

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ONTARIO STEFON PATRICK MAKINS,

APPELLANT

APPELLATE CASE NO. 2016-002495

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE..... 2

ARGUMENT

I.

The trial court violated Appellant's due process rights under Sixth and Fourteenth Amendments to present a complete defense and to confront adverse witnesses through meaningful cross-examination by refusing to allow Appellant to cross-examine Minor regarding three prior false allegations of sexual abuse that Minor made against that Appellant's two sons, both between the ages three and seven, and against Minor's niece.....3

II.

The trial court violated Appellant's due process rights under Sixth and Fourteenth Amendments to present a complete defense and to confront adverse witnesses through meaningful cross-examination by refusing to allow Appellant to cross-examine Minor regarding three prior false allegations of sexual abuse that Minor made against that Appellant's two sons, both between the ages three and seven, and against Minor's niece on the grounds that Appellant had to prove that the allegations were "absolutely false."17

III.

The trial court abused its discretion by allowing a witness to testify as both an expert witness in child sexual abuse trauma and as a fact witness regarding Minor's allegations of sexual abuse as the expert's testimony improperly bolstered Minor's credibility in a sexual abuse case against Appellant where Minor's credibility was the critical determination in the case.....21

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Beck v. State, 824 P.2d 385 (Ok. Ct. Crim. App. 1991) 13

California v. Green, 399 U.S. 149 (1970) 10

California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528 (1984)..... 10

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973) 10

Clinebell v. Com, 368 S.E.2d 263 (Va. 1988)..... 13

Commonwealth v. Bohannon, 378 N.E.2d 987 (Mass. 1978)..... 13

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 1111, 39 L.E.2d 347 (1974)..... 11

In re Vora, 354 S.C. 590, 582 S.E.2d 413 (2003)..... 11

Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964) 19

Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566 (1994)..... 26

Martin v. Dunlap, 266 S.C. 230, 222 S.E.2d 8 (1976) 11

Morgan v. State, 54 P.3d 332 (Ak. Ct. App. 2002) 18

Ramirez v. State, 419 S.C. 14, 795 S.E.2d 841 (2017) 19

Smith v. State, 377 S.E.2d 158 (Ga. 1989)..... 13

Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) 24

State v. Baron, 292 S.E.2d 741 (N.C. Ct. App. 1982) 13

State v. Boiter, 302 S.C. 381, 396 S.E.2d 364 (1990)..... passim

State v. Darby, 324 S.C. 114, 477 S.E.2d 710 (1996) 20

State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989)..... 24

State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000) 24

<i>State v. Gillian</i> , 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004)	11
<i>State v. Guenther</i> , 854 A.2d 308 (N.J. 2004).....	18
<i>State v. Gunn</i> , 313 S.C. 124, 437 S.E.2d 75 (1993).....	13, 18
<i>State v. Hutton</i> , 358 S.C. 622, 595 S.E.2d 876 (Ct.App.2004).....	10
<i>State v. Jenkins</i> , 322 S.C. 360, 474 S.E.2d 812 (Ct. App. 1996).....	11, 12
<i>State v. Jennings</i> , 394 S.C. 473, 716 S.E.2d 91 (2011)	24, 25, 27
<i>State v. LeClair</i> , 83 Or.App. 121, 730 P.2d 609 (1986)	13
<i>State v. Long</i> , 140 S.W.3d 27 (Mo. 2004)	13, 18
<i>State v. McGuire</i> , 272 S.C. 547, 253 S.E.2d 103 (1979).....	14
<i>State v. McKerley</i> , 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012).....	23, 26
<i>State v. Miller</i> , 921 A.2d 942 (N.H. 2007)	13, 19
<i>State v. Sierra</i> , 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999).....	11
<i>State v. Smith</i> , 315 S.C. 547, 446 S.E.2d 411 (1994)	11
<i>State v. Wilson</i> , 345 S.C. 1, 545 S.E.2d 827 (2001)	19
<i>State v. Wright</i> , 269 S.C. 414, 237 S.E.2d 764 (1977)	26
<i>State v. Wyrick</i> , 62 S.W.3d 751 (Tenn. Crim. App. 2001)	13

Constitutional Provisions

U.S. Const. amend VI	passim
U.S. Const. amend XIV	passim

Rules

Rule 403, SCRE.....	15, 26
Rule 608(b), SCRE	passim

STATEMENT OF ISSUE ON APPEAL

I.

The trial court violated Appellant's due process rights under Sixth and Fourteenth Amendments to present a complete defense and to confront adverse witnesses through meaningful cross-examination by refusing to allow Appellant to cross-examine Minor regarding three prior false allegations of sexual abuse that Minor made against that Appellant's two sons, both between the ages three and seven, and against Minor's niece.

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III.

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STATEMENT OF THE CASE

On August 23, 2016, the Greenville County Grand Jury indicted Appellant for criminal sexual conduct with a minor, first degree; criminal sexual conduct with a minor, third degree, and one count of committing a lewd act upon a minor. R. 373 – 374. R. 8,1.3 – 9,1.18.

On December 5-8, 2016, Appellant proceeded to trial before the Honorable Robin Stilwell and a jury. R. 1. Tom Quinn represented Appellant, and Assistant Solicitors Kate Patterson and Chris Hodge represented the State.

The jury found Appellant guilty of one count of criminal sexual conduct with a minor, third degree. R. 368, ll. 2-23. The trial court sentenced Appellant to ten years imprisonment. R. 369, l. 23 – 437, l. 8.

