THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
Doyet A, Early, III, Circuit Court Judge

Court of Appeals Opinion No. 2018-UP-109

The State of South Carolina, ... Respondent,

v.

Nakia Johnson, ...Petitioner.

Petition for Writ of Certiorari

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CERTIFICATION

Pursuant to Rule 242(C)(1), SCACR, counsel for the petitioner, Nakia Johnson, certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals. A. 593-99, 609.[1]

QUESTIONS PRESENTED

Question I

Did the Court of Appeals err by finding harmless error, regarding the third-degree criminal sexual conduct conviction, when David Kellin, a child advocacy center interviewer, testified he instructed the child to "tell the truth during the interview process," when that testimony was prohibited by *State v. Anderson* and *State v. Kromah*, there was no physical evidence of sexual abuse, and the issues before the jurors turned solely on the credibility of the witnesses?

Question II

Did the Court of Appeals err when it failed to hold inadmissible the testimony by Dr. Allison Foster that the "most painful dynamics in child sexual abuse cases involving family members is that mothers [and other adults] . . . [questioning] how could I not have seen something was going on" when the State presented testimony of the child's mother and other family members not being aware of the alleged child abuse and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the witnesses?

Question III

Should this Court order a new trial for Nakia Johnson based on the cumulative error doctrine?

STATEMENT OF THE CASE

On October 14, 2011, the complaining child witness and her mother accused the petitioner, Nakia Johnson, of child sexual abuse. The State arrested and indicted Mr.

[1] "R." refers to the Record on Appeal. "A." refers to the Appendix. The Record on Appeal is included in the Appendix. The page numbers for the Record on Appeal contained in the Appendix correspond to the pages numbers in the original Record on Appeal. For example, R. 1 is also numbered A. 1.

Johnson for first-degree criminal sexual conduct with a minor, second-degree criminal sexual conduct with a minor, and committing a lewd act on a minor child.[2] R. 526-29.

From June 22-26, 2015, the State tried Mr. Johnson before the Honorable Doyet A. Early, III and a jury in Kershaw County. Nicole Simpson and Kathryn Cavanaugh represented the State. Virgin Johnson, Jr. (no relation) and Corey Williams represented Mr. Johnson. The jurors found Mr. Johnson not guilty of first-degree criminal sexual conduct with a minor but returned guilty verdicts for second-degree criminal sexual conduct with minor and lewd act. R. 513-14. Judge Early sentenced Mr. Johnson to concurrent terms of twenty years for second-degree criminal sexual conduct with a minor and fifteen years for lewd act. R. 521, lines 8-16; 524-25. Judge Early subsequently denied Mr. Johnson's motion for a new trial.

Mr. Johnson timely appealed to the Court of Appeals, raising these three issues:

I. Should the trial court judge have granted a mistrial when the State's expert witness, Dr. Allison Foster, testified that the "most painful dynamics in child sexual abuse cases involving family members is that mothers [and other adults] . . . [questioning] how could I not have seen something was going on" when the State presented testimony of the child's mother and other family members not being aware of the alleged child abuse and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?

II. Should the trial judge have granted a mistrial when David Kellin, a child advocacy interviewer, testified he instructed the child to "tell the truth during the interview process," when that testimony is prohibited by *State v. Kromah* and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?

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[2] Lewd act was previously found in S.C. Code Ann. § 16-15-140. Lew act is now third-degree criminal sexual conduct with a minor, codified at S.C. Code Ann. § 16-3-655(C).

III. Should [the Court of Appeals] grant a new trial based on the cumulative error doctrine?

A. 535.

On December 5, 2017, the Court of Appeals convened an oral argument. The Court of Appeals subsequently issued a written opinion, *State v. Johnson*, Op. No. 2018-UP-109 (filed March 14, 2018), affirming Mr. Johnson's conviction for committing or attempting to commit a lewd act, reversing his conviction for second-degree criminal sexual conduct with a minor, and remanding the case for a new trial on the charge of second-degree criminal sexual conduct with a minor. A. 585-92. Regarding the first issue, the Court of Appeals did not find any error with Dr. Foster's testimony. A. 586-89. Regarding the second issue, the Court of Appeals held Mr. Kellin's "testimony was improper under" *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) and *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) but reasoned:

