

The Supreme Court of South Carolina

The State,

Respondent,

v.

Mark Baker,

Petitioner.

The Honorable Howard P. King
Sumter County
Trial Court Case No. 2005-GS-43-00004

ORDER

Petitioner seeks an extension to serve and file the Brief of Petitioner and additional copies of the Appendix, and asserts that extraordinary circumstances justify this extension. The opposing party consents to the extension. The request for an extension is granted until March 26, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.


C.J.
FOR THE COURT

Columbia, South Carolina

March 26, 2012

cc: Appellate Defender Kathrine H. Hudgins
Assistant Attorney General William M. Blich, Jr.
Ernest Adolphus Finney, III, Esquire

STATE OF SOUTH CAROLINA

ORIGINAL

IN THE SUPREME COURT

RECEIVED

MAR 19 2012

Certiorari to Sumter County

Howard P. King, Circuit Court Judge

S.C. Supreme Court
4

THE STATE,

RESPONDENT,

V.

MARK BAKER,

APPELLANT

PETITION FOR EXTENSION OF TIME
IN WHICH TO FILE THE BRIEF OF PETITIONER
AND ADDITIONAL COPIES OF THE APPENDIX

Counsel for Mark Baker petitions the Court for a **final one week extension, until March 26, 2012** in which to file the brief of petitioner and additional copies of the appendix in this case. In support of this petition, counsel shows:

1. The brief of petitioner and additional copies of the appendix are due to be filed with the Court today.
2. Counsel for Mr. Baker respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Counsel acknowledges that the previous extension made in this case was a final, however, due to illness, counsel was unable to complete this brief of petitioner. Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required.
3. Counsel had an oral argument before the Supreme Court in Wendell Williams v. State on March 13, 2012. Counsel filed petitions for rehearing in Joseph Walker v. State and State v. Mike Salley on March 8, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Marion Stewart on March 5, 2012. On February 23, 2012, counsel filed the initial brief of appellant and

designation of matter in State v. Gregory Velez. The brief of petitioner in State v. Mack Green was filed on February 20, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Lorenzo Inman on February 17, 2012. The petition for writ of certiorari and accompanying appendix was filed in Todd Sowell v. State on February 10, 2012. The petitions for rehearing were filed in State v. Norman Mitchell and State v. Robert Phipps on February 9, 2012. The brief of petitioner was filed in Clarence Gibbs v. State on February 8, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Robert Mackey on February 6, 2012. The initial brief of appellant and designation of matter were filed in State v. Supreme Ackbar on February 3, 2012. Counsel filed the petition for writ of certiorari and accompanying appendix in Michael Murray v. State on February 2, 2012.

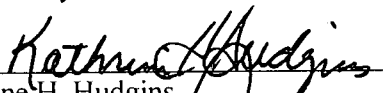
4. Counsel has not had time to complete the brief of petitioner and additional copies of the appendix in this case. As a result, counsel respectfully asks this Court for a **final one week extension, until March 26, 2012** in which to file the brief of petition and additional copies of the appendix. Counsel is striving to limit the number of extensions requested. Counsel is attempting to complete the cases with the most number of extensions first.


5. As indicated by signature below, William M. Blicht, Jr., of the Attorney General's Office, consents to this request.

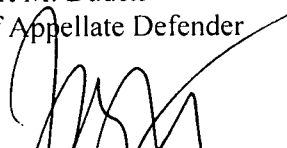
6. Counsel makes this request in good faith and not for purposes of delay.

Counsel respectfully requests a **final one week extension, until March 26, 2012**, in which to file the brief of petitioner and additional copies of the appendix in this case based upon the above circumstances.

Respectfully submitted,

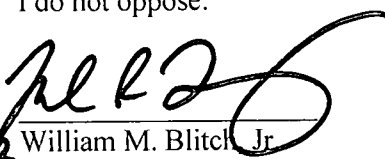

Kathrine H. Hudgins
Appellate Defender


Robert M. Dudek
Chief Appellate Defender


T. Patton Adams
Executive Director
J. Hugh Ryan, III
General Counsel

March 19, 2012

I do not oppose:


For William M. Blicht, Jr.

The Supreme Court of South Carolina

The State,

Respondent,

v.

Mark Baker,

Petitioner.

The Honorable Howard P. King
Sumter County
Trial Court Case No. 2005-GS-43-00004

ORDER

For good cause shown, the request for an extension to serve and file the Brief of Petitioner and additional copies of the Appendix is granted and extended until March 19, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Arenda J. Shealy*
Chief Deputy Clerk

Columbia, South Carolina

February 21, 2012

cc: Appellate Defender Kathrine H. Hudgins
Assistant Attorney General William M. Blich, Jr.
Ernest Adolphus Finney, III, Esquire

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Certiorari to Sumter County
Howard P. King, Circuit Court Judge

RECEIVED

FEB 17 2012

S.C. Supreme Court

(3)

THE STATE,

RESPONDENT,

v.

MARK BAKER,

APPELLANT

PETITION FOR EXTENSION OF TIME
IN WHICH TO FILE THE BRIEF OF PETITIONER
AND ADDITIONAL COPIES OF THE APPENDIX

Counsel for Mark Baker petitions the Court for a **final thirty day extension, until March 19, 2012** in which to file the brief of petitioner and additional copies of the appendix in this case. In support of this petition, counsel shows:

1. The brief of petitioner and additional copies of the appendix are due to be filed with the Court today.
2. Counsel for Mr. Baker respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required.
3. Counsel filed the petition for writ of certiorari and accompanying appendix in Kenneth Whitmore v. State on February 16, 2012. Counsel filed the petition for writ of certiorari and the accompanying appendix in Todd Sowell v. State on February 10, 2012. Counsel filed petitions for rehearing in State v. Robert Phipps and State v. Norman Mitchell on February 9, 2012. Counsel filed the brief of petitioner in Clarence Gibbs v. State on February 8, 2012. Counsel filed the initial brief of appellant and

designation of matter in State v. Rodney Mackey on February 6, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Supreme Ackbar on February 2, 2012. Counsel filed the petition for writ of certiorari and accompanying appendix in Michael Murray v. State on February 1, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Joseph Kelly State v. Joseph Kelly on January 27, 2012. Counsel filed the return to petition for writ of certiorari in Michael Witcher v. State on Counsel filed the initial brief of appellant and designation of matter in State v. David Chavez on January 20, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Lorenzo Inman and the return to petition for writ of certiorari for Shanna Kranchick v. State on January 17, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Craig Keeling on January 9, 2012. Counsel filed the petition for rehearing in Lorenzo R. Nicholson v. State on January 5, 2011.


4. Counsel has not had time to complete the brief of petitioner and additional copies of the appendix in this case. As a result, counsel respectfully asks this Court for a **final thirty day extension, until March 19, 2012** in which to file the brief of petition and additional copies of the appendix. Counsel is striving to limit the number of extensions requested. Counsel is attempting to complete the cases with the most number of extensions first.