ARGUMENT

I.

The trial court violated Appellant's due process rights under Sixth and Fourteenth Amendments to present a complete defense and to confront adverse witnesses through meaningful cross-examination by refusing to allow Appellant to cross-examine Minor regarding three prior false allegations of sexual abuse that Minor made against that Appellant's two sons, both between the ages three and seven, and against Minor's niece.

Relevant Facts

On March 10, 2015, Jenna Toney from the Julie Valentine Center began a two day long training session with Ms. Mary Jill Kroske's second grade class at Mitchell Road Elementary School in Greenville County. R. 116, l. 16 – 168, l. 25. Minor was a student in Kroske's class and present for Toney's sessions.

Toney's program was designed to inculcate in children an awareness of child molestation and to alert them to the ever present threat posed to them by strangers. *Id.* Among other advice, Toney instructed the second graders with examples of how they should react when strangers talked to them:

So the first situation is a stranger danger situation. It's about being at a gas station. We say that mom asked us to wait in the car real quick while she goes and gets her gas. But shortly after mom goes into the store, a car pulls up next to mom's car and there's someone in this car that we don't know. So I ask them what that means. That means that person's a stranger. And then -- so then that stranger rolls down his window or their window and says, 'hey, it's a lovely evening out.' And whenever he does this, it gives us a funny feeling in our tummies. We call it the butterflies or the willies. It's the nervous, uh-oh feeling we get sometimes. And I ask them if they know what I'm talking about and they say they do.

And then we say -- I say, you know, we get this feeling because mom, dad and grandma has told us not to, what? "Don't talk to

strangers." So we turn away from him because we're not going to and he sees that. So he gets out of his car and he starts to walk towards the store. But then he changes his mind and he starts to walk back towards mom's car. So what can we do to stay safe in the situation? So we go through -- they give me a bunch of ideas on what they can do to stay safe in this situation. But ultimately what I tell them is they lock the doors, they roll up the windows, and they honk the horn. Now, we honk the horn to draw attention to ourselves, let mom or dad know that we're in trouble and we need help, even though they're in the gas station. And it'll let other adults know in the parking lot that we need help.

R. 120, l. 18 – 172, l. 4. Toney also advised children not to answer the door if they were home alone when the mail man delivered a package and to call their parents or the police if the mail man knocked on the door. R. 122, l. 16 – 173, l. 11.

After covering a wide range of "stranger danger" scenarios on the first day of her presentation, Toney spent the second day lecturing the children about child molesters. Importantly for Appellant's trial, she defined child molesters as "people who try to touch kids on the private parts of their body. Or they'll try and get that kid to touch them on their private parts and they tell them to keep the touching a secret." R. 177, ll. 16-24.

Much of the child molester presentation was dedicated to telling children that child molesters could "look like a normal person" and "could be someone a kid knows and trust, even somebody that loves and cares about." R. 129, l. 5 – 185, l. 11. Toney informed the children that child molesters are tricky people who will use "rewards," "tricks," and "bribes" to keep children quiet. R. 126, l. 8 – 184, l. 15.

Toney ended the presentation by urging children to report child molesters even if the adult they initially tell does not believe their allegations and that "it's never too late to tell someone about a secret unsafe touch. It doesn't matter if it happened a week ago, a month ago or even years ago. It's never too late to tell someone." R. 138, ll. 9-20.

Minor's Initial Disclosure of Sexual Abuse

On March 20, 2015, less than two weeks after Torrey's session, Minor told Kroske that she had been molested. R. 109, ll. 4-11. Without asking questions, Kroske went to the school's guidance counselor and called the police. R. 109, l. 20 – 161, l. 9.

Greenville County Investigator David Picone interviewed Minor at her school. R. 201, l. 17 – 205, l. 22. At trial, Picone recalled that Minor did not initially want to talk about her allegations. *Id.* Picone and the victim's advocate eventually got Minor to disclose the abuse by having the victim's advocate point to Minor's breast, vagina, and butt while asking Minor if she was touched there. *Id.*

Minor indicated that she was touched in the vagina from age five until age eight during frequent visits to Appellant's apartment. *Id.* Appellant lived with his girlfriend, Toi Tisdale. Tisdale is Minor's older sister. Having successfully extracted a disclosure of sexual abuse, the police referred Minor to the Julie Valentine Center for a forensic interview. *Id.*

Appellant voluntarily met with law enforcement. R. 210, ll. 5 – 211, ll. 17. He adamantly denied sexually abusing Minor. He freely conceded that Minor regularly spent time at his and Tisdale's apartment as they frequently babysat Minor and she was good friends with his two sons. *Id.*

Appellant further stated that he had understandably been alone with Minor at various times during the three year period when the state alleged the abuse occurred. *Id.* Unlike the forensic interview, Appellant's denials were not recorded as Picone purportedly inadvertently failed to turn on the recording system. R. 210, l. 5 – 211, l. 21.

Disclosure of Sexual Abuse during Forensic Interview

The forensic interview occurred on March 23, 2015 and was given by Christine Carlburg. During the "non-leading" forensic interview Carlburg asked Minor on four different occasions whether Appellant penetrated her. R. 235, l. 15 – 237, l. 11.