> Although we find the trial court erred in allowing Kellin to testify that he asked Victim if she would tell the truth in the forensic interview, we believe this error only requires reversal of Johnson's conviction for second-degree CSC with a minor because only that conviction depended solely on the credibility of Victim. *See State v. Chavis*, 412 S.C. 101, 110, 771 S.E.2d 336, 341 (2015) ("The determination whether a bolstering error is harmless depends on whether the case turns on the credibility of the victim."). We affirm Johnson's lewd act conviction because Mother's testimony about overhearing Johnson and Victim's conversation corroborated Victim's testimony regarding the graveyard incident. Victim testified Johnson told her to get into the car to go to the store, and he left before Mother and the other children could come.

A. 589-91. Regarding the third issue, the Court of Appeals held Mr. Johnson did not establish cumulative error because the Court did not find error with the admission of Dr. Foster's testimony. A. 591-92.

On March 29, 2018, Mr. Johnson petitioned for rehearing. A. 593-97. On April 10, 2018, the State petitioned for rehearing.[3] A. 600-08. On June 21, 2018, the Court of Appeals denied the petitions for rehearing. A. 609. This petition for writ of *certiorari* follows.

STATEMENT OF FACTS

Mr. Johnson, a Lee County Deputy Sheriff at the time, and Pamela Hall[4] met in September 2010. At the time, both where married to other people, and Ms. Hall had a daughter from her prior relationship. The two married but later divorced. They had a son and two daughters together. After the divorce, Mr. Johnson provided financial support to Ms. Hall and the children. Mr. Johnson and Ms. Hall continued to have a friendly and sometimes intimate relationship. Prior to and after the divorce, they argued about Mr. Johnson "cheating" with other women. Sometimes these arguments turned physical.[5] R. 103-17.

At 6:36 p.m. on Tuesday, October 11, 2011, Pamela Hall reported to the Kershaw County Sheriff's Office that her eleven-year-old daughter from her previous relationship (hereinafter "the child") had been sexually assaulted. At 7:23 p.m., Deputy Sheriff Jerry Barnwell arrived at Ms. Hall's residence and interviewed her, learning that she had pointed a gun at Mr. Johnson. He did not interview the child but notified the "on-call

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[3] The Court of Appeals granted the State's unopposed petition to extend time to file its petition for rehearing.

[4] Ms. Hall has a 2002 conviction for fraudulent check and a 2009 conviction for financial identity fraud. For the 2009 charge, she served 18 months following a probation revocation. In 2010, Ms. Hall received inpatient treatment for alcohol and drug abuse. R. 130-33.

[5] The child testified she was aware of Mr. Johnson's "cheating" with other women. R. 33, lines 12-15; 35, lines 4-8.

investigator" and victims' advocate to meet Ms. Hall and the child at the hospital. R. 23-27.

According to Ms. Hall, Mr. Johnson came to pick up their youngest child. Before the children came home, they had sex. While Ms. Hall was helping their son with his homework, Mr. Johnson and the child left to go to the store. Ms. Hall called Mr. Johnson and asked him to pick up skins and beer from the store. Ms. Hall testified she got a call from Mr. Johnson's phone and could hear him talking. At first, she couldn't make out the conversation but claimed she heard him say, "[Y]ou know I want to nut in you, but I can't." Ms. Hall claimed Mr. Johnson asked, "[Y]ou know why?," and the child responded, "[B]ecause I will get pregnant." Ms. Hall also claimed she heard Mr. Johnson asking the child "does she want to do it; does she want to be on top or does she want him to get on top." After the child allegedly said she wanted Mr. Johnson to be "on top," Ms. Hall hung up the phone. Ms. Hall called back. Mr. Johnson answered. Ms. Hall told Mr. Johnson, "[Y]ou got ten seconds to have my baby back in the yard." Ms. Hall claimed not to remember everything else she said. She went into the yard and waited. According to Ms. Hall, Mr. Johnson drove back fast. Ms. Hall told the child to get out of the car. Ms. Hall jumped into the car, grabbed Mr. Johnson's gun, and argued with him. R. 117-20.

