THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM PICKENS COUNTY
Court of General Sessions
Perry H. Gravely, Circuit Court Judge

Appellate Court Case No.: 2017-001867

The State, ... Respondent,

v.

Joseph Campbell Williams, II, ... Appellant.

BRIEF OF THE APPELLANT

J. Falkner Wilkes (SC Bar #12893)
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Counsel for Appellant

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STATEMENT OF THE ISSUES

1. Did the court commit reversible error in limiting evidence of prior false accusations by complainant against persons other than the defendant?

2. Did the court commit reversible error in excluding evidence as to the Appellant's state of mind?

STATEMENT OF THE CASE

The Appellant was indicted by the grand jury in Pickens County for the offense of criminal sexual conduct with a minor, first degree (15-GS-39-1030), and criminal sexual conduct with a minor, second degree (17-GS-39-0700). The Appellant was tried by jury August 31st through September 1, 2017, the Honorable Perry H. Gravely presiding. Scott Dover, Esq., represented the Applicant at trial. Shannon Odom, Assistant Solicitor, represented the State. The jury returned a verdict of guilty on both charges and the Appellant was sentenced to 30 years on the CSC, first degree and 10 years consecutive on the CSC, second degree. The Appellant was remitted to the custody of the South Carolina Department of Corrections. A timely notice of appeal was filed. Joshua A. Edwards, Assistant Attorney General represents the State on appeal. J. Falkner Wilkes represents the Appellant on appeal.

STATEMENT OF FACTS

On November 30, 2013, the prosecutrix made a complaint to the Pickens County Sheriff's Office alleging sexual abuse by the Appellant when she was six or seven years old. R. p. 63. She reported this for the first time in 2013, when she was 17 years old. R. p. 108. She was 21 at the time of trial. R. p. 89. The prosecutrix testified that when she was six years old she began living on Lewis Street with her mother and the Appellant, her step father. R. p. 89; 97. She claimed that when she was seven years old and living at Jane Lane the Appellant rubbed on her "close to her privates". R. p. 92. She testified to oral sex occurring just before she went to live at her grandparents for a while on Railroad Street. R. p. 94. The prosecutrix testified that later the Appellant and her mom moved to High Top Drive where the "majority of everything that he done to me happened at." 94. She was ten when they initially moved to High Top. R. p. 100. The prosecutrix testified that the last abuse is occurred just before she turned thirteen. R. p. 106.

The defense produced Facebook postings showing that just hours prior to making allegations of sexual abuse against the Appellant the prosecutrix was upset with her mother and posted threats directed at them: "I think its funny people wanna say they beat someones ass when in reality they the ones who got beat. Pussy ass niggas wanna run wont face a man but wanna talk shit when everybodys gone. world war 3 is about to begin and everybody gonna wish they never fucked with me ! that anit a threat, that's a promise!" R. p. 154. The prosecutrix admitted posting the threats just hours prior to making the allegations against the Appellant that resulted in his arrest and prosecution in this case. R. p. 154-158. The defense also produced mental health/behavioral records where the prosecutrix had, over the course of years denied any sexual abuse, including specifically any abuse by the Appellant. R. p. 149-153; 226-227.

Early in the trial there was a discussion as to the application of the rape shield statute. There was an agreement on rape shield statute that the defense would not get into any prior sexual habits of the prosecutrix. R. p. 36-41.

During the trial the defense attempted to establish a prior pattern of false sexual abuse allegations by the prosecutrix against people other than the Appellant. R. p. 40. The state objected repeatedly claiming that such testimony should be excluded under the rape shield statute. The defense disclosed its intent to elicit testimony of prior false allegations of sexual abuse against two people other than the Appellant. R. p. 74-76. State's argued that testimony about prior false allegations violated the rape shield statute. R. p. 77. There was a long discussion with the court ruling that the defense could not get into the details (falsity) of the prior sexual allegations against other people. R. p. 77-83.

The state offered testimony by its expert witness, Farmer, who had been one of the prosecutrix's mental health providers. R. p. 201-206. Farmer had the prosecutrix's mental health records to refer to during her testimony. R. p. 206-208. The solicitor elicited testimony from Farmer about the prosecutrix's mental/behavioral health treatment. R. p. 208. Farmer testified that the prosecutrix made a false report of abuse by her mom. R. p. 215-216. Farmer went on to also identify in the records where the prosecutrix also made allegations of sexual abuse against two people other than the defendant. R. p. 215-216. Unlike the abuse claim involving the victim's mother, Farmer did not volunteer that the two allegations of sexual abuse made against other people were also false.[1]

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[1]Presumably, based on the court's earlier ruling, Farmer had been instructed not to disclose the details (falsity) of the victim's allegations of prior sexual abuse by persons other than the defendant.