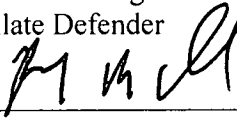
5. As indicated by signature below, William M. Blich, Jr., of the Attorney General's Office, consents to this request.

6. Counsel makes this request in good faith and not for purposes of delay.

Counsel respectfully requests a **final thirty day extension, until March 19, 2012**, in which to file the brief of petitioner and additional copies of the appendix in this case based upon the above circumstances.


Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender


Robert M. Dudek
Chief Appellate Defender

February 17, 2012

I do not oppose:


William M. Blich, Jr.

The Supreme Court of South Carolina

The State,

Respondent,

v.

Mark Baker,

Petitioner.

The Honorable Howard P. King
Sumter County
Trial Court Case No. 2005-GS-43-00004

ORDER

For good cause shown, the request for an extension to serve and file Petition for Writ of Certiorari and additional copies of the Appendix is granted and extended until February 17, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

January 19, 2012

cc: Appellate Defender Kathrine H. Hudgins
Assistant Attorney General William M. Blich, Jr.
Cecil Kelly Jackson, Esquire
The Honorable Tanya Gee

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Sumter County

Howard P. King, Circuit Court Judge

RECEIVED

JAN 18 2012

S.C. Supreme Court

2

THE STATE,

RESPONDENT,

v.

MARK BAKER,

PETITIONER

PETITION FOR EXTENSION OF TIME
IN WHICH TO FILE THE BRIEF OF PETITIONER
AND ADDITIONAL COPIES OF THE APPENDIX

Counsel for Mark Baker petitions the Court for a thirty day extension, in which to file the brief of petitioner and additional copies of the appendix in this case. In support of this petition, counsel shows:

1. The brief of petitioner and additional copies of the appendix are due to be filed with the Court today.
2. Counsel for Mr. Baker respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required. Counsel acknowledges that she hoped the last extension request would have been the final request but due to arguments in the Court of Appeals and two other cases with a greater number of extensions, counsel was unable to complete the initial brief in this case.
3. Counsel filed the initial brief of appellant and designation of matter in State v. Lorenzo Inman and the return to petition for writ of certiorari for Shanna Kranchick v. State on January 17, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Craig Keeling on January 9, 2012. Counsel filed the petition for rehearing in Lorenzo R. Nicholson v. State on January 5, 2011. Counsel filed the petition for rehearing in State v. Tawanda Williams on December 22, 2011. The initial brief of


appellant and designation of matter in State v. Jeffrey Herrmann was filed on December 21, 2011. The petition for writ of certiorari and accompanying appendix in Troy Goffe v. State were filed on December 16, 2011. Counsel filed the initial brief of appellant and designation of matter in State v. Travis Teasley on December 15, 2011. Counsel had two oral arguments in the Court of Appeals on the week of December 5, 2011. On December 6, 2011 had an oral argument in the case of State v. Daniel Jenkins. On December 7, 2011, counsel argued the case of State v. Robert Phipps.

4. Counsel has not had time to complete the brief of petitioner and additional copies of the appendix in this case. As a result, counsel respectfully asks this Court for a thirty day extension, in which to file the brief of petitioner and additional copies of the appendix. Counsel is striving to limit the number of extensions requested. Counsel is attempting to complete the cases with the most number of extensions first.

5. Counsel makes this request in good faith and not for purposes of delay.

Counsel respectfully requests a thirty day extension, in which to file the brief of petitioner and additional copies of the appendix in this case based upon the above circumstances.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

January 18, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Sumter County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

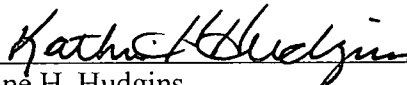
V.

MARK BAKER,

PETITIONER

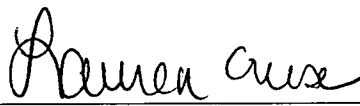
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the petition for extension of time in which to file the petition for writ of certiorari and accompanying appendix in the above referenced case has been served upon Mary Williams, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 18th day of January, 2012.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 18th day of January, 2012.


_____(L.S.)

Notary Public for South Carolina

My Commission Expires: August 23, 2014.

The Supreme Court of South Carolina

The State,

Respondent,

v.

Mark Baker,

Petitioner.

The Honorable Howard P. King
Sumter County
Trial Court Case No. 2005-GS-43-004


ORDER

The request for an extension to serve and file Brief of Petitioner is granted and extended until January 18, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY


Clerk

Columbia, South Carolina

December 20, 2011

cc: Appellate Defender Kathrine H. Hudgins

Attorney General Alan Wilson

Chief Deputy Attorney General John W. McIntosh

Assistant Deputy Attorney General Salley W. Elliott

Assistant Attorney General William M. Blich, Jr.

Cecil Kelly Jackson, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

December 19, 2011

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

RECEIVED

DEC 19 2011

S.C. Supreme Court

Re: Mark Baker v. The State

Dear Mr. Shearouse:

The Brief of Petitioner and additional copies of the appendix are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting a thirty day extension in which to serve and file the brief of petitioner and additional copies of the appendix.

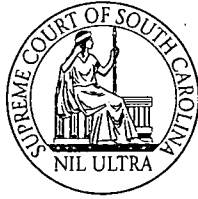
By copy of this letter, I am informing William M. Blich, Jr., Esquire, of the Attorney General's Office, of my request.

Sincerely,

Kathrine H. Hudgins
Appellate Defender

KHH/lec

cc: William M. Blich, Jr., Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 17, 2011

Appellate Defender Kathrine H. Hudgins
South Carolina Commission
on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Baker, Mark

Dear Counsel:

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before December 19, 2011. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Very truly yours,



CLERK

The State v. Baker, Mark
Page Two
November 17, 2011

DES/lda

Enclosure

cc: Attorney General Alan Wilson
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Salley W. Elliott
Assistant Attorney General William M. Blich, Jr.
Cecil Kelly Jackson, Esquire
The Honorable Tanya Gee

The Supreme Court of South Carolina

The State,

Respondent,


v.

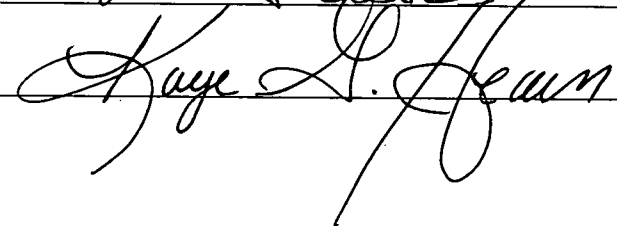
Mark Baker,

Petitioner.

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in State v. Baker, 390 S.C. 56, 700 S.E.2d 440 (Ct. App. 2010) as to Questions 2 and 3. The petition is denied as to Question 1. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

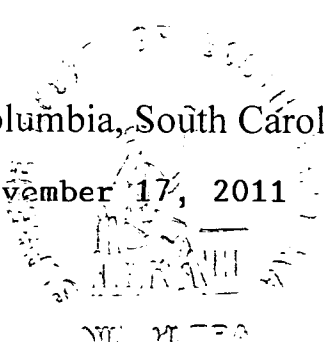


J.