Still holding Mr. Johnson's gun, Ms. Hall went to her mother's house[6] and talked to the child. When Ms. Hall asked her what happened, the child "kept saying nothing, nothing." Ms. Hall pressed, and the child eventually claimed Mr. Johnson "was touching her breasts." R. 120.

[6] Ms. Hall lived in "a single mobile home trailer [with] three bedrooms," which is next to her mother's house. R. 113.

Ms. Hall took the child back outside, confronted Mr. Johnson, and pointed his gun at him. Mr. Johnson denied he would "do something like that." R. 121-22. Ms. Hall told the child "to go in the house." She returned Mr. Johnson's gun and "told him to get out of my yard because I was calling the police." Ms. Hall called 911. After speaking with Deputy Barnwell, Ms. Hall took the child to the hospital. R. 125.

Later that night, the child was examined at the hospital and interviewed by the police. R. 67; 361. Temple Hart, a registered nurse, performed the examination. After getting general medical history from Ms. Hall, the child described the sexual assault from earlier in the day as involving touching and rubbing "on top of my clothes." Other than some redness, which could have multiple causes, the examination was normal. R. 165-80; 183; 188. Ms. Hart collected evidence in a sexual assault kit for further analysis. R. 173, lines 21-24; 177, lines 10-18. Paul Meah of the South Carolina Law Enforcement Division testified as an expert in DNA analysis. Mr. Meah examined the sexual assault kit, which contained a request from Ms. Hart to look for semen. Mr. Meah did not find any evidence of semen. R. 268-83.

At trial, the child testified about the allegations of sexual abuse.[7] When they lived in Fairfax, South Carolina, the child claimed Mr. Johnson "discovered that I had hair on my privates." She claimed Mr. Johnson would ask her to pull down her pants, and he would pull down his pants. She claimed Mr. Johnson would "rub" her arms and breasts, kiss her, and "put his private in my private." She also claimed Mr. Johnson would ask her if she would tell, and the child said she would not. R. 36-38.

[7] At the time she testified at trial, the child was a 15-year-old high school sophomore. She lived with her father and stepmother following Ms. Hall's probation revocation. R. 28-30.

The child testified about abuse allegedly occurring when she lived on her grandmother's property. She claimed she and Mr. Johnson would "go in the room" and Mr. Johnson "pull[ed] down his pants down" and told her "to suck it," meaning his penis. While she did this, she claimed Mr. Johnson would "rub [her] hair or move [her] head back and forth." She claimed "white stuff" would come out of his penis. Also at this location, the child claimed Mr. Johnson would "tell me to lay down and he'd kiss me. And he'd kiss my thighs and then he'll put his penis in my private." She further claimed Mr. Johnson would rub her bottom but would not put his penis inside. R. 38-40.

During the period of time when the child moved back to Fairfax, she claimed the abuse "just speeded up, just got worse than what it was." She claimed Mr. Johnson would "would mess with me" and the abuse lasted "hour after hours." Other than claiming it happened in the "back room, laundry room, and his room," the child did not testify to any details of the abuse. R. 44-46.

The child claimed abuse occurred at her Aunt Missy's house in Cassatt, South Carolina while her aunt was at work and Ms. Hall was outside the house. She claimed Mr. Jonson would take her into the computer room, "pull down his clothes," and tell the child to pull down her clothes. The child claimed Mr. Johnson would have her sit on his lap. She claimed Mr. Johnson would talk for a while, start "kissing and rubbing" her, lick and kiss her breasts and stomach, and rub her butt. The child testified Mr. Jonson would sit in the computer chair, ask her to sit in his lap, and "put is penis in my vajayjay, and he'll just move up and down constantly." R. 46-51.

The child claimed the abuse occurred during a trip to Walt Disney World in Orlando, Florida. On the first night there, she "slept on one side of the bed and they slept

on the other side." She "got closer to where he was." She claimed "he would take the cover up and down so I could see his penis that night." On the last day of the trip, the child claimed Mr. Johnson sent Ms. Hall and the other children to get the car. While they were gone, she claimed Mr. Johnson kept touching and rubbing her and tried to "[p]ut his penis in me," but she told him to stop because it hurt. R. 51-53.