On cross-examination the defense attempted to elicit testimony from Farmer, based on the medical records of the prosecutrix, that the two prior allegations of sexual assault were also found to be false. The state objected on the grounds of hearsay. R. p. 229. The court sustained the objection without stating a basis. R. p. 229.

The defense later attempted to offer testimony of the prior false allegations through the Appellant's brother. When the brother attempted to testify that victim "had a troubled past and had already made false accusations..." the state objected. R. p. 297. The court again sustained without explanation. R. p. 297. Then the defense attempted to elicit testimony from the Appellant's brother pertaining to the Appellant being around the prosecutrix (presumably due to her prior false allegations against other men): "did your brother, what was he telling you about his relationship with..." R. p. 298. The state objected and the court again sustained as hearsay. R. p. 298.

When the Appellant took the stand he testified that he would never be alone with the prosecutrix over the whole time he was married to the prosecutrix's mother. R. p. 303. When the Appellant attempted to explain why, the state objected and cut him off:

Q. Tell the jury why you would never leave yourself alone with this girl?

A. Because she'd made accusations against --.

R. p. 303.

The jury was sent out and argument ensued. The defense argued that the testimony was not offered for truth of the matter asserted. R. p. 303. Specifically the defense argued that the testimony proved the Appellant's motive and intent as to why he wouldn't be alone with the

prosecutrix. R. p. 303. The state maintained that the testimony violated the rape shield statute. 304-308.

The defense requested to proffer the Applicant's testimony. R. p. 303-307. When the defense attempted to proffer the Appellant's testimony the court immediately cut the Appellant off:

The Court:	I'll let you proffer.
Defense counsel:	Mr. Williams, I am going to ask you some question on a proffer. Did you ever leave yourself alone with [the prosecutrix]?
Defendant:	No, sir, I did not.
Defense counsel:	Because I was fearful of her because of past --
The Court:	Again, he can say "I was fearful of being accused of anything' but I don't think that he can say because of her previous allegations.

R. p. 307, l. 6-18.

After successfully preventing the testimony explaining that the Appellant didn't want to be alone with the prosecutrix because she had made prior false allegations of sexual abuse against other people, the solicitor went on to argue to the jury how she didn't believe the defense witnesses. R. p. 351. That the defense witness testimony was absurd to her [the prosecutor]. R. p. 351. The solicitor went on to say "How crazy is this?..... went to such great lengths... just to make sure that her daughters never had a chance to be alone with him. This is preposterous." R. p. 362. The solicitor went on attacking the defense testimony that the Appellant avoided ever being alone

with the prosecutrix: "How crazy is this? How illogical is this, that they want you to believe that they went to great lengths, to avoid sleep, just to make sure that her daughters never had a chance to be alone with him? This is preposterous." R. p. 362, l. 18-23. Throughout closing argument the state continued to take an unfair advantage of having blocked the Appellant's ability to explain the basis for his avoidance of ever being alone with the prosecutrix:

> Now, Mr. Dover said that the defendant would have been a fool to have put himself in that position. The defendant testified that 20 from the beginning he said that he wasn't left alone with them. By putting -- by saying, you know, that he would have been a fool to have put himself in that position, that's like a slap in the face to all the other step-dads out there. That is saying that no step-dad should ever be alone with a step-child because that's an inherent risk. That is saying that when moms and dads get married that have prior children, that the family shouldn't be blended. That you should try to have a good relationship. That you should push your child away. No. That makes no sense. And it makes no sense that mom would have gone to great lengths to keep the kids away from him like that.

R. p. 386, l. 17-397, l. 10.

ARGUMENT

I. THE COURT ERRED IN EXCLUDING EVIDENCE OF PRIOR FALSE ACCUSATIONS BY COMPLAINANT AGAINST PERSONS OTHER THAN THE DEFENDANT.

The defense in this case sought to introduce evidence of the prosecutrix's prior false allegations of sexual misconduct against persons other than the defendant. The state objected repeated raising the Rape Shield Statute.