J.

Columbia, South Carolina

November 17, 2011



 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Howard P. King, Circuit Court Judge

RECEIVED

NOV 29 2010

S.C. Supreme Court

Opinion No. 4698 (S.C. Ct. App. filed 6/15/2010)

05-GS-43-004.

THE STATE,

RESPONDENT,

V.

MARK BAKER,

APPELLANT

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 8/27/2010.

QUESTIONS PRESENTED

1. Did the judge err in limiting cross examination of witness Victoria Denise W. about school disciplinary problems and an expulsion that took place during the same month when the witness initially made allegations against the appellant?
2. Did the judge err in qualifying an officer with the Sumter County Sheriff's Department as an expert in "forensic interviewing" and allowing her testimony under Rule 702, SCRE?
3. Did the judge err in refusing to quash the indictments as vague and overbroad when the time frame alleged spanned six years?

STATEMENT OF THE CASE

In January of 2005, the Sumter County Grand Jury indicted Baker in a six count indictment for criminal sexual conduct with a minor second degree and five counts of lewd act upon a minor, indictment #2005-GS-43-4. Counts one through five involved Tara W. and count six involved Victoria Denise W. The original indictments alleged that the events took place between May 2002 through September 2004, for counts two through five and May 2002 through September 2002, for count six. On October 26, 2006, the Sumter County Grand Jury true billed an amended indictment #2005-GS-43-4. The amended indictment expanded the time frame back to June 1, 1998, for counts two through six. On November 13, 2006, approximately two weeks after the amendment to the indictment expanding the time frame by four years, Baker proceeded to jury trial before the Honorable Howard P. King. The jury returned verdicts of guilty on four of the five counts of lewd act. The jury returned a verdict of not guilty for criminal sexual conduct and one count of lewd act. Judge King sentenced Baker to 15 years concurrent for three counts and 15 years consecutive for one count. A timely notice of intent to appeal was served on November 22, 2006.

On May 18, 2010, the South Carolina Court of Appeals heard arguments in the case and in an opinion filed June 15, 2010, the Court of Appeals affirmed the sentences and convictions. The petition for rehearing was denied on August 27, 2010. This petition for writ of certiorari follows.

STATEMENT OF FACTS

In October of 2004, Victoria Denise W., Baker's niece, told her mother, Cheryl Branch, that Uncle Mark was "messaging" with her older sister Tara W. (R. p. 70, lines 14-23). At the time, Victoria Denise W. denied that anything had happened to her. (R. p. 71, lines 1-11; p. 87, lines 3- p. 88, lines 1-21). Victoria Denise W. later alleged abuse by Baker. These allegations were contained in count six of the indictment to which the jury returned a verdict of not guilty. The remaining five counts in the indictment involved Tara W. The jury returned a verdict of not guilty for one of those five counts.

Prior to trial Baker moved to quash the indictment because it was unconstitutionally vague and overbroad. (R. pp. 1-36). Additionally, Baker moved for a continuance based on the fact that two weeks prior to trial, the time frame alleged in five counts of the indictment was expanded by four years. (R. pp. 1-36). The judge denied both motions. (R. p. 34, lines 19 – p. 36 lines 1-5).

During the same month when Victoria Denise W. made allegations that Baker abused her sister, Victoria Denise W. was suspended or expelled from school for one year for a narcotics violation. (R. pp. 76-82). The State moved, pre-trial, to limit cross examination of Victoria Denise W. with school disciplinary records. (R. p. 38, lines 5-14; State's Motion in limine). Baker argued that cross examination of Victoria Denise W. in regard to the trouble she was in at school at the same time she made allegation against Baker was proper because it went to show motive under Rule 608. (R. pp. 48-55). The judge ruled that two instances of Victoria Denise's misconduct at school in October of 2004, including an expulsion, were not proper because the incident did not go to truthfulness or untruthfulness. (R. p. 53, lines 11 – p. 54, lines 1-11). The judge allowed Baker to make a proffer, outside of the presence of the jury, of the proposed cross examination. (R. pp. 74-81). Baker again argued that the cross examination was proper. (R. pp. 82-84). The judge again

ruled that the elicited impeachment testimony was not proper under Rule 608(b) or (c), SCRE. (R. pp. 84-86).

During the trial the State moved to qualify Gwen Herod, a victim assistance officer with the Sumter County Sheriff's Department, as an expert in "forensic interviewing." Officer Herod interviewed both Victoria Denise W. and Tara W. Baker objected. (R. p. 109, lines 7 – p. 110, lines 1-14). The judge held a hearing, outside the presence of the jury, in regard to Officer Herod's qualifications. (R. pp. 115-135). During the hearing the State moved to qualify Officer Herod as an expert in both "forensic interviewing" and "assessment of child abuse." (R. p. 120, lines 7-8). Officer Herod graduated from Hillcrest High School but did not obtain a college degree. (R. p. 124, lines 18-25). The officer testified that her training was limited to two one week courses sponsored by the American Prosecutor's Research Institute. (R. p. 125, lines 5- p. 126, lines 1-10). The officer admitted that she did not belong to any "associations of forensic interviewers" and was unable to answer counsel's question in regard to peer review. (R. p. 129, lines 1- 25). The judge qualified the officer as an expert in "forensic interviewing" but declined to qualify her as an expert in "assessment of child abuse." (R. p. 132, lines 22 – p. 133, lines 1-6). Baker objected. (R. pp. 133-134).

The hearing then continued so that the judge could determine if the "expert" testimony of the officer was admissible under Rule 702, SCRE. (R. p. 134, lines 24- p. 135, lines 1-13). After hearing testimony (R. pp. 135-149), the judge found the testimony admissible. (R. pp. 149-151). Baker objected. (R. pp. 151-155). The officer's "expert" testimony was admitted over objection. (R. pp. 157-174).

ARGUMENTS

1. The judge erred in limiting cross examination of Victoria Denise W. about school disciplinary problems and an expulsion that took place during the same month the witness made allegations against the appellant.

Victoria Denise W., Baker's niece, a witness and the victim alleged in count six of the indictment, was suspended or expelled from school for one year for a narcotics violation during the same month that she made allegations that Baker abused her sister. (R. pp. 76-81). The judge ruled that two instances of Victoria Denise's misconduct at school in October of 2004, including an expulsion, were not proper because the incident did not go to truthfulness or untruthfulness. (R. p. 53, lines 11 – p. 54, lines 1-11). The judge allowed Baker to make a proffer, outside of the presence of the jury, of the proposed cross examination. (R. pp. 74-81). Baker again argued that the cross examination was proper. (R. pp. 82-84). The judge again ruled that the elicited impeachment testimony was not proper under Rule 608(b) or (c) SCRE. (R. pp. 84-86). The judge erred.