Each time Minor denied that the sexual abuse ever escalated beyond Appellant supposedly touching her "private parts" on several occasions. *Id.* Minor expressly denied any other kind of sexual abuse. *Id.*

Minor claimed that she did not disclose the abuse when it occurred because Appellant "was scary and evil" and threatened to kill her and her family. R. 237, ll. 15-22. She also stated that the abuse always occurred at Appellant's house when no one else was present, including Appellant's sons. *Id.* Picone arrested Appellant after the forensic interview. R. 212, ll. 18-23.

Minor's Later Disclosures during Therapy

Minor's allegations against Appellant expanded once Minor began attending therapy sessions with Kristen Rich of the South Carolina Department of Mental Health. During one therapy session on July 6, 2016, over a year after Minor's disclosure, Rich asked Minor to recall the worst incident of sexual abuse she experienced. R. 275, l. 8 – 279, l. 20.

In response Minor drew Rich a photograph showing Appellant forcing her to perform oral sex on him. *Id.* Minor claimed this incident occurred sometime in the summer of 2014 and that the sexual abuse started when she was five and ended when she was eight. R. 278, ll. 12- 23.

This was the first time that Minor alleged Appellant had done more than touch her genitals. Minor repeated to Rich that she was afraid because Appellant threatened to kill her and her family if she told anyone about the abuse. R. 281, ll. 8-9.

During another therapy session Minor accused C.M. and M.M., Appellant's two sons and her nephews, of forcing her to have anal sex with them. R. 77, l. 11 – 78, l. 23. M.M. and C.M.

are both younger than Minor. At the time of Appellant's trial, Minor was ten years old, C.M. was six, and M.M. was nine. Nevertheless, Minor was adamant that the two young boys sodomized her when testifying at trial. *Id.*

Minor also accused another nephew, M.S. of sexually abusing her. In language that mirrored the terms used by Toney in her presentation, Minor accused M.S. of "touching her private parts." R. 70, l. 11 – 74, l. 25. M.S. is the daughter of one of Minor's older sisters. *Id.* M.S. lived in North Carolina and rarely saw Minor. *Id.*

Like her allegations against M.M., C.M., and Appellant, Minor was unable to provide any dates or time frame for M.S.'s alleged abuse. *Id.* Minor claimed that she told her mother and her therapist about M.S.'s abuse, but was unsure if she told the police. *Id.* Minor was adamant that M.S. sexually abused her.

Pre-Trial Boiter Hearing

Appellant moved pre-trial to be allowed to cross-examine Minor on the allegations she made against C.M. and M.M. pursuant to *State v. Boiter*. After Minor testified about the allegations, counsel proffered without objection from the State that C.M. and M.M. were available to testify and would deny Minor's allegations against them.

Defense counsel argued that the *Boiter* framework, particularly the requirement that Appellant "prove" that the allegations at issue were false, presented an impossible standard for the defense:

It appears that the burden is on the defense to first prove that the allegation made by the reported victim was false.

Then you go to other considerations about timeliness, the factual similarity to determine relevance.

As the Court has heard, [Minor] has testified these allegations did occur. Whether I believe that or no, it becomes an impossibility, even though I have the children here available to

testify that with denial of these allegations, I think it becomes a factual impossibility to prove the allegations false when there are no witnesses, there is no physical evidence, there are no reports that police -- there was no investigation. At best what I'm going to have is a swearing contest.

R. 84, l. 22 – 86, l. 20.

Defense counsel expressed frustration that the *Boiter* opinion did not specify the burden of proof that the defense had to carry, but simply required that the defense "prove" the allegations were false. *Id.* Defense counsel maintained that proving with complete certainty, as *Boiter* appeared to require, that the allegations against the six year old C.M. and nine year M.M. were false was impossible. *Id.*

Prior to finding Minor's allegations against C.M. and M.M. inadmissible, the trial court embraced some of defense counsel's frustrations:

Okay. All right. I do find that based on the evidence that's been submitted on the record, I cannot determine under any standard of proof, whether it's preponderance of the evidence, clear and convincing or beyond a reasonable doubt, that the accusations made by the victim, prior accusations were false.

I recognize the Defense's position that is, that under the relevant standard articulated by the Supreme Court that it's a futile endeavor to try to prove the falsity of prior accusations. I don't know if that's precisely true. However, I would say that it is an unwieldy burden. And for the record I'm not so sure that it's a fair burden to impose upon a defendant either. I don't know if that issue has been waived by the Defense.

However, I will tell you from the trial court perspective, I would love to have additional guidance from the Supreme Court about the burden of proof required for proving the falsity of the accusation.

And I think that it should more particularly be that the -- the proof should be that the accusation was in question, not that it was absolutely false. Because I think that visits ultimately an unfairness upon a defendant in not being able to explore prior allegations of sexual abuse that may be questionable. That is,

that had not been adjudicated but weren't proven specifically false in any tribunal or in any in-camera proceeding.

Okay. For that reason, I find that any cross-examination of prior allegations of sexual abuse or inadmissible...

R. 87, l. 11 – 88, l. 23.

Minor's Trial Testimony

Minor was ten years old at the time of Appellant's trial. Minor was unsure when Appellant began sexually abusing her and initially claimed that she did not remember being sexually abused and refused to testify about it. R. 174, ll. 2-23

With prompting from the solicitor, Minor went on to claim that Appellant first forced her to perform oral sex on him after she, M.M. and C.M. got in trouble for having a "water fight" in the bathroom of Appellant's apartment. R. 175, l. 7 – 226, l. 6. Minor could not remember what, if anything, Appellant said to her at time.

