THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

APPEAL FROM GREENVILLE COUNTY
Edward W. Miller, Circuit Court Judge

Opinion No. 5503 (S.C. Ct. App. filed July 26, 2017)

THE STATE, ...RESPONDENT,

V.

WALLACE STEVE PERRY, ...PETITIONER.

APPELLATE CASE NO. 2017-001965

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The Court of Appeals issued its decision on July 26, 2017. (App. p. 366). Counsel for Petitioner certifies that the petition for rehearing was timely made on August 10, 2017 and denied on August 24, 2017. (App. pp. 383, 389).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding Brandy Newcomer's testimony was admissible evidence of a common scheme or plane and her testimony was more probative than prejudicial under Rule 403, of the South Carolina Rules of Evidence?
2. Did the Court of Appeals err Dr. Henderson did not improperly comment on the veracity of Daughter Three's testimony?

STATEMENT OF THE CASE

Prior to trial, the State proffered the testimony of Brandy Newcomer as a witness under Rule 404(b), South Carolina Rules of Evidence, to testify about the prior bad acts of Petitioner Wallace Steve Perry ("Perry"). (App. p. 22, ll. 6-9). Newcomer was Perry's stepdaughter from a prior marriage. (App. p. 22, ll. 22-25). The State represented that Perry allegedly digitally penetrated Newcomer, performed oral sex on her, and the two eventually had sex. (App. p. 23, ll. 1-6). However, the State offered to limit Newcomer's testimony about having sex with Perry to redact dissimilar particulars of the sexual conduct. (App. p. 23, ll. 7-11). During the proffer, Newcomer testified Perry snuck into her room one night, the sexual abuse "progressed," and "the penetration and everything started." (App. p. 28, ll. 23-25).

The State argued Newcomer was a proper 404(b) witness for showing a motive, common scheme, or plan because (1) she, Daughter Two, and Daughter Three were "tweens" when the abuse occurred; (2) Perry was the father figure for all three girls; (3) the abuse always occurred in

Perry's home; (4) the alleged abuse of the three girls involved digital penetration and occurred during nighttime hours; and (5) Perry threatened the girls would get into trouble if they said anything. (App. p. 35, ll. 1-App. p. 36, ll. 15). Perry objected to Newcomer as a 404(b) witness. (App. p. 31, ll. 7-8; App. p. 38, ll. 10-13). Perry issued a subpoena to the Spartanburg Solicitor's Office regarding the charges against Perry relating to Newcomer. (App. p. 39, ll. 10-19). The Solicitor's Office did not have any records on any charges related to Newcomer, except that Perry participated in pre-trial intervention without admitting any guilt. (App. p. 39, ll. 13-19). The State admitted there was no trial because Newcomer was pregnant at the time, there were concerns the defense would characterize her as "sexually promiscuous," and she suffered from serious mental health issues. (App. p. 38, ll. 20-App. p. 39, ll. 5). The trial court reserved ruling on the issue. (App. p. 37, ll. 21-24).

During the trial, the trial court indicated it was inclined to allow Newcomer's testimony. (App. p. 157, ll. 1-2). Perry again objected to the admission of Newcomer's testimony. (App. p. 157, ll. 3-8). Perry argued the admission of Newcomer's testimony would only confuse the jury, divert attention away from the case at hand, and create serious prejudice. (App. p. 158, ll. 10-19). Moreover, Perry argued Newcomer's testimony was inadmissible to show a common scheme or plan because the State's attempt to tie Newcomer's testimony to Daughter Two and Daughter Three's testimony was too attenuated. (App. p. 159, ll. 14-19). The fact that the alleged abuse occurred in Perry's home or with people he knew did not create a common scheme or plan. (App. p. 159, ll. 14-19).

Perry also submitted records from the Solicitor's Office, which showed the records relating to any charges against Perry had been destroyed. (App. p. 160, ll. 1-2; App. p. 296-97). Thus, neither the State nor Perry had any way to review prior court records to determine Newcomer's

credibility. (App. p. 160, ll. 2-8). Finally, Perry argued the decision under State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), was unconstitutional.[1] The trial court found Newcomer's testimony was admissible under the 404(b) exception. (App. p. 162, ll. 20-24).