SCRE 608(c) provides that, "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." Counsel argued that the cross examination was proper because it went to motive to misrepresent. (R. p. 82, lines 3-15). Specifically, counsel argued that the witness made the allegation only because she was in trouble at school and in an effort to "get the spotlight off of her and focus on something else or someone else." (R. p. 48, lines 10-15). Baker was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness. See Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

Baker should have been permitted to question Victoria Denise W. about her disciplinary problems at school that took place during the same month that she made allegations against Baker. Victoria Denise W.'s credibility was a critical issue to be determined by the jury as she was the one who initially reported abuse of her older sister, Tara W. by Baker. Importantly, Victoria Denise W. initially denied any abuse by Baker. Counsel should have been able to cross examine her in regard to her discipline problems at school as motive to misrepresent under Rule 608(c).

In regard to the prohibited cross examination of witness Victoria Denise W. about school disciplinary problems that took place during the same month when the witness initially made allegations against the appellant, the Court of Appeals wrote, "We find it extremely unlikely that this simple incident would have a legitimate tendency to show the younger niece would fabricate a story of her uncle abusing her older sister in order to avert attention from her minor infraction." State v. Baker, 390 S.C. 56, 700 S.E.2d 440, 445, (Ct. App. 2010); App. p. 8). Counsel submits that this is a factual determination that should have been determined by the jury. The prohibited cross examination was proper under Rule Rule 608(c), SCRE.

2. The judge erred in qualifying an officer with the Sumter County Sheriff's Department as an expert in "forensic interviewing" and allowing her testimony under Rule 702, SCRE.

At trial, the solicitor offered Officer Gwen Herod, a victim assistance officer with the Sumter County Sheriff's Department, as an expert in "forensic interviewing." Baker objected. (R. p. 109, lines 7 – p. 110, lines 1-14). After the State proffered the officer's training, consisting of

two one week courses sponsored by the American Prosecutor's Research Institute, (R. pp. 115-135), the judge found her to be qualified in the field of "forensic interviewing." The judge stated, "How can I not qualify her under the Douglas case?" (R. p. 133, lines 10). The judge also stated that, "I have simply at this point determined that the field of forensic interviewing as recognized by Douglas is a ... a recognized field for expert testimony." (R. p. 135, lines 10-12). Counsel for Baker again objected stating, "Judge, and you know my prior objection about forensic interviewing and I understand the Court's position. I ... I do not believe that's a ... area that's proper qualification. Be that as it may, in regards to the ...to her testimony about...about doing the interview and then recommending the medical exam, I would say that's bolstering, Judge and cumulative and the reason I say that is...." (R. p. 151, lines 3-8). The judge replied that "Again, Douglas took care of that." (R. p. 151, line 9).

Counsel reiterated that he objected to the testimony on two grounds: 1.) "forensic interviewing" is not a recognized field for expert testimony; and 2.) Officer Herod was not qualified and therefore the testimony constituted improper bolstering. (R. p. 151, lines 18-24). The judge, over objection, qualified Officer Herod as an expert in "forensic interviewing" and allowed her to testify before the jury. (R. pp. 157-174). The judge found that her testimony met the requirements of Rule 702, SCRE and made a specific finding that the probative value of the testimony outweighed the prejudicial effect. (R. pp.149-150).

Officer Herod interviewed both Victoria Denise W. and Tara W. Victoria Denise W. initially denied that she was the victim sexual abuse. (R. p. 168, lines 1-7). Victoria Denise W. later changed her story. (R. pp. 168-169). In regard to Tara W., Officer Herod testified that, "Based on my interview and the disclosures that she made to me, I felt it was necessary that she have a medical exam done at that time." (R. p. 166, lines 16-17).

The case referred to by the trial judge is State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct.App. 2006) (affirmed as modified). Judge King was the trial judge in both Douglas and the present case. Judge King qualified Officer Herod as an expert witness in “forensic interviewing” in both Douglas and the present case. In Douglas, this Court found that “it was unnecessary for Herod to be qualified as an expert.” State v. Douglas, 380 S.C. 499, 501, 671 S.E.2d 606, 608 (2009). This Court, however, found that “Douglas suffered no prejudice either as a result of Herod’s testimony or by her qualification as an expert.” Id. At 503, 671 S.E.2d at 608-09. This Court wrote, “Moreover, the only **opinion** given by Herod was that she concluded Victim needed a medical exam. A pediatric nurse practitioner thereafter examined Victim and determined she had vaginal tearing and scarring consistent with past penetration. In light of this evidence, there is no conceivable prejudice to Douglas from Herod’s testimony.” Id. at 504, 671 S.E.2d at 609.

In the present case, the Court of Appeals wrote, “Even if we assume the trial judge erred in qualifying Herod as an expert, we find no prejudice as a result of this decision.” State v. Baker, 390 S.C. 56, 700 S.E.2d 440, 445, (Ct. App. 2010); App. p. 9). The Court of Appeals also found that Herod’s testimony did not constitute impermissible bolstering. “Baker’s contention that Herod’s testimony constituted impermissible bolstering is without merit.” Id. at 446, App. p. 10). The Court of Appeals erred.

Unlike Douglas, there was no physical evidence in the present case. The physical findings in the present case were normal. (R. p. 179, lines 18-21). The State’s evidence in the present case was based solely on the testimony of the two nieces, rendering their credibility a critical factor to be determined by the jury. With the absence of physical evidence, the only reasonable conclusion to be drawn is that, in the officer’s “expert opinion,” the niece was being truthful. Under the facts of

this case, the error in qualifying Herod as an expert constitutes improper bolstering and given the absence of physical evidence, prejudices Baker.

As in Douglas, it was unnecessary for Herod to be qualified as an expert. In the present case, Officer Herod's testimony as an "expert" should have been excluded because its probative value was substantially outweighed by its unduly prejudicial effect. See Rule 403, SCRE. Officer Herod could have testified to any probative matters without being declared an expert. See Rule 801 (D), SCRE. The testimony is particularly prejudicial in this case where Baker was prohibited from attacking the credibility of one of the complaining witnesses in cross examination and the only evidence against Baker was the testimony of the nieces.

3. The judge erred in refusing to quash the indictments as vague and overbroad when the time frame alleged spanned six years

Prior to trial Baker moved to quash the indictment because it was unconstitutionally vague and overbroad. (R. pp. 1-36). As outlined in the motion to quash submitted by Baker, four of the six counts allege a time frame of over six years, alleging that incidents took place between June of 1998, and September of 2004. In addition to the motion to quash, Counsel for Baker filed a motion to require the State to be more specific concerning the dates, times and places of the alleged sexual conduct contained in the indictment. (R. 235). The judge denied the motion to quash the indictment. (R. p. 34, lines 19 – p. 36, lines 1-5). The judge erred.

The Court of Appeals utilized the two prong test of State v. Tumbleston, 376 S.C. 90, 654 S.E.2d 849 (Ct. App. 2007): 1.) Is time a material element of the offense? and 2.) Is the time period covered by the indictment prior to the return of the indictment by the grand jury? The Court, however, does not address the six year time frame.