The child testified about a trip to Myrtle Beach, South Carolina. She claimed Mr. Johnson touched her underwater and made her grab him underwater. When they returned from Myrtle Beach to a hotel in Bishopville, South Carolina, the child claimed Mr. Johnson sent Ms. Hall "to the store to get some soap and something else" and told her "brothers and sisters to go in the bathroom." She claimed Mr. Johnson told her "to lay back on the bed and take [her] pants off" and "put his penis in my vajayjay." R. 53-55.

The child testified about incidents allegedly occurring on various dirt roads near her Aunt Missy's house. She claimed Mr. Johnson would pull down her pants, take her pants off, have her "get on top of him," and have her "ride" him by "mov[ing] up and down." She claimed this happened "multiple times" on multiple dirt roads but she could only identify a single dirt road for law enforcement. R. 55-58.

The child testified about the day Ms. Hall called the police. She and Mr. Johnson left to go to the store. Instead of going to the store, the child claimed Mr. Johnson took her to a graveyard, pulled down his pants, and told her to pull down her pants. She claimed, Mr. Johnson "started touching me and he started feeling, but we never could have done nothing because of the fact that my mama was still on the line and he was just talking." She further claimed, after Mr. Johnson got off the phone with Ms. Hall, the two went to the store and rushed home. R. 61-64.

On October 12, 2011, David Kellin, a social worker, interviewed the child at the Family Resource Center—a child advocacy center mandated by statute[8]—at the request of Investigator Rick Bailey. Because the child was sick, the interview was terminated early. The videotape of this interview was introduced at trial. R. 229-43; 251-52. On November 9, 2011, Laurie Caldwell of the Dickerson Center—also a child advocacy center—interviewed the child a second time. The videotape of this interview was not introduced into evidence because the child had turned twelve prior to the interview. R. 292-306.

Dr. Susan Luberoff, a medical doctor, testified as an expert "in the field of child sexual assault examinations." She examined the child on October 14, 2011 at the Assessment & Resource Center ("ARC")—also a child advocacy canter. The examination was normal, and Dr. Luberoff could not offer an opinion whether sexual abuse "happened or whether it didn't" happen. R. 340-54.

A records custodian from AT&T testified that, on the afternoon of October 11, 2011, (1) Ms. Hall's phone called Mr. Johnson's phone for fifty seconds beginning at 5:41 p.m., (2) Mr. Johnson's phone called Ms. Hall's phone for two minutes, three seconds beginning at 5:54 p.m., and (3) Ms. Hall's phone called Mr. Johnson's phone for one minute, and twenty-three seconds to one minute, twenty-five seconds, beginning at 5:56 p.m. R. 191-205.

Investigator Dave Capps, of the Lee County Sheriff's Office, who is also responsible for "in house IT," retrieved the security video from Fountain Grocery Store showing that Mr. Johnson and the child were inside the store at 5:58 p.m. or 5:59 p.m. R.

[8] S.C. Code Ann. § 63-11-310.

253-61; 263-67. Investigator Rick Bailey of the Kershaw County Sheriff's Office acknowledged it would be impossible for Mr. Johnson to have been at the graveyard and the store at the same time. R. 395-97.

Investigator Rick Bailey of the Kershaw County Sheriff's Office contacted Mr. Johnson and requested he provide an interview. Mr. Johnson cooperated with the investigation. The interview, occurring on October 14-15, 2011, was videotaped and played to the jurors. R. 362-70; 373-74. During the interview, Mr. Johnson denied abusing the child. At the conclusion of the interview, Investigator Bailey arrested Mr. Johnson by serving arrest warrants that had already been obtained based solely on the statements of Ms. Hall and the child. R. 385-87.

ARGUMENTS

Question I

Did the Court of Appeals err by finding harmless error, regarding the third-degree criminal sexual conduct conviction, when David Kellin, a child advocacy center interviewer, testified he instructed the child to "tell the truth during the interview process," when that testimony was prohibited by *State v. Anderson* and *State v. Kromah*, there was no physical evidence of sexual abuse, and the issues before the jurors turned solely on the credibility of the witnesses?