Newcomer testified her mother and Perry married when she was around five years old, and they separated when she was fourteen years old. (App. p. 221, ll. 1-3). Newcomer, who was thirty-six years old at the time of Perry's trial, claimed Perry put his hands down her pajamas one night when she was nine years old. (App. p. 223, ll. 3-6). She stated this continued until Perry stopped touching her when she was thirteen years old. (App. p. 224, ll. 19-22). Newcomer recalled Perry usually touched her when she was in her bedroom, but sometimes it occurred in the bathroom. (App. p. 226, ll. 8-10). She alleged Perry performed oral sex on her once. (App. p. 226, ll. 16-18). Newcomer stated Perry threatened her not to tell because no one would believe Newcomer and Newcomer's accusations would hurt the family. (App. p. 224, ll. 4-5). She waited to tell her mother about Perry touching her until she was fourteen years old. (App. p. 224, ll. 11-12). Newcomer's mother and Perry were still married when Newcomer alleged Perry had inappropriately touched her, but her mother left Perry shortly thereafter due to Newcomer's allegations. (App. p. 227, ll. 8-10).

Perry met Laura Jones in their neighborhood in 1993, around the time he separated from Newcomer's mother. (App. p. 52, ll. 3-8). The pair never married, but they had two set of twins—Daughter One and Daughter Two, and Daughter Three and Son. (App. p. 53, ll. 1-6). Daughter One and Daughter Two were born in 1994, and Daughter Three and Son were born in 1996. (App.

[1] In Wallace, the Supreme Court found a defendant's prior bad act of sexually abusing the accuser's sister was admissible.

p. 70, ll. 17-20). Perry and Jones separated in 2000, but they remained close friends after separating. (App. p. 53, ll. 7-8).

Although Perry and Jones did not have a formal custody arrangement, they decided Jones had custody during the week and Perry had custody on the weekends from Friday until Sunday afternoon. (App. p. 53, ll. 17-23). Perry also had custody of their children during the holidays. (App. p. 53, l. 23). Although there was no formal court order, Perry regularly paid child support. (App. p. 53, l. 25). When the pair separated, Daughter One and Daughter Two were five years old and Daughter Three and Son were three years old. (App. p. 54, ll. 9-10). Jones described Perry as a "very good father." (App. p. 55, ll. 1-2). Jones spoke with Perry often during the week, especially if one of their children was having issues at school. (App. p. 55, ll. 6-9).

In March 2012, Daughter Three told Jones that Perry had sexually abused her during her weekend visitations with him. (App. p. 55, ll. 14-22). Shortly thereafter, Daughter Two also claimed Perry sexually abused her. (App. p. 57, l. 21). Jones waited over two months before reporting the allegations of sexual abuse, and only after her older children urged her to report the accusations. (App. p. 55, ll. 19-25; App. p. 57, ll:11-13). Jones testified neither Daughter Three nor Daughter Two had ever claimed to have any problems with Perry before. (App. p. 62, ll. 9-13).

Daughter Three testified she was approximately three years old when her parents separated. (App. p. 72, ll. 5-7). Daughter Three recalled visiting Perry with her siblings every weekend as a child. (App. p. 72, l. 22). When the children first began visiting Perry, he was living at the Churchill Apartments where he worked in maintenance. (App. p. 72, ll. 15-16). Perry's apartment at Churchill had three bedrooms. (App. p. 72, ll. 10-11). Daughter Three recalled Son and Perry

each had their own room, and she slept with her two other sisters on one air mattress in the other bedroom. (App. p. 73, ll.13-19). Daughter Three alleged Perry came into their bedroom in the early morning hours and lay on the air mattress with the three girls. (App. p. 76, ll. 7-15). Daughter Three claimed she woke up one morning when Perry's finger was in her vagina. (App. p. 75, ll. 5-6). She stated Perry began touching her when she was ten years old until she was eleven years old. (App. p. 75, ll. 10-14; App. p. 98, ll. 8-13).