Minor further alleged that, on at least three occasions, Appellant forced her to perform oral sex on him while C.M., M.M. or others were in the room. R. 176, ll. 7-22; r. 182, ll. 1-11. Minor stated that Appellant would occasionally give her a dollar after she performed oral sex on him and once made her watch a video on how to perform oral sex. R. 180, ll. 5-20.

On cross-examination, Minor admitted that she never told police or the forensic interviewer about Appellant making her watch the video. R. 190, l. 11 – 192, l. 2. Minor also admitted that Appellant never threatened her. She conceded that she had lied to police, the forensic interviewer, and her therapist in an effort to explain why she had waited to report Appellant. *Id.*

Minor further conceded that her story of sexual abuse had "grown" in the year and a half since she first accused Appellant from Appellant touching her to Appellant forcing her to perform oral sex. R. 194, l. 3 – 195, l. 12.

Other Evidence

As noted *supra*, there was no physical evidence corroborating Minor's allegations. Moreover, despite Minor claiming that Appellant on at least one occasion forced her to perform oral sex while the same room as other people, no witnesses came forward at trial to say that they observed any suspicious acts by Appellant or saw any sexual abuse.

The only other evidence that suggested Minor had experience something traumatic was testimony from Minor's mother that Minor began touching herself and wetting her bed after she disclosed the sexual abuse. R. 152, l. 13 – 155, l. 9. Minor's mother also claimed that prior to the abuse, Minor frequently complained to her about having to go to the apartment that Appellant and Tisdale's residence. *Id.*

Discussion

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038 (1973); *see also California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, (1984) (finding the Due Process Clause of the Fourteenth Amendment affords criminal defendants a meaningful opportunity to present a complete defense); *State v. Hutton*, 358 S.C. 622, 631, 595 S.E.2d 876, 881 (Ct.App.2004) (recognizing fundamental fairness requires criminal defendants be granted a meaningful opportunity to present a complete defense).

The cross-examination of adverse witnesses has been accurately described as the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (*internal quotations omitted*). The right to confront adverse witnesses through

meaningful cross-examination is foremost amongst the rights that secure the accused "a fair opportunity to defend against the State's accusations." *State v. Gillian*, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004).

The right to cross-examine a prosecuting witness is of constitutional dimensions because it is essential to a fair trial. *State v. Sierra*, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999). Denial of an accused's right to effective cross-examination is a "constitutional error of the first magnitude." *Davis v. Alaska*, 415 U.S. 308, 218, 94 S.Ct. 1105, 1111, 39 L.E.2d 347 (1974).

The Confrontation Clause does not prevent a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. Trial judges retain the power impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness's safety, or interrogation that is repetitive or only marginally relevant. *Martin v. Dunlap*, 266 S.C. 230, 222 S.E.2d 8 (1976).

However, before a defendant can be prohibited from attempting to demonstrate bias on the part of a witness, the record must clearly show that the cross-examination is improper. *State v. Smith*, 315 S.C. 547, 446 S.E.2d 411 (1994). Generally, where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *In re Vora*, 354 S.C. 590, 582 S.E.2d 413 (2003).

The credibility of any witness is undoubtedly a relevant subject for cross-examination. *State v. Jenkins*, 322 S.C. 360, 360, 474 S.E.2d 812, 814-815 (Ct. App. 1996) (reversing conviction where trial court erroneously prevented defendant from cross-examining detective about circumstances of controlled buy made by confidential informant).

Rule 611(b), SCRE, expressly provides that "a witness may be cross-examined on any matter relevant to any issue in the case, including credibility." Under Rule 608(b), SCRE, witnesses may be cross-examined regarding:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross- examined has testified.

Rule 608(b), SCRE. The credibility of the prosecuting witness is a critical subject for cross-examination. *Jenkins*, 322 S.C. at 360, 474 S.E.2d at 814-815.

An anomalous restriction on the otherwise wide-ranging right to cross-examine the prosecuting witnesses on issues relating to credibility is when the defendant wishes to confront the prosecuting witness about a prior false accusation of sexual abuse. *State v. Boiter*, 302 S.C. 381, 383-384, 396 S.E.2d 364, 365 (1990) (holding defendant failed to prove that prior accusations of sexual abuse made by prosecuting witness were false where neither the police nor social services investigated the prior allegation.).

For this one subject, a defendant must first prove that the allegations were false in a pre-trial hearing before being allowed to confront the prosecuting witness regarding alleged prior false accusation of sexual abuse. *Id.* Only if the defendant can prove that the prior allegations were false does the trial court then determine whether the probative value of the allegations are substantially outweighed by the risk of prejudice. *Id.*

To do this, the trial court evaluates how remote in time the prior allegation is to the offense at trial and the extent of any factual similarities between the two allegations. *Id.* In effect, *Boiter* lays out a nearly impossible standard for the introduction of prior false accusations of sexual abuse during cross-examination.

Requiring the defendant to prove that the prosecuting witness' prior allegation was factually false before allowing the defendant to cross-examine on the prior allegation is constitutionally unsound. *Boiter* places an unreasonable restriction on the right to cross-examine the prosecuting witness so as to test their credibility. 302 S.C. at 305, 396 S.E.2d at 365.