The Court of Appeals "agree[d] with [Mr.] Johnson that the forensic interview's testimony was improper under *Kromah* and *Anderson*" because Mr. "Kellin testified he begins forensic interviews by asking victims if they would tell the truth during the interview process" and the "trial court refused to strike this testimony or grant a mistrial." The Court of Appeals then concluded, "Although we find the trial court erred in allowing Kellin to testify that he asked Victim if she would tell the truth in the forensic interview, we believe this error only requires reversal of Johnson's conviction for second degree CSC with a minor because only that conviction depended solely on the credibility of

Victim." The Court of Appeals "affirm[ed] Johnson's lewd act conviction because Mother's testimony about overhearing Johnson and Victim's conversation corroborated Victim's testimony regarding the graveyard incident." A. 589-90. As pointed out in Mr. Johnson's petition for rehearing, A. 594-96, the Court of Appeals holding that the mother's testimony was sufficient to corroborate the child's testimony regarding the alleged assault at the graveyard erred for two reasons. The Court of Appeals additionally erred in its application of the harmless error analysis.

For its first error, the Court of Appeals overlooked Mr. Johnson presenting evidence of Ms. Hall's motive to pressure or coach her child to make false allegations. An adult's motive for making false allegations of sexual abuse is a recurring problem. *See, e.g.*, *State v. Smith*, 383 S.C. 159, 679 S.E.2d 176 (2009) (trial judge did not abuse his discretion or commit an error of law in granting defendant a new trial based on coaching by child's aunt during trial). That two witnesses sharing the same motive corroborated each other about one allegation in the case does not mean credibility was not the central issue for the jurors to resolve. Following the Court of Appeals' analysis to the logical conclusion, the appellate courts could never reverse a conviction for third-degree criminal sexual conduct with a minor when the adult "coaching" the child provides testimony corroborating a portion of the child's testimony whose credibility is an issue in the case. There is no way an appellate court could conclude, beyond a reasonable doubt, that Ms. Hall's motive-based testimony is sufficient corroboration in the absence of any physical evidence corroborating the sexual assault allegations.

The second error involves the timeframe for the third-degree criminal sexual conduct allegations. The Court of Appeals correctly observed, "Mother's testimony,

however, does not corroborate Victim's testimony about any other events" other than the graveyard allegations. A. 591. But, the Court of Appeals did not consider that the lewd act indictment alleged an over four-year timeframe during which the crime could have occurred. The child claimed Mr. Johnson sexually abused her on multiple dates at multiple locations. Accordingly, there is no way to know whether the jurors convicted Mr. Johnson of lewd act based on the graveyard allegation or one of the other allegations. In fact, the Court of Appeals correctly noted, "The State entered a surveillance video into evidence showing [Mr.] Johnson and Victim at the store that day." A. 590 (fn. 4). The opinion below, however, neglected to consider evidence in the record, including the time stamps on the surveillance video, showing Mr. Johnson and the child were at the store at the same time of the phone call that supposedly corroborated the graveyard allegations. R. 191-205, 253-61, 263-67, 395-97. Thus, the jurors likely rejected these allegations and based the lewd act conviction on other allegations. Regardless, there is no way the Court of Appeals could conclude, beyond a reasonable doubt, that the jurors based the lewd act conviction on this testimony as opposed to other testimony.

In addition to making these errors, the Court of Appeals did not apply the correct standard of review. An appellate court must be able to conclude the error was "harmless beyond a reasonable doubt." *State v. Mouzon*, 326 S.C. 199, 205, 485 S.E.2d 918, 921 (1997). Although arising in the context of a post-conviction relief case, this Court's recent opinion in *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) is instructive for when the State's evidence is so strong that error does not result in prejudice. *Smalls* held, "[F]or the evidence to be overwhelming such that it categorically precludes a finding of prejudice..., the evidence must include something conclusive, such as a confession,

DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland*[9] standard of a reasonable probability. . . the factfinder would have had a reasonable doubt cannot possibly be met." *Id.* 422 S.C. at 191, 810 S.E.2d at 845 (internal quotations omitted). In this case, the State did not present any evidence—such as DNA, a confession, or physical evidence—so conclusive that excludes the possibility that the jurors could have a reasonable doubt if the error was removed from the case.