Daughter Three testified Perry never woke up the other two girls when he lay on the air mattress with them. (App. p. 76, ll. 16-19). Although Daughter One and Daughter Two never awoke during these alleged visits, Daughter Three claimed she woke up once when Perry began touching Daughter Two because she could feel the air mattress moving around. (App. p. 78, ll. 1-3). However, Daughter Three did not tell her mother about Perry allegedly touching her or her sister until she was in high school. (App. p. 80, ll. 11-22). Daughter Three claimed Perry threatened her not to tell because she would get in trouble or be taken away from her mother. (App. p. 75, ll. 19-23).

Daughter Two testified Perry began touching her when she was five or seven years old during her visits to his apartment on the weekends. (App. p. 115, ll. 17-18; App. p. 127, ll. 1-12). Daughter Two claimed Perry came into the girls' bedroom in the early morning hours. (App. p. 115, ll. 22-23). Daughter Two recalled her two sisters slept with her on an air mattress in their bedroom. (App. p. 116, ll. 4-9). According to Daughter Two, the air mattress was pushed against the side of one wall in their bedroom. (App. p. 124, ll. 11-12). Daughter One slept on the side of the air mattress facing the wall, Daughter Three slept in the middle of her two sisters, and Daughter Two slept on the outside of the air mattress. (App. p. 124, ll. 8-10).

Around 2007, Perry moved to the Carlyle Apartments. (App. p. 116, ll. 22-23). Daughter Two recalled she and Daughter Three shared a bedroom, Daughter One slept on the couch, and Perry shared a bedroom with Son while Perry lived at the Carlyle apartments. (App. p. 117, ll. 1-9). According to Daughter Two, Perry continued visiting her bedroom during the early morning hours. (App. p. 117, ll. 12-15). Perry allegedly threatened Daughter Two not to tell anyone or either the children would be taken away from their mother. (App. p. 116, ll. 1-3). Daughter Two claimed Perry put his fingers in her vagina, and he performed oral sex on her two times. (App. p. 117, ll. 12-15). She stated Perry stopped touching her when she was around sixteen or seventeen years old. (App. p. 120, ll. 12-17). Daughter Two continued visiting Perry every weekend until Daughter Three claimed Perry had abused her. (App. p. 120, ll. 10-11).

Daughter One—Daughter Two's twin sister—recalled sleeping on the air mattress at the Churchill Apartments with Daughter Two and Daughter Three. (App. p. 193, ll. 13-17). When Perry moved to the Carlyle apartments, Daughter One began sleeping on the couch while Daughter Two and Daughter Three continued to share a room. (App. p. 193, ll. 18-23). Daughter One never saw or heard Perry touching her sisters. (App. p. 195, ll. 1-7).

Detective Mary Thomas, of the Greenville Police Department, testified there was no physical evidence with this case. (App. p. 146, ll. 10-23). Dr. Nancy Henderson, qualified as an expert in child sexual abuse, testified she examined Daughter Two and Daughter Three. (App. pp. 178-79, ll. 14-ll. 6). Although Daughter Three had a normal examination with no specific findings, Dr. Henderson opined her findings were consistent with Daughter Three having experienced sexual abuse based solely on Daughter Three's allegations. (App. p. 185, ll. 16-19). Perry objected, arguing Dr. Henderson was improperly vouching, but the trial court overruled the objection. (App. p. 185, ll. 20-25). Similarly, Dr. Henderson testified Daughter Two's normal

examination was consistent with Dr. Henderson's opinion that Daughter Two had been sexually abused. (App. p. 188, ll. 3-11).

Perry denied touching or performing oral sex on Daughter Two, Daughter Three, or Newcomer. (App. p. 239, ll. 20-25; App. p. 240, ll. 12-25). Perry further denied lying in Daughter Two and Daughter Three's room next to the air mattress in the early morning hours. (App. p. 242, ll. 8-14). In fact, Perry was usually not up that early in the morning. (Id.). Perry testified that shortly before Daughter Two and Daughter Three made these accusations, his children became very upset when he moved in with his girlfriend, Angela Ramey. (App. p. 241, ll. 18-24). Ramey and their friend, Patty Frye, similarly testified Ramey and Perry's relationship with his children became tense when Ramey moved in with Perry. (App. p. 237, ll. 8-10; App. p. 238, ll. 1-4).