Other jurisdictions, including jurisdictions the *Boiter* court relied on two and a half decades ago, have recognized that cross-examining the prosecuting witness on prior false accusations of sexual abuse is necessary for a fair determination of the case when the prosecuting witness's credibility is central to the State's case against the defendant. These states simply require that there is some evidence that the prosecuting witness made prior accusations that were false, unless the probative value of the evidence which the defendant seeks to elicit on the cross-examination (including the probability that false accusations were in fact made) is substantially outweighed by the risk of prejudice, confusion, embarrassment or delay. *State v. LeClair*, 83 Or. App. 121, 730 P.2d 609, 615 (1986); *Smith v. State*, 377 S.E.2d 158 (Ga. 1989); *State v. Baron*, 292 S.E.2d 741, 743 (N.C. Ct. App. 1982).

These jurisdiction rightly treat cross-examination on a witness's prior allegations of sexual abuse no differently than other kinds of impeachment and credibility evidence offered to attack a witness under those jurisdictions equivalent of Rule 608(b), SCRE. *Commonwealth v. Bohannon*, 378 N.E.2d 987 (Mass. 1978); *State v. Wyrick*, 62 S.W.3d 751 (Tenn. Crim. App. 2001); *Beck v. State*, 824 P.2d 385 (Ok. Ct. Crim. App. 1991); *Clinebell v. Com*, 368 S.E.2d 263 (Va. 1988); *State v. Long*, 140 S.W.3d 27 (Mo. 2004); *State v. Miller*, 921 A.2d 942 (N.H. 2007).

Further, the *Boiter* standard is antithetical to the stated goal of the Rules of Evidence that relevant evidence be admissible. Evidence bearing directly on the credibility of witnesses, especially prosecuting witnesses, is relevant and admissible. See Rule 608(b), SCRE.

In all other instances, a cross-examiner seeking to attack the credibility of a witness by asking about the witness's specific past conduct under Rule 608(b), SCRE must simply have a good faith basis for the question. *State v. Gunn*, 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993); *see also See State v. McGuire*, 272 S.C. 547, 253 S.E.2d 103 (1979) (a witness may be impeached by past conduct which fairly tends to affect her credibility if the questioner has a good faith basis for asking the question).

Only in instances where the defendant is seeking to attack a witness's credibility based on that witness having made a prior false accusation of sexual abuse, is the defendant required to prove the accusation was factually false. *Boiter*, 302 S.C. at 383-384, 396 S.E.2d at 365. This is an impossible burden of proof for a defendant to satisfy and an unreasonable restriction on a defendant's right to confront adverse witnesses.

Appellant's case aptly illustrates the impossibility of satisfying *Boiter's* requirement of proving falsity. When asked to describe what C.M., M.M., and M.S. did, Minor refused. When initially pressed, Minor claimed she did not remember. R. 70, l. 15 – 83, l. 7. Finally, with additional prompting, Minor alleged that Appellant's six and nine year old sons sodomized her or "played with her butt" when the boys were around ages four and seven respectively. Minor also accused M.S. of "touching her private parts."

Minor, who is older than both boys, never reported any of this abuse to the police. She never mentioned it to the forensic interviewer. *Id.* She first disclosed these purported incidents of abuse to her therapist during a counseling session almost two years after she accused Appellant of sexually assaulting her. There were no witnesses. There was no physical evidence or corroborating reports of any injuries from the assault.

Defense counsel proffered without objection that all three children denied Minor's allegations. R. 85, ll. 6-23. Common sense and a basic understanding of human develop strongly support defense counsel's contention that Minor's allegations against Appellant's sons and M.S. were false.

Nevertheless, Minor was adamant that the three sexually assaulted her. R. 73, ll. 12- 17; R. 77, ll. 20-22. Defense counsel correctly noted that he was faced with a "swearing match" and could not prove that the allegations were factually false. R. 85, ll. 6-23. Thus, under *Boiter* the allegations were inadmissible. *Id.*

Minor's credibility was critical to a fair determination of Appellant's case. The central issue at trial was whether or not the alleged acts of sexual abuse occurred. Like M.S., C.M., and M.M., Appellant denied the abuse occurred. R. 210, ll. 10-14. Minor was the only witness able to testify on this issue. Evaluations of witness credibility are the exclusive remit of the jury. *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) (instructing jury that testimony of the victim need not be corroborated in prosecutions for criminal sexual conduct; was an impermissible charge on the facts and unconstitutional.).

Appellant sought by his questions to bring to the jury's attention that Minor had made multiple allegations of sexual abuse against family members. These other allegations of abuse were substantially similar to Minor's allegations against Appellant and these other allegations of abuse were very likely false. The fundamental requirement for admitting extrinsic evidence of a prior false allegation should be a showing of legal relevance. *See* Rule 403, SCRE

Evidence of other false accusations accusing other family members of committing the same crimes that Appellant was standing trial for would have seriously damaged Minor's credibility. Moreover, the possibility that this evidence might have had a significant impact on

the issue of credibility is enhanced by the fact that Minor's testimony was inconsistent and confused.

Had defense attorney been allowed to cross-examine Minor on these other prior false accusations of sexual abuse, Minor's credibility would have been further undermined. This evidence might have had a significant impact on the issue of whether or not the abuse occurred and consequently on the outcome of trial.

Therefore, the exclusion of the Appellant proposed cross-examination questions regarding Minor's likely false allegations of sexual abuse by M.S., C.M., and M.M. violated Appellant's due process right to effectively confront his accuser and to present his defense fully.