Because credibility of the witnesses was the central issue for the jurors to determine, the error was not harmless. *See Mouzon. Compare Kromah*, 401 S.C. at 362, 737 S.E.2d at 501 ("Based on the entire record, including the physical evidence documented in this case, the challenged testimony could not reasonably have affected the result of the trial, so any error in its admission was harmless beyond a reasonable doubt.") *with Anderson*, 413 S.C. at 219, 776 S.E.2d at 79 (finding "overwhelming" prejudice when the "case turned solely on the credibility of the minor and of Appellant. The minor testified to abuse by Appellant over a course of three to four years, while Appellant denied any improper conduct. There was no physical evidence of sexual abuse.").

This Court should grant the writ and consider the issue. This Court's guidance is needed to clarify the proper application of the harmless error rule. Although this Court's recent precedent in appeals of criminal sexual conduct with a minor convictions focused on the presence or absence of physical evidence of sexual abuse, *e.g. Anderson, Kromah,* and *Jennings,* as *Smalls* illustrates, other considerations are relevant.

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[9] *Strickland v. Washington*, 466 U.S. 668 (1984).

Question II

Did the Court of Appeals err when it failed to hold inadmissible the testimony by Dr. Allison Foster that the "most painful dynamics in child sexual abuse cases involving family members is that mothers [and other adults] . . . [questioning] how could I not have seen something was going on" when the State presented testimony of the child's mother and other family members not being aware of the alleged child abuse and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the witnesses?

The prosecution called Dr. Allison Foster, who is employed at the ARC and offered her as an expert in "child abuse assessment." Outside the presence of the jurors, the trial judge decided to qualify Dr. Foster as an expert witness based on the holding in *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) (distinguishing improper bolstering cases because in *Brown* the behavioral expert did not examine the victim) *abrogated in part by State v. Jones*, No. 2016-001933, 2018 WL 3297908 (S.C. July 5, 2018). The trial judge clarified that Dr. Foster would "not be offering any opinion regarding the credibility or believability of the victim ***and/or other witnesses***," "commenting on whether or not she was actually assaulted," or offering testimony beyond giving "an opinion about the effects sexual assault has or responses to sexual assault ***on children.***" R. 308-13 (emphasis added).

After the jurors returned to the courtroom, the trial court judge qualified Dr. Foster as an expert "in the field of child abuse assessment." R. 313-17. Consistent with *Brown*, Dr. Foster's initially testified about the dynamics of child sexual abuse and the process of a child disclosing the abuse. R. 317-31. The prosecution then asked, Dr. Foster, "[D]o family members always know what's happening to a child?" Dr. Foster responded:

> No, they do not. And one of the more painful dynamics in child sexual abuse cases involving family members is that mothers—and I'll say

> mothers because most often it is the mother who is saying, how could I not have seen something was going on? So every week, and at my job at the ARC, that's a question that –

Trial counsel requested a sidebar and moved for a mistrial. R. 311-33. At the conclusion of Dr. Foster's testimony, trial counsel placed Mr. Johnson's mistrial motion on the record. Counsel argued:

> I think that goes directly in this case to bolstering the credibility of the – of what was said by the mom and the daughter. And that testimony elicited is prejudicial and would impact the jury that I think . . . the proper remedy is a mistrial.

R. 337, line 13 – 338, line 4. Trial counsel pointed out the lack of "physical evidence" in the case, and the trial judge acknowledged, "Everything is credibility." Trial counsel agreed and pointed out, "[T]he fact that she testified as an expert bolsters it. But when her testimony becomes more specific to this particular case, it bolsters it more." Counsel pointed out, "[Y]ou can't un-ring the bell,"[10] and renewed the request for a mistrial "in the interest of justice and fairness." The trial court judge once again denied the motion. R. 338, line 5 – 460, line 4.

The prosecutor emphasized the testimony of Dr. Foster during closing arguments. R. 450, line 25 – 451, line 4; 575, lines 4-5; 464, line 12 – 467, line 23.