In a prosecution for criminal sexual conduct or assault with intent to commit criminal sexual conduct, the admissibility of evidence of the victim's sexual conduct is controlled by S.C. Code Ann. 16-3-659.1 (1985). Unlike the federal rule which contains the standards and procedures governing the admissibility of such evidence, this rule merely references the statute. Note to Rule 412. Rule 412, SCRE, provides: "In prosecutions for criminal sexual conduct or assault with intent to commit criminal sexual conduct, the admissibility of evidence concerning the victim's sexual conduct is subject to the limitations contained in S.C. Code Ann. 16-3-659.1 (1985)." South Carolina's Rape Shield statute provides in pertinent part: "Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656;..." S.C. Code Ann. § 16-3-659.1. The testimony that the court excluded was not evidence of the victim's sexual conduct, but rather evidence of the prosecutrix's prior false allegations. The former is barred by Rule 412, the latter is not.

Rule 412 is designed only to preclude evidence of a complaining witness's prior sexual conduct. Evidence of prior false accusations of rape made by a complaining witness does not constitute "prior sexual conduct" for rape shield purposes. In presenting such evidence, a

defendant is not probing the complaining witness's sexual history. Rather, a defendant seeks to prove for impeachment purposes that the complaining witness has previously made false accusations of rape. Viewed in this light, such evidence is more properly understood as verbal conduct, not sexual conduct. To the extent a defendant offers evidence of prior false accusations of rape to impeach the credibility of the witness, its admission does not run afoul of the Rape Shield Rule. *See* State v. Walton, 715 N.E.2d 824, 826–27 (Ind. 1999).

Other jurisdictions are reasonably consistent in allowing evidence of prior false accusations for impeachment purposes.[2] Maine, Maryland, Missouri, New Mexico, Ohio, Tennessee, Vermont, and Wisconsin follow the federal rule and allow cross-examination concerning a prior false accusation that is probative of the witness's character for truthfulness, but do not allow the use of extrinsic evidence to contradict the witness's answer or to prove the character trait. *See, e.g.*, State v. Almurshidy, 732 A.2d 280, 287 n. 4 (Me.1999); State v. Cox, 298 Md. 173, 468 A.2d 319, 323–24 (1983); State v. Raines, 118 S.W.3d 205, 211–14 (Mo.Ct.App.2003); State v. Scott, 113 N.M. 525, 828 P.2d 958, 962–63 (Ct.App.1984); State v. Boggs, 63 Ohio St.3d 418, 588 N.E.2d 813, 816–17 (1992); State v. Wyrick, 62 S.W.3d 751, 780–82 (Tenn.Crim.App.2001); State v. Leggett, 164 Vt. 599, 664 A.2d 271, 272 (1995); State v. Olson, 179 Wis.2d 715, 508 N.W.2d 616, 619–20 (Ct.App.1993), *reh'g denied*, 515 N.W.2d 715 (Wis.1994).

Alaska, Arizona, Arkansas, Idaho, New Hampshire, and Nevada also have evidence rules similar to the federal rule, but have relaxed those rules in sexual crime cases to allow the

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[2]The following state-by-state analysis was made by the Supreme Court of New Jersey in State v. Guenther, 181 N.J. 129 (2004). Although somewhat dated, it remains relevant.

admission of extrinsic evidence of an accuser's prior false sexual crime allegation. See, e.g., Morgan v. State, 54 P.3d 332, 336 (Alaska Ct.App.2002); State v. Hutchinson, 141 Ariz. 583, 688 P.2d 209, 212–13 (Ct.App.1984) (*interpreting* State ex rel Pope v. Superior Court, 113 Ariz. 22, 545 P.2d 946, 953 (1976)); West v. State, 290 Ark. 329, 719 S.W.2d 684, 686–87 (1986), *reh'g denied*, 290 Ark. 329, 722 S.W.2d 284 (1987); State v. Schwartzmiller, 107 Idaho 89, 685 P.2d 830, 833 (1984); State v. Gordon, 146 N.H. 258, 770 A.2d 702, 704–05 (2001); Miller v. State, 105 Nev. 497, 779 P.2d 87, 89–90 (1989).