Accordingly, this Court should now take the opportunity to rule that under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, a defendant has a right cross-examine a witness, including the prosecuting witness, on a prior false allegation of sexual abuse for the purposes of attacking that witness's credibility under Rule 608(b) and Rule 611(b) of the South Carolina Rules of Evidence when defendant has a good faith factual basis for asking the question and the credibility of the challenged witness is a critical issue in the case.

II.

The trial court violated Appellant's due process rights under Sixth and Fourteenth Amendments to present a complete defense and to confront adverse witnesses through meaningful cross-examination by refusing to allow Appellant to cross-examine Minor regarding three prior false allegations of sexual abuse that Minor made against that Appellant's two sons, both between the ages three and seven, and against Minor's niece on the grounds that Appellant had to prove that the allegations were "absolutely false."

In the event this court upholds *Boiter's* requirement that a defendant "prove" a prior allegation of sexual abuse was false before allowing cross-examination on the prior allegation, this Court should take the opportunity to clarify the burden of proof that a defendant must satisfy in order to prove that the prior allegation of sexual abuse was false.

The record of the *Boiter* hearing makes clear that neither defense counsel nor the trial court could discern the burden of proof that the defense must overcome before a witness can be cross-examined on a prior false allegation of sexual abuse. R. 84, l. 22 – 88, l. 23. The defense maintained that a straightforward reading of *Boiter* required that the defense prove the prior allegations were factually impossible. *Id.*

The trial court demurred as to the impossibility of proving factual falsity, but recognized the due process dilemma caused by *Boiter*:

I recognize the Defense's position that is, that under the relevant standard articulated by the Supreme Court that it's a futile endeavor to try to prove the falsity of prior accusations. I don't know if that's precisely true. However, I would say that it is an unwieldy burden. **And for the record, I'm not so sure that it's a fair burden to impose upon a defendant either.** I don't know if that issue has been waived by the Defense.

However, I will tell you from the trial court perspective, I would love to have additional guidance from the Supreme

Court about the burden of proof required for proving the falsity of the accusation.

And I think that it should more particularly be that the -- the proof should be that the accusation was in question, not that it was absolutely false. Because I think that visits ultimately an unfairness upon a defendant in not being able to explore prior allegations of sexual abuse that may be questionable. That is, that had not been adjudicated but weren't proven specifically false in any tribunal or in any in-camera proceeding.

Id. (emphasis added). The trial court was absolutely correct in its assessment of *Boiter's* constitutional and evidentiary problems.

If this Court still wishes to impose on the defendant a burden of proving, to some degree, that the prior allegation is false; the only constitutionally sound burden of proof would be to require that the defendant to prove by a preponderance of the evidence that there is a reasonable probability the prior allegation of sexual abuse was false. *See State v. Guenther*, 854 A.2d 308, 324 (N.J. 2004) (holding that to impeach prosecuting witness who allegedly made a prior false criminal accusation, trial courts must first conduct determine by a preponderance of the evidence whether defendant has proven that a prior accusation charging criminal conduct was false).

Adopting the preponderance of the evidence standard would be consistent with our other foundational requirements for **admitting or excluding extrinsic evidence** of some fact sought to be proven. *Cf. Morgan v. State*, 54 P.3d 332 (Ak. Ct. App. 2002) (holding that extrinsic evidence of prior false claim of sexual assault must be proven by a preponderance of the evidence); *see also State v. Long*, 140 S.W.3d 27 (Mo. 2004). It would concededly keep in place *Boiter's* disparate treatment of cross-examination questions attacking the credibility of a witness based on prior false allegations of sexual abuse versus cross-examination on other specific instances of prior conduct. Rule 608(b), SCRE; *see also Gunn*, 313 S.C. at 136, 437 S.E.2d at 82.

For instance, the State must prove by a preponderance of the evidence that a defendant's statement to law enforcement was voluntarily made before the statement can be entered into evidence. Further, the State must show by a preponderance of the evidence that false statements in a search warrant were not made intentionally or with reckless disregard for the truth. *State v. Miller*, 375 S.C. 370, 379, 652 S.E.2d 444, 449 (Ct. App. 2007) citing *Jackson v. Denno*, 378 U.S. 368, 376, 84 S.Ct. 1774 (1964); see also *State v. Wilson*, 345 S.C. 1, 4, 545 S.E.2d 827, 829 (2001) (at trial state bears the burden of showing by a preponderance of the evidence that a motion to suppress should not be denied).

Requiring the defense prove that there is a reasonable probability, the prior allegation is false addresses the concern for fairness displayed by the trial court in Appellant's case:

I think that it should more particularly be that the -- the proof should be that the accusation was in question, not that it was absolutely false. Because I think that visits ultimately an unfairness upon a defendant in not being able to explore prior allegations of sexual abuse that may be questionable

R. 88, ll. 9-19. Reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome." *Ramirez v. State*, 419 S.C. 14, 795 S.E.2d 841 (2017). In the context of an alleged prior false allegation of sexual abuse, reasonable probability would be a probability sufficient to undermine confidence in the validity of the witness's claim of prior sexual abuse.

It is fundamentally unfair, and offensive to due process, to require the defense prove that the prior accusation was "absolutely false." R. 87, l. 11 – 88, l. 19; *Boiter*, 302 S.C. at 383, 396 S.E.2d at 365. Neither the State nor a criminal defendant nor any civil litigant are required to prove the "absolute" existence of a disputed fact.