In *State v. Anderson*, decided about six weeks after Mr. Johnson's trial, this Court approved the procedure recognized by the Court of Appeals in *Brown*, noting:

> The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility.

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[10] *See State-Record Co. v. State*, 332 S.C. 346, 356, fn. 19, 504 S.E.2d 592, 597, fn. 19 (1998) ("it is difficult, if not impossible, to unring a bell." (internal quotations omitted)).

413 S.C. at 218-19, 776 S.E.2d at 79.

By explaining the reactions of caregivers, Dr. Foster's testimony exceeded the procedure approved by *Brown* and *Anderson*. *Anderson* cited to cases where our appellate courts approved expert testimony about the behavioral characteristics of victims of sexual abuse. *E.g., State v. White,* 361 S.C. 407, 605 S.E.2d 540 (2004); *State v. Schumpert,* 312 S.C. 502, 435 S.E.2d 859 (1993); and *State v. Weaverling,* 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). None of these cases approved expert testimony vouching for caregivers and other adult family members.

This Court recently considered expert testimony about nonoffending caregivers in *Jones*. This Court observed:

> Though she was admitted generally as an expert in child sex abuse dynamics, Galloway-Williams' testimony concerned two distinct concepts: delayed disclosure by sexual abuse victims and the behavior of nonoffending caregivers. As to the first area, the law in South Carolina is settled: behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized. *See State v. Anderson*, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015) ("Certainly we recognize that there is such an expertise: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims."). Her testimony about delayed disclosure from sex abuse victims fits squarely within this commonly recognized category. However, the behavior of nonoffending caregivers presents a less settled question. Nevertheless, our review of the record indicates the trial judge did not abuse his discretion in finding the subject appropriate for expert testimony. The State explained it was offering Galloway-Williams' testimony to educate the jurors on why a nonoffending caregiver may fail to act after learning sexual abuse was occurring, contrary to what a reasonable person would expect. Finding this testimony to be in a similar category as other behavioral testimony admissible in sexual abuse cases, the trial judge concluded it fell outside the scope of lay knowledge and was therefore admissible.

Jones, at *2. After pointing out "the behavior of nonoffending caregivers presents a less settled question," this Court cautioned:

> [T]his holding does not create a categorical rule establishing this as a recognized area of expertise in every case. If such an expert is challenged, the proper course of action for the trial court remains to hear a proffer of the proposed expert's testimony and determine whether the all of the requirements of Rule 702, SCRE, have been satisfied.

Id. at *2 (fn. 1).

Jones and Mr. Johnson's case reveal a new state-wide strategy of prosecutors using the *Anderson-Brown* procedure to offer expert testimony about the behavior of nonoffending caregivers. Mr. Johnson's improper bolstering objection was a challenge to the reliability of the Dr. Foster's testimony.[11] The trial judge did not convene a hearing to determine the reliability of this evidence that the prosecution used to explain the behavior of the non-offending caregivers. This Court's intervention is needed to provide guidance to the bench and bar about the proper limitations of testimony under the *Anderson-Brown* procedure. Significantly, this Court has observed, "Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior." *White*, 361 S.C. at 414-15, 605 S.E.2d at 544. *See also Anderson* 413 S.C. at 218, 776 S.E.2d at 79 (citing *White* for this proposition). Presumably, these considerations involving children are attributed childhood brain development.[12] Impressionability, an inability to effectively articulate

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[11] *See Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010) (recognizing trial courts as gatekeepers of the admissibility expert testimony and summarizing three-part procedure for admitting expert testimony, to wit: (1) subject matter requiring expert testimony, (2) qualifications of the proffered expert, and (3) reliability of proffered testimony). *See also State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015) (trial court must determine reliability of child abuse assessment expert).

[12] The courts recognize childhood brain development science in other contexts in the criminal justice system. *E.g. Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014)

events, and childhood brain development are not considerations involving adults. This Court should not sanction unvalidated expert testimony to corroborate the testimony of an adult non-offending caregiver.