Massachusetts and Oregon, which like New Jersey follow the common law rule, have recognized a limited exception to allow cross-examination of an accuser who has made a prior false sexual crime allegation when the case involves a similar crime, but disallow extrinsic evidence. *See, e.g.*, Commonwealth v. Bohannon, 376 Mass. 90, 378 N.E.2d 987, 991 (1978); State v. Driver, 192 Or.App. 395, 86 P.3d 53, 55–58 (2004). Kansas, Georgia, Indiana, Louisiana, and Virginia, which also follow the common law rule prohibiting specific conduct evidence relating to character, have suggested that the defendant's right to confrontation in a sexual crime case allows cross-examination of the accuser-witness and the admission of extrinsic evidence to prove the witness's prior false sexual crime accusation. *See, e.g.*, State v. Barber, *supra*, 766 P.2d at 1290 (Kan.); Smith v. State, 259 Ga. 135, 377 S.E.2d 158, 160, *cert. denied*, 493 U.S. 825, 110 S.Ct. 88, 107 L.Ed.2d 53 (1989); Little v. State, 413 N.E.2d 639, 643–44 (Ind.Ct.App.1980); State v. Smith, 743 So.2d 199, 202 (La.1999); Clinebell v. Commonwealth, 235 Va. 319, 368 S.E.2d 263, 266 (1988).

Texas has embraced a case-by-case analysis to determine whether a defendant's right to confrontation requires relaxation of the bar on specific conduct evidence in all cases in which an

accuser has made a prior false criminal allegation—not just sexual crime cases. *See* Lopez v. State, 18 S.W.3d 220, 225 (Tex.Crim.App.2000) (declining "to create a per se exception to the Rule 608(b) for sexual offenses" because "[i]t makes no sense to say that certain factors will always be present in a case involving a sexual offense").

Some Federal Courts of Appeals that have addressed the use of a prior false accusation to undermine the credibility of an accuser-witness have determined that restrictions on the admissibility of extrinsic evidence do not violate the Sixth Amendment right to confrontation. *See, e.g.*, Boggs v. Collins, 226 F.3d 728, 736–40 (6th Cir.2000), *cert. denied*, 532 U.S. 913, 121 S.Ct. 1245, 149 L.Ed.2d 152 (2001); Hogan v. Hanks, 97 F.3d 189, 191 (7th Cir.1996), *cert. denied*, 520 U.S. 1171, 117 S.Ct. 1439, 137 L.Ed.2d 546 (1997); United States v. Bartlett, 856 F.2d 1071, 1088–89 (8th Cir.1988).

Several jurisdictions have recognized that prior false accusations of sexual crimes by the accuser may be admissible for reasons unrelated to impeachment of general credibility—to prove the accuser's habit, state of mind, motive, or common scheme. *See, e.g.*, Peeples v. State, 681 So.2d 236, 237–39 (Ala.1995) (habit); People v. Hurlburt, 166 Cal.App.2d 334, 333 P.2d 82, 87 (1958) (state of mind); State v. Anderson, 211 Mont. 272, 686 P.2d 193, 199, 201 (1984) (state of mind, motive, and bias). In the present case, given multiple prior false allegations, combined with other evidence in the victim's mental health records of a pattern of lying, the evidence could fall within the realm of habit, intent, or common scheme.

In determining that prior false allegations are admissible under Rule 412, other court's have considered and resolved any conflict with Rule 608. Rule 608 provides in part:

> (b) Specific Instances of Conduct. 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.

In considering the apparent conflict other court's have held that "evidentiary constraints must sometimes yield to a defendant's right of cross-examination." Clinebell v. Commonwealth, 235 Va. 319, 368 S.E.2d 263, 266 (1988); *see also* Mengon v. State, 505 N.E.2d 788, 792 (Ind.1987) (holding that a party's right to cross-examination should not be unduly limited by the court). A defendant's Sixth Amendment right of confrontation requires that the defendant be afforded an opportunity to conduct effective cross-examination of State witnesses in order to test their believability. Davis v. Alaska, 415 U.S. 308, 315–18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Timberlake v. State, 690 N.E.2d 243, 255 (Ind.1997), *cert. denied*, 525 U.S. 1073, 119 S.Ct. 808, 142 L.Ed.2d 668 (1999). "The right to cross-examine, as well as other forms of confrontation, 'ensure [sic] that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo–American criminal proceedings.' " Tague v. Richards, 3 F.3d 1133, 1138 (7th Cir.1993) (*quoting* Maryland v. Craig, 497 U.S. 836, 846, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990)). Accordingly, the majority of jurisdictions that have considered the have held that the evidentiary rule preventing evidence of specific acts of untruthfulness must yield to the defendant's Sixth Amendment right of confrontation and right to

present a full defense.[3] Finding both the reasoning and weight of this authority persuasive, we hold that evidence of prior false accusations of rape is admissible to attack the credibility of the accusing witness, notwithstanding the general exclusionary edict of Rule 608(b). *See* State v. Walton, 715 N.E.2d 824, 827 (Ind. 1999).