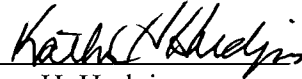
In State v. Wade, 306 S.C. 79, 409 S.E.2d 780 (1991), the Court refused to adopt a *per se* rule of insufficiency for a two year time frame alleged in an indictment. In Baker's case, however, the time frame was over six years. Without creating a *per se* rule of insufficiency, this Court should find that the six year time frame alleged in the indictment is insufficient. As argued by Baker and Wade, it is virtually impossible to try and defend against accusations spanning such a vast period of time without specific dates. (R. pp. 29-30). One of the true tests of the sufficiency of the indictment is whether it apprises the defendant of what he must be prepared to defend. State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987). The indictment in Baker's case fails to meet the sufficiency test set out in Munn.

The Court of Appeals wrote, "The time period covered by the indictments occurred prior to the return of the indictments by the grand jury. Thus, the second prong [referring to the two prong test of Tumbleston] is met, and the indictments were not overly broad." State v. Baker, 390 S.C. 56, 700 S.E.2d 440, 443, (Ct. App. 2010); App. p. 4). The Court of Appeals erred in refusing to address the six year time frame alleged in the indictment as vague and overly broad.

CONCLUSION

Based on the above arguments, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 29th day of November, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County

Howard P. King, Circuit Court Judge

Opinion No. 4698 (S.C. Ct. App. filed 6/15/2010)
05-GS-43-004.

THE STATE,

RESPONDENT,

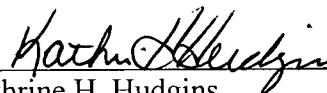
V.

MARK BAKER,

APPELLANT

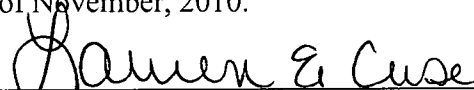
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William M. Blich, Jr., Esquire, and the S.C. Court of Appeals this 29th day of November, 2010.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of November, 2010.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Sumter County
Hon. Howard P. King, Circuit Court Judge

ORIGINAL

RECEIVED

DEC 29 2010

The State,

Respondent,
S.C. Supreme Court

v.

Mark Baker,

Petitioner.

Opinion No. 4698 (S.C. Ct. App. filed June 15, 2010)

**RETURN TO PETITION FOR WRIT OF CERTIORARI
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STATEMENT OF QUESTION PRESENTED

- I. The Court of Appeals correctly found the trial court did not err in limiting cross-examination of the younger niece regarding school disciplinary problems when they were irrelevant, failed to demonstrate bias, and were not probative of truthfulness. Additionally, any error is entirely harmless.
- II. The Court of Appeals correctly found any error in qualifying Officer Herod as an expert in forensic interviewing was harmless. Further, the Court of Appeals properly held the testimony did not constitute improper bolstering.
- III. The Court of Appeals correctly found the trial court did not err in refusing to quash the indictment as time was not of the essence and the indictment was not overbroad.

STATEMENT OF THE CASE

Procedural Background

Petitioner was originally indicted on five counts of lewd act upon a minor and one count of criminal sexual conduct with a minor. Four counts of lewd act involve Petitioner's older niece and alleged the incidents took place between May 2002 and September 2004. The CSC with a minor count also involved the older niece. The fifth count of lewd act alleged Petitioner committed the lewd act on his younger niece between May 2002 and September 2002. The five counts for lewd act were amended to expand the time frame for the incidents back to June 1998. Petitioner was served notice of the amendments on October 3, 2006, and the Sumter County Grand Jury true billed the amended indictment 2005-GS-43-4 on October 26, 2006. Petitioner proceeded to trial before the Honorable Howard P. King and a jury. The jury found Petitioner guilty of four counts of lewd act, all related to the older niece. The jury acquitted Petitioner of the remaining two charges. The court sentenced Petitioner to fifteen years concurrent on three counts and fifteen years consecutive on the fourth, for a total of thirty years imprisonment.

The Court of Appeals issued an opinion affirming the trial court on June 15, 2010. See State v. Baker, 390 S.C. 56, 700 S.E.2d 440 (Ct. App. 2010). Petitioner served and filed a petition for rehearing on June 30, 2010, which was denied on August 27, 2010. This petition follows.

Factual Background

The two alleged victims in this case were Petitioner's nieces who visited Petitioner and his wife in Sumter for a week each summer. (T.164-165; 228-229; R. 58-59; 90-91).

The younger niece first made the allegation that Petitioner was abusing her older sister and denied Petitioner had abused her. (T.185-186; R.70-71). Officer Gwen Herod conducted a forensic interview with each of the girls. (T.348; 353; R.164; 168). The older niece admitted the ongoing abuse by Petitioner. (T.349-350; R. 164-165). The younger niece again denied Petitioner had abused her. (T.353; R.168). As a result of the interview, Officer Herod believed the older niece needed to be referred for a medical exam. (T.351; R. 166). Dr. Anne Abel conducted the medical exam during which the older niece again disclosed the abuse. (T.401-402; R.178-179).

Originally, the older niece indicated the abuse occurred for several years, from 2002 until 2004. (T.245; R. 107). She indicated Petitioner would pull down her underpants and rub his penis on her buttocks, back, and other areas of her body. (T.234-235; R. 96-97). The older niece indicated Petitioner would kiss her, including trying to stick his tongue in her mouth, and once tried to make her perform oral sex on him. Finally, she stated he digitally penetrated her. (T.238; R. 100). Based on these allegations, Petitioner was indicted for one count of criminal sexual conduct with a minor (Count 1) and 4 counts of committing a lewd act upon a minor (Counts 2-5). (Indictment; R.219-221).

The younger niece subsequently indicated she was also abused by Petitioner, but only on one occasion. (T.169-170; 186-187; 353-354; R. 63-64, 71-72; 168-169). She indicated Petitioner rubbed his penis on her one time, but that he never did it again. (T.174-176; R. 68-70). For this, Petitioner was charged with one count of committing a lewd act upon a minor (Count 6). (Indictment; R.219-221).

The original dates of Counts 2-5 indicated the abuse happened between 2002 and 2004. However, after the sisters viewed photos of their visits to Sumter to visit kept in their Aunt's scrapbook, the older niece indicated the abuse began before her youngest sister was born in October 1998. (T.233; 246; R. 95; 108). The younger niece also indicated the one time she was abused must have occurred in 1998 as well. (T.171; 187; R. 65; 72). Prior to trial, the indictment was amended to reflect a change in the dates for Counts 2-5 of 1998 through 2004. Additionally, Count 6 related to the younger niece was amended to reflect the abuse occurred during the summer of 1998. (Amended Indictment; R.212-214).

