this Court reiterated the rule that in criminal sexual conduct cases, evidence from other witnesses that the alleged victim complained of a sexual assault is admissible in corroboration limited to the time and place of the assault and excluding details or particulars. Id. at 20, 443 S.E.2d at 568. This Court went on to hold that "[i]mproper corroboration testimony that is *merely cumulative to the victim's testimony*, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." Id. at 21, 443 S.E.2d at 569 (emphasis in original). Thus, this Court held that had the uncle's testimony been properly objected to, the appellate court would not have held the social worker's testimony was harmless and the outcome of the direct appeal would have been different. Id.

In its return, the state argued Petitioner's reliance on Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994) was "misplaced." Ret. at 14. In the state's view, "a majority of this Court abandoned the theory upon which Petitioner" relied in State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011). Ret. at 14. Writing the majority opinion, then-Justice Pleicones cited to Jolly in discussing how the

error in Jennings was not harmless. Jennings, 394 S.C. at 478, 716 S.E.2d at 94. Then-Justice Beatty concurred with Justice Pleicones. Id. However, Justices Kittredge and Hearn concurred in a separate opinion. Id. at 482-483, 716 S.E.2d at 95-96. The concurrence concluded "the apparent categorical rule emanating from Jolly v State and its progeny precluding a finding of harmless error goes too far." Id. at 482, 716 S.E.2d at 95. The lone dissenter, then-Chief Justice Toal, expressed disagreement with the string of cases cited by the majority "to support the assertion that improperly admitted hearsay testimony that is merely cumulative to the victim's testimony can never be harmless error." Id. at 483, 716 S.E.2d at 96. In light of the opinions of the justices in Jennings, the state contends that Jolly is no longer good law. Ret. at 14. However, this Court has not overruled Jolly, nor should it.

In reaching its conclusion that "[i]mproper corroboration testimony that is merely cumulative to the victim's testimony ... cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration," the Jolly Court relied upon State v. Barrett, 299 SC. 485, 386 S.E.2d 242 (1989). Jolly, 314 S.C. at 21, 443 S.E.2d at 569. Barrett was convicted of criminal sexual conduct with a minor. Barrett, 299 S.C. at 486, 386 S.E.2d at 242-243. The state presented the testimony of a social worker regarding what the alleged victim told her about the incident of alleged abuse. Id. at 486, 386 S.E.2d at 243. The social worker testified "extensively to details of the sexual abuse" reported by the alleged victim. Id. at 487, 386 S.E.2d at 243. This Court noted that "[a]lthough there was physical evidence suggesting the presence of sexual abuse, the state relied solely upon victim's testimony to establish the details of the crime and the identity of the perpetrator." Id. After concluding this was error – exceeding the time and place exception to hearsay in sexual assault cases – this Court held the error was not harmless. Id. Certainly, the social worker's testimony was cumulative to the alleged victim's

testimony, but it was "precisely this cumulative effect which enhance[d] the devastating impact of improper corroboration." Id.

This Court has applied the rationale of the harmless error analysis employed in Jolly and Barrett in several cases. In Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001), this Court found a trial lawyer performed deficiently by failing to object to the testimony of four witnesses who claimed the alleged victim of a sexual assault indicated Dawkins was the assailant. Turning to the prejudice prong, this Court relied upon Jolly to find that counsel's deficient performance was prejudicial. Id. at 156-157, 551 S.E.2d at 263. This Court explained that when improperly admitted testimony corroborates the testimony of an alleged victim, it is not merely cumulative such that no harm arises. Id. Sexual abuse cases typically occur when and where the only witnesses are the accused and the alleged victim; therefore, the credibility of the parties is paramount. In a case in which the credibility of the only witness is of such immense importance, improperly admitted evidence corroborating that witness's testimony cannot be harmless. Id.

Relying on Dawkins, this Court found trial counsel provided ineffective assistance in Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002). Trial counsel elicited testimony from a doctor to the effect that the alleged victim identified Ingle as the abuser and failed to object to a detective's testimony that the alleged victim identified Ingle as her abuser. Id. at 474, 560 S.E.2d at 404. This was deficient performance because the testimony went beyond the time and place limitation of the hearsay rules. Id. Concerning prejudice, this Court "reiterate[d] that improper corroboration testimony that is cumulative to the victim's testimony is harmful since it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." Id. at 474-475, 560 S.E.2d at 405 (internal quotation omitted). Just a few months later, this Court found trial counsel ineffective for failing to object to the testimony of a mother and father of an alleged victim of sexual

assault where the two identified the defendant as the perpetrator and described the alleged abuse. Sanchez v. State, 351 S.C. 270, 275, 569 S.E.2d 363, 365 (2002). This Court also held the error was prejudicial because the improper testimony was corroborative of the victim in such a way as to not be merely cumulative. Id. "Mother's and father's testimony impermissibly bolstered the victim's testimony" by identifying the perpetrator and providing the details and particulars of the assault. Id.