The jury found Perry guilty of first-degree criminal sexual conduct (CSC) and second-degree CSC with Daughter Two. (App. p. 283, ll. 14-22). The jury also found Perry guilty of first-degree CSC and second-degree CSC with Daughter Three. (App. p. 283, ll. 23- App. p. 284, ll. 8). The trial court sentenced Perry to concurrent thirty-year sentences for each of the two first-degree CSC convictions and twenty-year sentences for each of the two second-degree CSC convictions. (App. p. 293, ll. 9-11). The Court of Appeals affirmed Perry's convictions. (App. 366).

ARGUMENT

I. The Court of Appeals Erred in Holding Newcomer's Testimony was Admissible Evidence of a Common Scheme or Plan. Moreover, Newcomer's Testimony was More Prejudicial than Probative under Rule 403, of the South Carolina Rules of Evidence.

a. Evidence of a Common Scheme or Plan

"[N]o tenent of evidence law in the context of 'prior bad acts' is more firmly established than the principle that propensity or character evidence is inadmissible to prove the specific crime charged . . . ." State v. Tuffour, 364 S.C. 497, 502, 613 S.E.2d 814, 817 (Ct. App. 2005), *vacated*, 371 S.C. 511, 641 S.E.2d 24 (2007). Evidence of other bad acts may be admitted only to prove defendant's guilt if that evidence establishes: (1) motive; (2) intent; (3) absence of mistake or accident; (4) identity; or (5) a common scheme or plan involving other crimes so closely related to the one charged than proof of one tends to prove the other. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

With regard to a common scheme or plan exception, the State must prove more than a close degree of similarity between the prior bad acts and the crime charged to satisfy Lyle. State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997). In other words, the fact that a person commits two similar crimes does not satisfy the "common scheme or plan" exception. State v. Stokes, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983). The mere presence or similarity only serves to enhance the potential for prejudice. State v. Parker, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993). Instead, there must be a connection between the other prior bad acts and the crime charged "so that proof of the former tends to prove the latter." Stokes, 279 S.C. at 193, 304 S.E.2d at 815.

In State v. Wallace, the Court held evidence of other acts of sexual misconduct was admissible in a trial for CSC with a minor as a common scheme or plan under Rule 404(b) if there was a "close degree of similarity" between the two acts. 384 S.C. 428, 434, 683 S.E.2d 275, 278 (2009). The trial court should weigh the similarities with the dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. Id. at

433, 683 S.E.2d at 278. If the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b). Id.

The Wallace Court provided a number of factors the trial court should consider when determining whether the bad act and the crime charged had a close degree of similarity, including, (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of occurrence, for example, the type of sexual battery. Id. Wallace essentially created an exception to Rule 404(b)'s exclusion of propensity evidence. In non-sexual offense cases, the mere presence of similarity only enhances the potential for prejudice; however, in cases where the defendant has been charged with a sexual offense, a close degree of similarity seems to satisfy Lyle.

In Wallace, the defendant was accused of sexually abusing a minor child by touching her breasts and digitally penetrating her. Id. at 431, 683 S.E.2d at 276-77. The defendant began touching the child's breasts when the child was in seventh grade. Id. at 431, 683 S.E.2d at 276. One night, the defendant pulled the child's pants off and "pushed his hands up her private parts." Id. The child disclosed the sexual abuse to her older sister the next day. Id. at 431, 683 S.E.2d at 277. The sister alleged the defendant had also sexually abused her from the time she was in seventh grade until she graduated from high school. Id. at 431, 683 S.E.2d at 277. The sister's abuse began with touching of the breasts, digital penetration and oral sex, and then progressed to the point of intercourse. Id. at 435, 683 S.E.2d at 278. The Supreme Court found the trial court had properly redacted the sister's testimony regarding intercourse, which was dissimilar to the child's abuse, to avoid unfair prejudice to the defendant. Id. The Court noted the fact that the

child's abuse was interrupted before it could culminate in intercourse did not diminish the similarity between the progression the abuse took in each case. Id.