ARGUMENT

- I. **The Court of Appeals correctly found the trial court did not err in limiting cross-examination of the younger niece regarding school disciplinary problems when they were irrelevant, failed to demonstrate bias, and were not probative of truthfulness. Additionally, any error is entirely harmless.**

Petitioner contends the Court of Appeals erred in affirming the trial court's limitation of his cross-examination of the younger niece regarding two school disciplinary incidents. The incidents, however, do not demonstrate any motive to fabricate because the main incident occurred after the girl made the allegations. Further, neither incident was probative of the girls character for truthfulness. Finally, the Petitioner sought to cross-examine the younger niece about her bias and motive for fabrication in making the initial allegations, but the allegations of abuse related to the older niece and, at trial, the older niece testified fully about the abuse perpetrated by Petitioner.

Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). In order to state a violation of the confrontation clause, a criminal defendant must show he was "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness." Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); State v. Gillian, 360 S.C. 433, 451, 602 S.E.2d 62, 71 (Ct. App. 2004).

Further, as stated by the Court of Appeals in Gillian stated:

The Confrontation Clause does not, however, prevent a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness safety, or interrogation that is repetitive or only marginally relevant.

Gillian, 360 S.C. at 451, 602 S.E.2d at 71 (citing Van Arsdall, 475 U.S. 673).

The trial court in this case clearly did not abuse his discretion in limiting the cross-examination of the younger niece. In October 2004, the younger niece alleged Petitioner abused her older sister when they spent time at their Aunt and Uncle's house in Sumter. (T.185; R.70). Petitioner sought to cross-examine the younger niece regarding two disciplinary incidents at school that occurred about the same time as when she made the allegations regarding abuse of her sister.

The disciplinary incidents were not relevant and did not demonstrate any bias or motive to misrepresent on the part of the witness. (T.119-121; 154-156; R.43-45; 48-50). The first incident involved the girl being in the library when she did not have a pass. As a result, she was written up for cutting class. (T.159; R. 53). It seems highly unlikely the witness would fabricate a story of her uncle abusing her older sister in order to deflect attention from this incident. Further, the evidence would not demonstrate the "prototypical form of bias" as to form a violation of the Confrontation Clause or Rule 608(c), SCRE. Finally, this incident was not probative of the witness' character of truthfulness or veracity as required under Rule 608(b), SCRE.

The second incident did not even occur until after the younger niece made the allegations against Petitioner. (T.157; R. 51). In the second incident, she was expelled under a zero tolerance policy because she had a prescription pain pill in her possession on school grounds without a proper prescription. (T.158-159; R. 52-53). This incident, while the more major infraction in terms of the punishment, could not have been used to demonstrate bias because it occurred after she made the allegations. Additionally, it also was not probative of the truthfulness of the witness under Rule 608(b), nor does it demonstrate bias or a motive to misrepresent under Rule 608(c).

Finally, if an error occurred, it would be entirely harmless. For the error to be harmless, the court must determine “beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.” Taylor v. State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993) (citing Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)). “[A]n insubstantial error not affecting the result of the trial is harmless where ‘guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.’” State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (quoting State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)). “Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial.” State v. Sherard, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991).

The allegations originally made by the younger niece were not that she was abused, but alleged Petitioner abused her older sister. The credibility of the younger niece was not relevant to a determination of whether the older niece was abused when the older niece thoroughly testified to the abuse by Petitioner. As a result, the fact Petitioner was not

able to cross-examine the younger niece was harmless at best because it was the credibility of the victim, the older niece, that was relevant to a determination of guilt or innocence on the charges. Even if the incidents demonstrated the younger niece had a motive or bias for making the allegations, the substance of the allegations was proven by the testimony of the older niece. Accordingly, the Court of Appeals properly affirmed the trial court, and the petition for writ of certiorari on this issue should be denied.

II. The Court of Appeals correctly found any error in qualifying Officer Herod as an expert in forensic interviewing was harmless. Further, the Court of Appeals properly held the testimony did not constitute improper bolstering.

Petitioner contends the Court of Appeals erred in finding any error in qualifying Officer Herod as an expert in forensic interviewing was harmless. Further, he maintains the Court of Appeals erred in finding the testimony was not impermissible bolstering. The Court of Appeals correctly relied on this Court's opinion in State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009)¹ (hereinafter referred to as Douglas II) to find any error was harmless. Further, the testimony Petitioner points to as improper bolstering was merely cumulative to other un-objected to testimony in the record.

Prior to her testimony, the court allowed a proffer of Officer Herod's qualifications and proposed testimony. (T.299-315; 318-332; R.115-132). As a result of the proffer, and relying on the Court of Appeals' decision in State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006), the trial court indicated he would qualify Officer Herod as an expert and allow her testimony. (T.317; 332-333; R.134; 149-150). At trial, Officer Herod was again qualified and allowed to testify. (T.345; R.160). She indicated she used the RATAC method to conduct a forensic interview of the victims. (T.346; 348; 353; R.161; 163; 168). Further, she testified the older niece disclosed the abuse, but the younger niece denied being abused. (T.349-350; 353; R.164-165; 168). Finally, she indicated that as a result of the interview, she believed the older niece should be referred for a medical exam. (T.351; R.166).

¹The State notes Officer Herod was the witness qualified as an expert in Douglas II, and her testimony in this case differs very little from her testimony as recounted by this Court in Douglas II.

In Douglas II, this Court found the testimony by Officer Herod was not required to be presented by an expert witness, and the Court concluded it was unnecessary for the trial court to have qualified her as an expert. Douglas II, 380 S.C. at 503, 671 S.E.2d 608. In this case, as in Douglas II, Officer Herod testified regarding her interview with the victims as well as the steps she took as a result of the interviews.

Petitioner in this case, maintains Officer Herod's testimony was unduly prejudicial because she could have testified to any probative matters without being declared an expert. In the instant case, the trial court charged the jury regarding their role and the consideration of the evidence:

As jurors then it is your duty to determine as I have stated to you the effect, the value, the weight, and the truth of the evidence presented during the course of this trial. Necessarily then you must assess the credibility of the witnesses who have testified in this case. Credibility is simply a legalistic term meaning believability. It becomes your duty then to analyze and evaluate the evidence and to determine that evidence which convinces you of its truth. I charge you that in determining the question of credibility or believability of the witnesses you may believe the one witness as against several witnesses or several witnesses as against one witness. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety. You may consider whether any witness has exhibited any interest, any bias or any prejudice in the case. And you may consider the demeanor of the witness, that is the appearance of a witness from the witness stand. And you may consider the opportunity for knowledge concerning those things about which a witness testified. These considerations you do not exercise arbitrarily but if in your good judgement there is sound reason in the record for so doing. For your ... your objective, ladies and gentlemen, is to find the truth. (T.559-560; R. 205-206) (Emphasis added).