In a more recent post-conviction relief case, this Court cited the prejudice analysis from Jolly and Dawkins, but did not rely upon that analysis in arriving at its conclusion that trial counsel's deficient performance, which allowed improper corroborative evidence to be admitted, was prejudicial. Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010). Smith's counsel failed to object to the testimony of a forensic interviewer, who testified the alleged victim identified Smith as her perpetrator and that the forensic interviewer found the testimony believable because the alleged victim had no reason not to be truthful. Id. at 564, 689 S.E.2d at 631. Trial counsel provided no reason for his failure to object; thus, the presumption of adequate representation based on a valid trial strategy disappeared. Id. at 568, 689 S.E.2d at 633.

Then, this Court determined Smith was prejudiced by the failure because the outcome of the case hinged on the alleged victim's credibility regarding identification of the perpetrator, and there was otherwise an absence of overwhelming evidence of guilt. Id. at 568-569, 689 S.E.2d at 633. According to this Court, "[t]he forensic interviewer's hearsay testimony impermissibly corroborated the victim's identification of Smith as the assailant, and the forensic interviewer's subsequent opinion testimony improperly bolstered the victim's credibility." Id. This Court was convinced of the prejudicial nature of the testimony due to the prosecutor's heavy reliance on it during closing argument "to overcome inconsistencies" in the alleged victim's testimony. Id. There was "no valid claim of overwhelming evidence of Smith's guilt" in the case. Id. This Court determined that

confidence in the outcome was undermined due to the weak case against Smith and the corroborative nature of the improperly admitted testimony. Id.

The Court of Appeals examined a similar issue in State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999). The Court held the judge erroneously admitted the testimony of the alleged victim's stepmother concerning what the alleged victim said about the abuse, including identification of the perpetrator and details of the abuse. Id. at 155, 515 S.E.2d at 771. Next, citing Jolly, supra, the Court held the error was prejudicial because it corroborated the alleged victim's testimony. Id. at 156, 515 S.E.2d at 771. The Court noted the state introduced no physical evidence of the molestation; thus, the "case was essentially a swearing contest, pitting Whisonant's word against the victim's as to whether the incident occurred." Id. The alleged victim's testimony was improperly bolstered in the minds of the jury by the stepmother's testimony, which mirrored the alleged victim's. Id.

In a more recent case, the Court of Appeals concluded trial counsel provided ineffective assistance by failing to object to testimony from numerous witnesses that corroborated the testimony of the alleged victim in a criminal sexual conduct case. Vail v. State, 402 S.C. 77, 91, 738 S.E.2d 503, 511 (Ct. App. 2013). The Court explained the alleged victim's testimony was "'extremely crucial' to the outcome of th[e] case regarding the alleged sexual relationship between her and Vail, and there was otherwise an absence of overwhelming evidence of Vail's guilt." Id. at 90, 738 S.E.2d at 510. "The state's case was built upon victim's story against Vail's story." Id. The Court concluded that "[i]n light of the circumstantial evidence presented to the jury in addition to the heavy emphasis on victim's credibility," "the admission of the inadmissible hearsay" was not "harmless beyond a reasonable doubt." Id. at 91, 738 S.E.2d at 511.

Addressing the claim presented in the instant matter, the Court of Appeals found the error to be harmless. See App. 2. However, a careful review of the record and governing case law reveals the testimony could *not* have been harmless. The doctor's testimony revealed (1) the perpetrator's identity, (2) the alleged sex act, (3) the claim the two watched pornography together, and (4) that the two entered a secret pact not to reveal the information. Additionally, the doctor's testimony suggested that Minor 1 discussed what occurred not just with Minor 1, but with Minor 2 as well, because the doctor used the pronouns "they" and "them." Minor 1's disclosures to Dr. Simmons far exceeded what was needed for medical diagnosis and treatment. Given Minor 1's age and the length of time between the last incident of alleged abuse and the medical encounter, it is unlikely Minor 1 was providing *any* information to Dr. Simmons to assist in diagnosis and treatment. Therefore, the public policy basis for Rule 803(4), SCRE – that a patient tells the doctor the truth in order to receive accurate treatment – was not present here. See Iron Shell, 633 F.2d at 84 (explaining that one part of the two-part test for the medical diagnosis hearsay exception requires the declarant's motive in sharing the information with the physician be consistent with the purpose of the rule – to obtain medical diagnosis or treatment); State v. Butcher, 866 N.E.2d 13, 26 (Ohio Ct. App. 2007)(finding insufficient evidence in the record to indicate the child of tender years provided the information to the doctor for the purposes of medical diagnosis and treatment and warning against allowing doctors "to assume the role of a police investigator, elicit statements from the alleged victims, and then testify regarding those statements under the guise that they were given for the purpose of medical diagnosis or treatment"); see also Robert P. Mosteller, Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment, 67 N.C. Law Rev. 257, 266 (1989)(explaining that "because of the subject matter or the characteristics of the declarant, a

child may have no subjective appreciation of the importance of the inquiry to medical treatment").[2] Further, Dr. Simmons made no diagnosis and administered no treatment based on Minor 1's statements; therefore, none of Minor 1's statements to Dr. Simmons fall within the exception created by the Rules.