Here, the Court of Appeals erred in finding Newcomer's testimony admissible under Rule 404(b), SCRE. There was not a close degree of similarity between the alleged abuse of Newcomer and Daughter Two and Daughter Three's testimony. First, the ages of Daughter Two, Daughter Three, and Newcomer varied. See id. at 433, 683 S.E.2d at 278 (providing the age of the victims when the abuse occurred is a factor to consider when determining admissibility under Rule 404(b)). Daughter Two testified the abuse began when she was approximately five years old until she was almost seventeen years old, but Daughter Three and Newcomer testified Perry allegedly abused them during their tween years only. (App. p. 75, ll. 10-14; App. p. 77, ll. 8-13; App. p. 120, ll. 12-17; App. p. 127, ll. 1-12; App. p. 223, ll. 3-6; App. p. 224, ll. 19-22). Daughter Three and Newcomer's ages may have been similar; however, Daughter Two claimed she was sexually abused from when she was a young child until she was almost an adult. Second, the abuse occurred in different locations and at different times during the day. See id. Newcomer testified the abuse occurred at night, but Daughter Two and Daughter Three testified the sexual abuse usually occurred during the early morning hours between five to six a.m. Third, although Perry allegedly threatened Daughter Two, Daughter Three, and Newcomer, the content of the threats was different. See id. Daughter Two and Daughter Three testified Perry threatened they would get into trouble if they told, but Newcomer testified Perry said no one would believe her and the allegations would hurt their family.

Finally, and perhaps most dissimilar, during the proffer of Newcomer's testimony, she and the State indicated the sexual abuse progressed to intercourse. (App. p. 23, ll. 7-11). The trial court redacted a portion of Newcomer's testimony about having intercourse with Perry in an effort

to make that alleged bad act more similar to the charged crimes. This case is unlike Wallace where this Court found the trial court did not err in redacting the sister's testimony about having intercourse with the defendant. 384 S.C. at 435, 683 S.E.2d at 278. In Wallace, there was no opportunity for the abuse of the child to progress like the sister's abuse because the child reported the defendant digitally penetrated her the day after it happened. See id. Here, there was an opportunity for the alleged abuse of Daughter Two and Daughter Three to progress to intercourse like Newcomer. All three women testified the abuse spanned a number of years. Specifically, Daughter Two testified the abuse spanned almost a dozen years, much longer than Newcomer testified Perry had sexually abused her. However, Perry never had intercourse with Daughter Two. Thus, the type of sexual battery was dissimilar, and the trial court erred in redacting the dissimilarity of the type of sexual battery. Accordingly, the Court of Appeals erred in admitting Newcomer's testimony under Rule 404(b).

b. Rule 403

If the bad act evidence is found admissible under Rule 404(b), the court must then conduct the prejudice analysis required by Rule 403, SCRE. See id. at 435, 683 S.E.2d at 278. Thus, the prior bad act evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403, SCRE. The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). Although remoteness in time between the prior bad act and the charged crime is not a dispositive factor, it is one that the court must consider when determining whether testimony is admissible. State v. McCombs, 410 S.C. 90, 101, 762 S.E.2d 744, 750 (Ct. App.

2014), *vacated*, 412 S.C. 282, 772 S.E.2d 510 (2015). The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

There were clear issues with whether the prior bad act occurred. The State admitted there was no trial because Newcomer was pregnant at the time, she was "sexually promiscuous," and she suffered from mental health issues. The Solicitor's Office did not have any records on the charges related to Newcomer. Further, the temporal remoteness between the two acts also adds to the prejudice. See State v. McCombs, 410 S.C. 90, 101, 762 S.E.2d 744, 750 (Ct. App. 2014) (providing the temporal proximity of the bad act and the charged crime is a factor to consider). Over eight years separated Newcomer's abuse from when Daughter Two claimed Perry began abusing her. An even more remote period of fifteen years separated Newcomer's abuse from when Daughter Three claimed Perry began abusing her. Finally, Daughter Two and Daughter Three's credibility was at issue in this case, and the admission of Newcomer's testimony only created prejudice by implying that because Newcomer alleged Perry abused her, Perry must have Daughter Two and Daughter Three.

c. Harmless Error

Finally, the admission of Newcomer's testimony was not harmless error. "Harmless error analyses are fact-intensive inquiries and are not governed by a definite set of rules." State v. Jenkins, 412 S.C. 643, 651, 773 S.E.2d 906, 909 (2015). Instead, appellate courts should determine the materiality and prejudicial character of the error in light of the entire care. Id. at 651, 773 S.E.2d at 910. An error is harmless if it did not reasonably affect the result of the trial. Id. The issue is not whether the State proved its case beyond a reasonable doubt, but whether beyond a

reasonable doubt the trial court contributed to the guilty verdict. State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012).