The trial court continued regarding the jury's consideration of expert testimony:

Now, there have been ... it has been admitted into this case certain testimony from expert witnesses. I would tell you that the rules of evidence ordinarily do not permit witnesses to testify to opinions or conclusions. An exception to this rule exists for witnesses we call expert witnesses. A witness [who] by education and experience has become expert in some art, science, profession or calling may state an opinion as to relevant and material matter in which the witness claims to be an expert and they'll also state the reasons for the opinion. You should consider the expert opinion received [into] evidence in this case and like any other evidence give it the weight you think that it deserves. If you decide that the opinion of an expert witness is not based on sufficient education and experience or if you conclude that the reasons given in support of their opinion are not sound or that the opinion is outweighed by other evidence, you may disregard the opinion entirely. An expert witness testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert. Further, you are not required to accept an expert's opinion even though it is not contradicted.

(T.560; R.206) (Emphasis added).

The jury was clearly informed that they could assign their own weight to the expert testimony, and they should treat the testimony the same as all other testimony without ascribing special weight to the designation of the witness as an expert. This Court in Douglas II found no prejudice as a result of Officer Herod being qualified as an expert. Accordingly, in the instant case, Petitioner was not prejudiced by the designation of Officer Herod as an expert when her testimony could have been received without such designation, and the jury was specifically instructed not to assign additional weight to her designation as an expert. See Douglas II, 380 S.C. at 503, 671 S.E.2d at 609.

Further, Petitioner's argument that the testimony constituted impermissible bolstering is also without merit. Officer Herod never testified she believed the testimony of either victim. The only time she testified regarding telling the truth was during a colloquy on cross-examination by Petitioner's counsel:

Q. In regards to the ... to the rapport stage, part of what you emphasize to them is the importance of telling the truth, don't you?

A. Yes, sir. We talk about that and I'm also assessing whether the child can even differentiate between the truth and a lie.

Q. Okay.

A. But we do talk about the truth and the importance of it.

Q. Right.

A. Yes, sir.

Q. And when you ... and you did a forensic interview of Tara, is that right?

A. Yes, sir, I did.

Q. Okay. And you also did a forensic interview of Denise at that time, is that correct?

A. After Tara.

Q. After Tara.

A. The same day.

Q. Both of those occurred on October 21st, 2004, right?

A. That's correct.

Q. When you ... when you did the forensic interview on Tara you emphasized to her in that standardized portion the importance of telling the truth, didn't you?

A. Yes, sir, I do in every interview.

Q. Okay. And you did it then ... if you did it with every interview you did it with Denise.

A. I did. (T.355-356; R.170-171).

Accordingly, if it was error for Officer Herod to discuss the need for the witness to tell the truth or the importance of the victims telling the truth, the issue was raised by Petitioner and he cannot on appeal complain of any error he created. See State v. Beam, 336 S.C. 45, 52,

518 S.E.2d 297, 301 (Ct. App. 1999) (finding a party cannot complain of prejudice from the admission of evidence if he opened the door to its admission).

Additionally, Petitioner contends Officer Herod's testimony constituted improper bolstering. (T.351; R.166). Her opinion that "[b]ased on my interview and the disclosures that [the older niece] made to me, I felt it was necessary that she have a medical exam done at that time" was permissible whether Officer Herod was qualified as an expert or not. See Rule 701, SCRE. The opinion is rationally based on her interview with the victim and the perceptions she made, is helpful for determining the progression of the case, and does not require specialized skill or knowledge. In addition, the testimony would not qualify as improper bolstering, nor did Officer Herod vouch for the veracity of the witness. See Douglas II, 380 S.C. at 504, 671 S.E.2d at 609.

Finally, even if the statement by Officer Herod regarding the victim's need for a medical exam is bolstering or otherwise inadmissible, the error in admission would be harmless because it is cumulative to other un-objected to testimony in the record. Dr. Anne Able, the pediatric physician that conducted the medical exam of the older niece testified the victim was referred for a sexual abuse protocol exam by Officer Herod. (T.401-402; R.178-179). Further, she testified the forensic interview was already conducted by Officer Herod so her responsibility was to conduct a medical exam, which included a disclosure of the abuse by the victim as part of the history Dr. Able received. (T.402; R.179).

Also, Sergeant Dailey testified Officer Herod conducted a forensic interview of the older niece and as a result of the interview a medical exam was scheduled. (T.470-472;

R.201-203). Accordingly, any error in admission of the statement by Officer Herod is harmless given the other un-objected to testimony in the record.

Therefore, while it may have been error for the trial court to qualify Officer Herod as an expert, Petitioner cannot demonstrate how he was prejudiced by the designation, and his argument that the testimony and designation were improper bolstering is also without merit. Accordingly, the Court of Appeals properly affirmed the trial court, and the petition for writ of certiorari on this issue should be denied.

III. The Court of Appeals correctly found the trial court did not err in refusing to quash the indictment as time was not of the essence and the indictment was not overbroad.

Petitioner contends the Court of Appeals erred in finding the trial court correctly denied his motion to quash the indictment. (T.51-57; R.2-8). The time is not of the essence in cases involving either criminal sexual conduct or committing a lewd act upon a minor. As a result, the court did not err in denying the motion to quash the indictments.

The indictment is a notice document, and any challenge to the sufficiency of an indictment must be made before the jury is sworn. See State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005).

If the objection is timely made, the circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.

Id. at 102-103; 610 S.E.2d at 500 (citing S.C. Code Ann. § 17-19-20 (2003); State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003)).

Further, in determining whether an indictment is sufficient, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances. State v. Tumbleston, 376 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct. App. 2007)(citing, *inter alia*, State v. Means, 367 S.C. 374, 383, 626 S.E.2d 348, 353-54 (2006)). An indictment generally passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily

understood. Id. at 98, 654 S.E.2d at 853 (citing State v. Reddick, 348 S.C. 631, 635, 560 S.E.2d 441, 443 (Ct. App. 2002)).

“Where time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly occurred.” State v. Nicholson, 366 S.C. 568, 574, 623 S.E.2d 100, 103 (Ct. App. 2005) (quoting State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App. 1991)). A two-prong test exists for determining the sufficiency of an indictment involving a purportedly overbroad time period: (1) whether time is a material element of the offense; and (2) whether the time period covered by the indictment occurred prior to the return of the indictment by the grand jury. Tumbleston, 376 S.C. 90, 98-99, 654 S.E.2d 849, 853-854.

“Time is not a material element of . . . committing a lewd act on a minor.” Id. at 101, 654 S.E.2d at 855; see also, S.C. Code Ann. § 16-15-140 (Supp. 2007) (“It is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child.”). As a result, there was no need for the State to prove the lewd act occurred at a specific time or date. See Id. (finding an indictment which stated the charged occurred “on or between 2001 and June 2004” was sufficient).

The four counts of lewd act in the amended indictment all stated:

That MARK BAKER, a person over the age of fourteen (14) years, did in Sumter County between the period of June 1, 2001 and September 1, 2004, violate Section 16-15-140 of the Code of Laws of South Carolina (1976), as amended, in that the said MARK BAKER did wilfully and lewdly commit or

attempt to commit a lewd and lascivious act upon or with the body, or any part or member thereof, of a child under the age of sixteen (16) years; to-wit: [Older Niece] (Date of Birth: . . . /89), with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of himself or of the said child.