As a common reasonable doubt jury instruction states, regarding the highest burden of proof in our judicial system, “[t]here are very few things in this world that we know with absolute certainty. And in criminal cases, the law does not require proof that overcomes every possible doubt. The law doesn't require that.” *State v. Darby*, 324 S.C. 114, 115, 477 S.E.2d 710, 711 (1996).

Accordingly, in the event that this Court concludes that a defendant must make a preliminary showing, beyond those required by Rules 401, 403, and 608(b), SCRE, that a witness's prior allegation of sexual abuse was factually false, this Court should take the opportunity to clarify that the defense has the burden of proving by a preponderance of the evidence that there is a reasonable probability that the accusation of sexual abuse is false.

III.

The trial court abused its discretion by allowing a witness to testify as both an expert witness in child sexual abuse trauma and as a fact witness regarding Minor's allegations of sexual abuse as the expert's testimony improperly bolstered Minor's credibility in a sexual abuse case against Appellant where Minor's credibility was the critical determination in the case.

Relevant Facts

At trial, the State sought to have therapist Kristin Rich testify as both an expert in the treatment of child trauma and child sexual abuse dynamics and as the therapist that diagnosed Minor with post-traumatic stress syndrome. R. 249, ll. 1-14. Further, the State sought to have Rich testify that Minor, a year and half after her first allegation of sexual abuse by Appellant, disclosed to her during a counseling session that Appellant had forced her to repeatedly perform oral sex on him when she was between the ages of six and eight. R. 91, l. 7 – 92, l. 25.

Defense counsel objected to having Rich testify as both an expert witness and a fact witness. Counsel argued that Rich's testimony would improperly bolster Minor's testimony. R. 47, l. 11 – 49, l. 7. The trial court acknowledged defense counsel's concern was valid:

This is my concern about this witness and why I'm somewhat circumspect. We have a long line of cases which discuss expert witnesses buttressing the credibility of minor witnesses. And although I think that most of what she talked about in a vacuum is okay, my concern is that she begins to talk about the specific treatment and discussions with this child and without saying 'that makes her believable', she is suggesting that that makes her believable.

And I want to make sure that what we're not doing is an end run around forensic interviewers being qualified as expert witnesses and thereby buttressing the credibility of witnesses.

R. 48, ll. 8-23. The State assured the trial court that it would limit Rich's testimony and not ask her if she determined the source of Minor's PTSD. R. 45, l. 23 – 46, l. 22.

Rich was qualified as an expert in child the treatment of child trauma and child sexual abuse dynamics, testified before the jury as to the common symptoms children exhibit when they have experienced trauma. R. 251, l. 4 – 253, l. 20. Rich stated that child who have experienced trauma frequently act out and misbehave. *Id.*

Rich also explained that children who have experienced trauma because of sexual abuse will frequently avoid talking about the abuse or avoid trying to visit where the abuse occurred. She posited that child sexual abuse "is strongly correlated with ... bedwetting, pulling out hair, wanting to avoid particular situations, being frightened in certain situations. Sometimes children who have been abused by a particular type of perpetrator, they want to avoid that. .. some children want to avoid men." R. 252, ll. 17-25.

Rich then held forth how children typically do not immediately disclose the abuse and how it was perfectly normal for children's stories surrounding the abuse to change over time. "Disclosure is really not an event, it's a process." R. 254, l. 2 – 255, l. 18. Every single factor that Rich enumerated regarding characteristics and behaviors of children who have suffered trauma because of sexual abuse, matched Minor's behavior.

The State then moved on to asking Rich about her treatment of Minor. Rich testified that she only works with children who have experienced some kind of trauma and that she had "provided therapy to the victim in this case." R. 257, ll. 6-9. Defense counsel immediately moved for a mistrial arguing that the State had just vouched for Minor's credibility in direct violation of the court's pre-trial ruling:

Defense counsel stated that Rich had stated she worked with children who had sustained trauma and that she was treating Minor for trauma. "[O]nce-Ms. Rich says 'I only work with people who have been traumatized, who have suffered ... ' -- I believe that her description was "a very bad event, one that they can feel that they can be hurt or killed, that was shocking and would leave them

horrified", she is saying that, 'Every child I work with or every person I work with has suffered some trauma. That's why I provide counseling to them, is they are my clientele.

By definition then, she is saying [Minor] suffered a trauma. In this case, the trauma was from sexual abuse.

R. 260, ll. 3-16. Counsel further averred that it was obvious the State was attempting to vouch for Minor's credibility by "saying in essence 'if she didn't suffer trauma, I wouldn't be working with her.'" R. 260, ll. 18-25. Furthermore, once the State had Rich testify to Minor's disclosure, Rich would expressly stating that she had found Minor's disclosure credible.

The trial court declined to grant a mistrial, but noted the clear parallel between Rich's testimony and the – now impermissible – testimony of purported forensic interviewers, "I'm not certain how we distinguish the therapist from a forensic interviewer. I know how we do it semantically. I'm not certain how we do it substantively." R. 267, ll. 9-16.

Ultimately, the court ruled that Rich's testimony was not objectionable because Rich had not testified beyond what a "blind expert" would have testified too. R. 269, ll. 19-22. Curiously, the trial court also held that if Rich "testifies about the disclosure, then obviously she represents to the jury that she has a relationship, a professional relationship with this child. But if she doesn't talk about the diagnosis and all of those other things, then I don't think you get to the point of vouching." R. 269, l. 23 – 270, l. 4.