This case boils down to the credibility of the two sisters asserting Perry sexually assaulted them. There was no physical evidence in this case, and there was nothing to investigate because the sisters waited years to accuse Perry. Aside from the sisters' testimony, the only other testimony presented by the State was witnesses who testified about the sisters' out-of-court conversations about the sexual abuse. See e.g., State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94-95 (2011) ("We further find the trial court's admission of the reports did not amount to harmless error. *There was no physical evidence presented in this case. The only evidence presented by the State was the children's accounts of what occurred and other hearsay evidence of the children's accounts.* Because the children's credibility was the most critical determination of the case, we find the admission of the written reports was not harmless." (emphasis added) (citation omitted)). Accordingly, the admission of Newcomer's testimony was not a harmless error.

II. Dr. Henderson Improperly Commented on the Veracity of Daughter Three's Testimony.

It is improper for an expert to comment on the veracity of a child's accusations of sexual abuse. See id. at 480, 716 S.E.2d at 94. For example, a therapist cannot indicate he believed a child's allegations were genuine. State v. Dawkins, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989). In Jennings, the Supreme Court concluded the trial court erred in admitting a forensic interviewer's report that stated each child "provided a compelling disclosure of abuse." 394 S.C. at 480, 716 S.E.2d at 94. The trial court further erred in allowing the forensic interviewer to testify each of the children provided details consistent with the background information received from their mother, the police report, and the other children. Id. The forensic interviewer's report and opinions were erroneously used to prove the children were being truthful. Id.

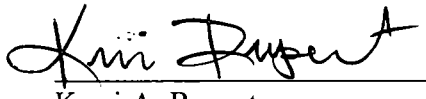
Dr. Henderson testified her findings from examining Daughter Three were consistent with Daughter Three having experienced sexual abuse despite the fact that Daughter Three's examination was completely normal. Dr. Henderson further stated that her opinion was based on "what [Daughter Three] has shared with me" regarding the allegations of abuse. The Court of Appeals concluded that althought the "consistent with sexual abuse" question was "inartfully worded, the response it elicited did not amount to improper bolstering." (App. p. 366). The Court ultimately concluded that the "most likely interpretation" of Dr. Henderson's response was the normal examination result did not rule out a sexual assault in delayed disclosure cases. (App. p. 366).

South Carolina case law provides it is improper for an expert to indicate the victim's allegations were genuine or truthful. Id.; State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000). Although the Jennings Court found the expert witness improperly vouched for the child by stating "[t]here is no other way to interpret the language . . . other to mean the forensic interviewer believed the children were being truthful," the Court did not go so far as to find that vouching for the veracity of a witness is admissible if the jury may find different interpretations of the testimony. In other words, an expert witness either vouches for a witness or does not. Here, Dr. Henderson clearly testified Daughter Three's normal examination was consistent with Daughter Three having experienced sexual abuse. Further, the credibility of Daughter Three was at issue when there was no physical evidence, which makes the possible interpretations of Dr. Henderson's testimony even more harmful. See Jennings, 394 S.C. at 480, 716 S.E.2d at 95 ("Because the children's credibility was the most critical determination of this case, we find the admission of the written reports was not harmless."). Thus, the Court of Appeals erred when finding Dr. Henderson did not vouch for the veracity of Daughter Three.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant his petition for writ of certiorari and to reverse the Court of Appeals' order.

Respectfully Submitted,



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PROOF OF SERVICE

I hereby certify that I served a copy of the Petition for Writ of Certiorari upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on October 16, 2017, addressed to the following:

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