(Amended Indictment, counts 2-5; R.212-214). The indictments clearly track the language of section 16-15-140, identify the elements of the crimes for which Petitioner was charged, establish the victim was under the age of sixteen by designating her birth date, and show the offenses occurred prior to the return of the indictment by the grand jury.

Further, the circumstances of the case demonstrate the time frame delineated in the indictments was appropriate. The victim was a child at the time the offenses occurred. She had some difficulty remembering dates related to the offenses. Additionally, she indicated the offenses took place over a significant period of time and not just a single or two-time occurrence. (T.238; R.100). Originally, the older niece indicated the abuse occurred for several years, from 2002 until 2004. However, after she and her younger sister viewed photos of their visits to Sumter to visit kept in their Aunt's scrapbook, the older niece indicated the abuse began before her youngest sister was born in October 1998 and before her Aunt and Petitioner got air conditioning, which also occurred in 1998. (T.233; R.95).

The older niece indicated the lewd acts by Petitioner occurred every summer they went to Sumter to visit from 1998 until 2004, when the abuse was finally disclosed. (T.238; R. 100). As stated in Tumbleston: "Indeed, indictments for a sex crime that allege offenses occurred during a specified time period are sufficient when the circumstances of the case warrant considering an extended time frame." Tumbleston, 376 S.C. at 102, 654 S.E.2d at

855 (citing Nicholson, 366 S.C. at 574, 623 S.E.2d at 103; State v. Alexander, 140 S.C. 325, 138 S.E. 835, 839 (1927)). This is certainly true when the victim indicates the abuse was ongoing over a significant period of time as exists in this case.

Additionally, the notion that a specified time period prevented Petitioner from adequately preparing his defense to the charges is without merit. Reading the indictments objectively from a reasonable person's view, they contain the necessary elements of the offenses charged and sufficiently apprise Petitioner of the charges he must face. Petitioner proceeded with the defense of denial, and the jury simply rejected this defense. He never asserted a defense based on alibi, either before or after the amendment of the indictment to expand the time frame. His contention regarding the sufficiency of the indictments is without merit and the trial court did not abuse his discretion in denying Petitioner's motion. Accordingly, the Court of Appeals properly affirmed the trial court, and the petition for writ of certiorari on this issue should be denied.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari to the Court of Appeals should be denied.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

C. KELLY JACKSON
Solicitor, Third Judicial Circuit

Sumter County Courthouse
Sumter, South Carolina 29150
(803) 436-2185

BY:


William M. Blich, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
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ATTORNEYS FOR RESPONDENT

December 29, 2010

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Sumter County
Hon. Howard P. King, Circuit Court Judge

The State,

Respondent,

v.

Mark Baker,

Petitioner.

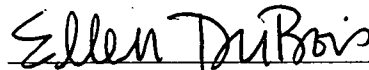
Opinion No. 4698 (S.C. Ct. App. filed June 15, 2010)

PROOF OF SERVICE

I, ELLEN DuBOIS, certify that I have served the within Return to Petition for Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
P. O. Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 29th day of December, 2010.



ELLEN DuBOIS

Legal Assistant

Office of Attorney General

Post Office Box 11549

Columbia, SC 29211

(803) 734-3727



HENRY McMASTER
ATTORNEY GENERAL

December 29, 2010

RECEIVED

DEC 29 2010

S.C. Supreme Court

Kathrine H. Hudgins, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
P. O. Box 11589
Columbia, South Carolina 29211

Re: State v. Mark Baker

Dear Ms. Hudgins:

I am enclosing two (2) copies of the Return to Petition for Writ of Certiorari to the Court of Appeals in the above-referenced case.

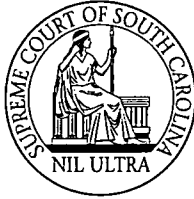
If you have any questions concerning this matter, please contact me.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General

WMB:erd
Enclosures

cc: ~~Honorable Daniel E. Shearouse~~ (original and six enclosed)
Victim Services (enclosure)



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 30, 2010

Appellate Defender Kathrine H. Hudgins
South Carolina Commission
on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Baker, Mark
Case Tracking No. 2010-172951

Dear Counsel:

This office has received your Petition for Writ of Certiorari and Appendix in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,



CLERK

The State v. Baker, Mark
Page Two
November 30, 2010

DES/lda

cc: Assistant Attorney General William M. Blich, Jr.
Cecil Kelly Jackson, Esquire
The Honorable Tanya Gee

The Supreme Court of South Carolina

The State,

Respondent,

v.

Mark Baker,

Petitioner.

The Honorable Howard P. King
Sumter County
Trial Court Case No. 2005-GS-43-004

ORDER

For good cause shown, the request for an extension to serve and file the Petition for Writ of Certiorari and Appendix is granted and extended until November 26, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

October 28, 2010

cc: Appellate Defender Kathrine H. Hudgins
Assistant Attorney General William M. Blicht, Jr.
The Honorable Tanya Gee



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

 ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

October 27, 2010

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

RECEIVED

OCT. 27 2010

S.C. Supreme Court

Re: The State v. Mark Baker
County: Sumter
Indictment: 05-GS-43-004
Judge: Howard P. King
Trial Date: November 16, 2006

Dear Mr. Shearouse:

The Petition for Writ of Certiorari and accompanying appendix are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting a thirty day extension in which to serve and file the petition.

By copy of this letter, I am informing William M. Blich, Jr., of the Attorney General's Office, of my request.

Sincerely,

Kathrine H. Hudgins
Appellate Defender

KHH/lec

cc: Court of Appeals
William M. Blich, Jr., Esquire

The Supreme Court of South Carolina

The State, Respondent,
v.
Mark Baker, Petitioner.

The Honorable Howard P. King
Sumter County
Trial Court Case No. 2005-GS-43-004

ORDER

For good cause having been shown, the time for serving and filing the
Petition for Writ of Certiorari and Appendix in the above entitled matter is
hereby extended until October 27, 2010.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

September 27, 2010

cc: Appellate Defender Kathrine H. Hudgins
Assistant Attorney General William M. Blicht, Jr.
The Honorable Tanya Gee

FILED



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

September 24, 2010

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

RECEIVED

SEP 24 2010

S.C. SUPREME COURT


Re: The State v. Mark Baker
County: Sumter
Indictment: 05-GS-43-004
Judge: Howard P. King
Trial Date: November 16, 2006

Dear Mr. Shearouse:

The Petition for Writ of Certiorari and accompanying appendix are due to be served and filed with the Court **Monday, September 27, 2010**. However, because of my heavy workload at this time, I am requesting a thirty day extension in which to serve and file the petition.

By copy of this letter, I am informing William M. Blicht, Jr., of the Attorney General's Office, of my request.

Sincerely,


Kathrine H. Hudgins
Appellate Defender

KHH/lec

cc: Court of Appeals
William M. Blicht, Jr., Esquire

2006-39479
11-16-06
pub