As a matter of first impression the South Carolina Supreme Court held that prior allegations by the victim against persons other than the defendant may be probative on the issue of credibility . State v. Boiter, 396 S.E.2d 364, 302 S.C. 381 (S.C., 1990). There the court noted that "other jurisdictions have held that such evidence is admissible only if the court makes a threshold determination that the prior accusation was false. *See* Clinebell v. Com., 235 Va. 319, 368 S.E.2d 263 (1988); Woods v. State, 657 P.2d 180 (Okl.1983), Commonwealth v. Bohannon, 376 Mass. 90, 95, 378 N.E.2d 987, 991 (1978). Other Courts have also considered remoteness of the prior accusation. *See* State v. LeCair, *supra*." *See* State v. Boiter, 396 S.E.2d 364, 302 S.C. 381 (S.C., 1990). Although apparently holding that the trial court must make some threshold determination that the prior accusation was false to allow such evidence, the Boiter Court did not articulate an applicable standard of proof when doing so.

The standard of proof applied in similar cases varies among jurisdictions. Some jurisdictions require that the prior accusation be shown to be "demonstrably false." *See, e.g.*, Little, *supra*, 413 N.E.2d at 643 (Ind.Ct.App.); State v. Sieler, 397 N.W.2d 89, 92 (S.D.1986); Berry v. Commonwealth, 84 S.W.3d 82, 91 (Ky.Ct.App.2001). Others have articulated varying

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[3] *E.g.*, Clinebell, 368 S.E.2d at 265–66; Commonwealth v. Bohannon, 376 Mass. 90, 378 N.E.2d 987, 990–91 (1978); West v. State, 290 Ark. 329, 719 S.W.2d 684, 687 (1986); State v. Anderson, 211 Mont. 272, 686 P.2d 193, 198–201 (1984); Miller v. State, 105 Nev. 497, 779 P.2d 87, 89 (1989); Smith v. State, 259 Ga. 135, 377 S.E.2d 158, 160, *cert. denied*, 493 U.S. 825, 110 S.Ct. 88, 107 L.Ed.2d 53 (1989).

standards of proof for determining whether the witness made the accusation and whether it was false: clear and convincing evidence, Gordon, *supra*, 770 A.2d at 704, 705 (N.H.); preponderance of the evidence, Morgan v. State, 54 P.3d 332, 339 (Alaska Ct.App.2002); or "a reasonable probability of falsity," Smith, *supra*, 377 S.E.2d at 160(Ga.); Barber, *supra*, 766 P.2d at 1290 (Kan.Ct.App.); Clinebell, *supra*, **323 368 S.E.2d at 266 (Va.). *See also* Smith, *supra*, 743 So.2d at 203 (La.) (stating judge must determine "whether reasonable jurors could find, based on the evidence presented by defendant, that the victim had made prior false accusations").

Although not setting a clear standard of proof, the Boiter Court held that in deciding admissibility of evidence of a victim's prior accusation, the trial judge should first determine whether such accusation was false. If the prior allegation was false, the next consideration becomes remoteness in time. Finally, the trial court shall consider the factual similarity between prior and present allegations to determine relevancy.

The defense in this case was clearly attempting to lay a proper foundation for the admissibility of the prior false statements. In every attempt the trial court summarily cut the defense off without allowing an opportunity to present evidence relevant to a Boiter analysis. Given the testimony at issue, it was incumbent upon the trial court to conduct a proper Boiter analysis, which it failed to do.

Despite some testimony about the prior sexual allegations against other people was admitted, evidence of their falsity was excluded. Although the trial court repeatedly cut off the defense, a review of the questions that the defense was attempting to ask, the arguments of counsel, as well as other testimony that was admitted, facts relating to the investigation and falsity of the prior accusations appear to have been recorded in the mental/behavioral health

records of the prosecutrix. The record is sufficient evidence to show that the allegations were false, or at least sufficient enough to require the trial court to conduct a hearing to properly address and determine the issue under the factors set forth in Boiter.

There is nothing in the record that would suggest that the trial court considered, much less conducted, a proper analysis under Boiter. The record shows that the court simply refused to allow the defendant an opportunity to meet his burden to establish admissibility under Boiter. Accordingly, the trial court's ruling constitutes an error of law and is not entitled to any deference. Failing to allow the defense an opportunity to present evidence to carry the burden as to admissibility constitutes an abuse of discretion on the part of the trial judge.