Minor 1 allegedly told Dr. Simmons that he was made to suck his father's penis – an activity for which no testing or examination could corroborate. Even if testing or examination could corroborate the activity or would have been part of treatment following such a revelation, there is no evidence that Dr. Simmons actually engaged in any activity whatsoever in light of statements made by Minor 1. Without question, Minor 1's disclosures of (1) watching pornographic movies and (2) having a secret pact with Petitioner were completely unrelated to medical diagnosis or treatment. See Conley v. State, 620 So.2d 180, 183-184 (Fla. 1993)(finding an alleged victim's statements as to how she was sexually assaulted to a doctor were admissible because they were reasonably pertinent to diagnosis or treatment, but her statement that she was assaulted at gunpoint was not admissible because it was not reasonably pertinent to medical treatment); Veluzat, 578 A.2d at 96 (statements that the child was asked to perform sexual acts that never occurred were not for purposes of medical diagnosis and treatment). At a minimum, Minor 1's disclosure of the name and/or relationship of the person who allegedly assaulted him were unnecessary for medical

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[2] In State v. Coates, 950 A.2d 114, 123 n.10 (Md. 2008), the Maryland Court of Appeals held statements to a nurse practitioner were not admissible under the medical diagnosis hearsay exception because it was unlikely the alleged victim believed her statements to the nurse were for medical diagnosis or treatment when she saw the nurse "some fourteen months after the last sexual abuse incident, and three weeks after her disclosure to her mother of what had occurred." The court found there was "no indication that [the alleged victim] had any understanding, at her age, that she was at continued risk of developing a latent, sexually transmitted disease or HIV." Id. Further, the court explained that "most eight-year olds would not discern emergent circumstances or medical necessity in the absence of any medical complaints or symptoms." Id.; see also People v. Meeboer, 484 N.W.2d 621, 621 (Mich. 1992)(listing factors, including age and maturity of the declarant, to consider when determining whether a statement falls within the medical diagnosis exception); State v. Kay, 927 P.2d 897, 908 (Idaho Ct. App. 1996)(same).

diagnosis and treatment as this Court's precedent dictates. The testimony was used to corroborate and bolster the testimony of the complaining witnesses – the solicitor's closing argument demonstrates exactly how prejudicial Dr. Simmons' testimony was. See Veluzat, 578 A.2d at 96-97(explaining the error in permitting a doctor to exceed the scope of the hearsay exception posed "significant prejudicial effect" because "a physician's testimony can carry with it an impression of great credibility").

The prosecutor's theme during closing argument – consistent statements by the twins regarding the abuse – highlighted the prejudicial nature of Dr. Simmons' testimony regarding the identity of the abuser. Specifically, the prosecutor told the jurors to think about "their consistent stories, their consistent accounts of what their father did to them." R. 312, ll. 15-19. Thereafter, the prosecutor recounted the witnesses who told the jury about statements made by the twins concerning alleged abuse, including the statements of Dr. Simmons:

> And the first one we heard on the stand was this account that [Minor 1] gave to Dr. Simmons, ..., the first account we heard is that [Minor 1] told Dr. Simmons that his dad had touched his penis, and his dad had made him suck his penis, and that they had a secret pact, and that his dad was making them watch porn, pornography.

R. 312, l. 19 – R. 313, l. 1.

The prosecutor did not stop there; she emphasized to the jury that Minor 1's statement to Dr. Simmons was "consistent with the other statements that [Minor 1] gave to both the interviewer at Hope Haven" and to the jurors. R. 313, ll. 2-4. Repeatedly, the prosecutor told the jurors to "think about the consistencies" and that Minor 1 was consistent with his accounts. R. 317, ll. 2-20; R. 323, ll. 23-25; R. 326, ll. 10-19; R. 326, ll. 20-23; R. 327, l. 8. The prosecutor informed the jurors that the judge would instruct them that "[t]he victims' statements in this case need not be corroborated. However, you didn't just hear from [Minor 1] and [Minor 2]. You heard from Kristin Dalton, the nurse practitioner; from Dr. Simmons; from Investigator Fraser; from Cynthia and Johnnie; from

Rose." R. 329, ll. 8-12. Dr. Simmons' testimony of hearsay statements made by Minor 1 served to corroborate Minor 1's testimony in such a way to violate Appellant's constitutional right to a fair trial and could *not* be deemed harmless.

CONCLUSION

Petitioner respectfully requests this Court reverse the Court of Appeals and find the state failed to prove the erroneous admission of hearsay testimony was not harmless beyond a reasonable doubt.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of July, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES SIMMONS JR.,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on James Simmons, #355956, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 6th day of July, 2017.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of July, 2017.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.