After the jury returned, Rich testified that Minor disclosed the sexual abuse to her during a counseling treatment session. R. 275, l. 8 – 279, l. 20. Rich recalled that the disclosure, "wasn't until the second session that she would say it because part of the therapy is to be able to say the things that you're scared of." R. 279, ll. 7-13.

Discussion

The *only* purpose of Rich's testimony was to improperly bolster Minor's testimony. The South Carolina Court of Appeals has recently held that it is improper for a witness to bolster the testimony of other witnesses. *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012); see also *Smith v. State*, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (finding a "forensic interviewer's...opinion testimony improperly bolstered the Victim's credibility").

In *McKerley*, the trial court allowed a witness to testify as an expert in "forensic interviewing and child abuse assessment." 397 S.C at 463, 725 S.E.2d at 141. The expert had interviewed the alleged victim twice and concluded that both interviews were compelling for sexual abuse. She also determined that the victim's statements were consistent with other information she had on the case. *Id.* at 466, 725 S.E.2d at 142. Our Court of Appeals determined that there was no other way to interpret the language used in the expert's testimony other than to mean she believed the victim was being truthful. It further held, "In light of [the expert's] extensive inadmissible testimony bolstering the credibility of the victim ... we cannot say the erroneous admission of [the expert's] testimony did not contribute to the jury's decision," therefore finding harmful error. *Id.* at 467, 725 S.E.2d at 143.

Our Supreme Court has also held that it is improper "for an expert to comment on the veracity of a child's accusations of sexual abuse." *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011); see *State v. Dawkins*, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989) (finding therapist indicating he believed victim's allegations were genuine was improper); see also *State v. Dempsey*, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000) (finding

therapist's testimony children were being truthful in ninety-five percent of instances in which sexual abuse was alleged was improper vouching for child).

In *Jennings*, the forensic interviewer, who was qualified as an expert, interviewed the three alleged victims of sexual abuse and issued a separate report for each child that was admitted into evidence. She concluded in her reports that each child provided a compelling disclosure of abuse by the defendant and that the children provided details that were consistent with the background information received from their mother, the police report, and the other children. 394 S.C. at 476-481, 716 S.E.2d at 92-95.

Our Supreme Court held that conclusions in the reports improperly vouched for the children's veracity and, thus, the trial court abused its discretion by admitting the reports into evidence. It further held the error was *not* harmless because there was no physical evidence presented at trial and, therefore, the children's credibility was the sole issue in the case. *Id.* at 94-95, 716 S.E.2d at 480.

It is clear from the record that the state in this case attempted to circumvent recent case law sharply limiting the use of forensic interviewers by presenting a Minor's therapist, who was presumably familiar Minor' expected testimony and specific allegations. The State used Rich's direct knowledge of the specifics of the case to *indirectly comment on Minors' credibility* and provide greater weight to their testimony.

Rich's testimony was very likely interpreted by the jury to express that they should believe Minor because Minor's behavior was typical, expected, and complied with the behavior of the majority of other victims of sexual abuse. Moreover, that jurors should believe Minor because she disclosed sexual abuse to an expert in "the treatment of child trauma and child sexual abuse dynamics." The expert, Rich, found Minor's disclosure credible enough to inform law enforcement

For example, Rich testified that the vast majority are children are delayed in disclosing abuse just like Minor in this case. Her testimony strongly implied that because she witness Minor act in the same manner as other victims of sexual abuse Minor must be telling the truth.

Therefore, admitting her as an expert and allowing her to testify as both an expert witness and a fact witness was error as "[t]he assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. at 464, 725 S.E.2d at 141 (citing *State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)).

Not only was Rich's testimony used to bolster Minor's testimony, it was also highly prejudicial to Appellant and cumulative. Under Rule 403, SCRE, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ... or needless presentation of cumulative evidence."

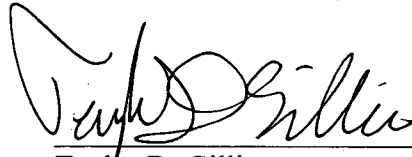
Why Minor delayed disclosing was an issue of dispute. Initially, Minor claimed Appellant threatened her life and her family. Minor later admitted that this was a lie and that she did not disclose earlier because she did not realize Appellant was a child molester.

Rich testified that either reason was consistent with the actions of a child who was traumatized by sexual abuse. R. 251, l. 6 – 257, l. 8. Rich's testimony regarding both the typical process of delayed disclosure and her first hand observations of Minor's disclosure process was used solely by the State to reinforce and reiterate the reasoning for Minor's actions and behavior. *See Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) ("Improper corroboration testimony that is *merely cumulative to the victim's testimony*, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.") (emphasis in original).

Rich's testimony was also prejudicial to Appellant because there was no physical evidence presented in the case and the sole issue was the credibility of Minor. Because the Minor's credibility was the most critical determination in this case and Rich's testimony was used solely to bolster Minor's credibility, Appellant was clearly prejudiced and should be granted a new trial. *See Jennings*, 394 S.C. at 480, 716 S.E.2d at 94-95 ("Because the children's credibility was the most critical determination of this case, we find the admissibility of the [forensic interviewer's] written reports was not harmless.").

CONCLUSION

By reason of the foregoing arguments, Appellant's convictions should be reversed and this case remanded to the Greenville County Court of General Sessions for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D. Gilliam", written over a horizontal line.

Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of March, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 13, 2018



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