Prejudice

This case turned entirely on the believability of the prosecutrix. As a result, the defense of the case rested heavily on her effective cross-examination. In limiting the defense cross-examination the court violate the Appellant's rights under the Confrontation Clause. "A violation of the defendant's Sixth Amendment right to confront the witness is not per se reversible error" if the "error was harmless beyond a reasonable doubt." State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) (*quoting* State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994)) (*internal quotations omitted*). This Court must determine whether the error was harmless beyond a reasonable doubt. Graham, 314 S.C. at 385, 444 S.E.2d at 527. No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990); State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985); State v.

Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct.App.2004). Whether an error is harmless depends on the particular facts of each case and upon a host of factors, including:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case.

Mizzell, 349 S.C. at 333, 563 S.E.2d at 318–19 (*quoting* Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

"Harmless beyond a reasonable doubt" means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt. Mizzell, 349 S.C. at 334, 563 S.E.2d at 319; Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). "In determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict." Mizzell, 349 S.C. at 334, 563 S.E.2d at 319 (internal quotations omitted). The Mizzell Court concluded the trial court committed reversible error:

> Considering the Van Arsdall factors, we note much of Steele's testimony was either cumulative or corroborated by other witnesses....
> ...Critically, however, Steele was the only witness to testify as an eyewitness to [defendants'] burglary of the home. The lack of physical evidence placing [defendants] at the scene enhanced the importance of Steele's testimony. As in [State v.] Brown, [303 S.C. 169, 399 S.E.2d 593 (1991),] the co-conspirator witness is the only link placing [defendants] at the scene of the crime....
> ....Because Steele was the only witness to directly link [defendants] to the burglary, we cannot say the trial court's error was harmless beyond a reasonable doubt. Accordingly, we find the trial court committed prejudicial error in limiting [defendants'] cross-examination into Steele's possible sentence.

State v. Mizzell, 349 S.C. 326, 334–35, 563 S.E.2d 315, 319–20 (2002). Here, the only evidence against the Appellant was the testimony of the prosecutrix. Limiting the Appellant's effective cross-examination can not be harmless.

Prejudice is further evident where several witnesses, including the Appellant, testified that the allegations could not be true because the Appellant intentionally avoided ever being alone with the prosecutrix. The state objected every time a witness, including the Appellant, attempted to explain the reason underlying the Appellant's fear of being alone with the prosecutrix. Then after having kept out any explanation behind the witnesses' testimony that the defendant would never be alone with the prosecutrix, the state made the defense's lack of explanation the object of ridicule in closing argument. The conviction of the Appellant should therefore be reversed.

II. THE COURT ERRED IN REFUSING TO ALLOW WITNESSES OFFER TESTIMONY TO EXPLAIN THE APPELLANT'S STATE OF MIND.

A key element of the defense in this case involved testimony that the Appellant never allowed the prosecutrix around him when they would be alone together. The Appellant, his wife, and his brother each testified that the Appellant went to great lengths to make sure that he was never alone with the prosecutrix. As unusual as that may seem, it would make sense in light of the multiple prior false sexual allegations by the prosecutrix against other people. Relying on the rape shield statute the state objected. Although the court failed to state clearly the basis for excluding any mention of the prior false allegations, during discussions it referred to the testimony at issue as hearsay. R. p. 306, l. 17; R. p. 305-308. To the extent that the court excluded the testimony on the grounds of hearsay, such a ruling is in error.

The Appellant argued that the evidence established the Appellant's state of mind in deciding to avoid ever being alone with the prosecutrix. Rule 803 (3) provides that the following

are not excluded by the hearsay rule: "Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." Testimony as to the prior false allegations explained the Appellant's state of mind as fearful of being alone with the prosecutrix. It was therefore, not excludable as hearsay.

Rule 803 (4) provides that the following are not excluded by the hearsay rule: "Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion." Rule 803 (4) SCRE. Evidence relating to the falsity of prior sexual allegations were contained in the prosecutrix's mental/behavioral health records and, being pertinent to her treatment and diagnosis, were not excludable as hearsay.

As set forth above, the prejudice created by the exclusion of the testimony is obvious given the state's closing argument ridiculing the defense testimony about the Appellant never being alone with the prosecutrix. The court therefore erred in excluding the testimony as hearsay.

CONCLUSION

Based on the foregoing the conviction and sentence of the Appellant should be reversed and set aside.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that the Final Brief of Appellant complies with Rule 211 and further that it has been redacted in compliance with the Supreme Court's Order on the redaction of private data and personal identifiers.

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