Dr. Foster's testimony was not admissible because it bolstered the testimony of the non-offending adult caregivers.[13] *See Anderson* and *Kromah.* The prosecution used her testimony to explain why none of the child's relatives recognized any evidence of sexual abuse. As pointed out be trial counsel, "when her testimony becomes more specific to this particular case, it bolsters it more." R. 338, lines 12-13. Prior to what she allegedly overheard on the phone call on October 11, 2011, Pamela Hall had not observed any evidence of child sexual abuse. Pamela Hall's sisters Stacey Hall and Melissa Hall testified at trial. Stacey Hall testified that the child "acted normal" around Mr. Johnson, and she did to have any indication that sexual abuse was occurring. R. 159, lines 14-22. During the period of time that Pamela Hall and the child lived at her house, Melissa Hall also did not have any indication that sexual abuse was occurring. R. 211, lines 13-24.

Dr. Foster's testimony is not harmless beyond a reasonable doubt because of the lack of physical evidence corroborating the allegations and the fact that the case turned solely on the credibility of the witnesses. *See Mouzon. Compare Kromah*, 401 S.C. at 62, 737 S.E.2d at 501 ("Based on the entire record, including the physical evidence documented in this case, the challenged testimony could not reasonably have affected the

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(life without parole sentences for juveniles without individualized consideration of youth constituted cruel and unusual punishment).

[13] The trial judge apparently concluded the testimony was not admissible when he instructed the jurors, "Disregard that last statement and answer, ladies and gentlemen of the jury." R. 333, lines 7-8. After acknowledging this curative instruction, the Court of Appeals ruled, "We hold the trial court did not err in denying Johnson's motion for a mistrial because Dr. Foster's testimony did not bolster Mother's testimony." R. 588.

result of the trial, so any error in its admission was harmless beyond a reasonable doubt.") *with Anderson*, 413 S.C. at 219, 776 S.E.2d at 79 (finding "overwhelming" prejudice when the "case turned solely on the credibility of the minor and of Appellant. The minor testified to abuse by Appellant over a course of three to four years, while Appellant denied any improper conduct. There was no physical evidence of sexual abuse.").

The prejudice to Mr. Johnson is similar to what happened in *Anderson.* The prosecution sought to prove the abuse occurred "time and time again," R. 442, line 12; 454 lines 20-21, but there was no physical evidence of abuse. Both medical exams were normal. The prosecution argued, "[B]ottom line, is if you believe [the child], that is enough to find the defendant guilty." R. 443, lines 7-10. And see, R. 446, lines 13-14 ("Well, the real question here is, why would [the child] lie."). And, R. 471, lines 6-10 ("Bottom line is this: Why should you believe [the child]: Because if you accept that the victim's testimony need not be corroborated, then the only question left is, why should you believe her?").

This Court should grant the writ and consider the issue. This Court's guidance is needed to resolve the question left unanswered in *Jones,* to wit: whether expert testimony about the behavior of nonoffending caregivers is admissible in a criminal sexual conduct with a minor trial.

Question III

Should this Court order a new trial for Nakia Johnson based on the cumulative error doctrine?

The "cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from

receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial." *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297-98 (Ct. App. 2000), *reversed on other grounds by State v. Blurton,* 352 S.C. 203, 573 S.E.2d 802 (2002) (citing *State v. Johnson,* 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)). Mr. Johnson asked the Court of Appeals to grant him a new trial based on the cumulative error doctrine, pointing out the error discussed in the other two issues involved improper bolstering of the child, her mother, and the other family members that testified at trial. *See* Final Brief of Appellant, R. 550. If this Court disagrees Mr. Johnson is entitled to a new trial on each of these (or either one of these) issues, then this Court should apply the cumulative error analysis.

As seen in Sections I and II above, the error was not harmless beyond a reasonable doubt because of the absence of physical evidence and the importance of the jurors determining the credibility of the witnesses. *See Anderson* and *Kromah, Supra.*

(conclusion on next page)

CONCLUSION

For the foregoing reasons, this Court should grant the writ and consider the issues. This Court's guidance is needed for two reasons. First, this Court should clarify the proper application of the harmless error rule. Second, this Court should resolve the question left unanswered in *Jones,* to wit: whether expert testimony about the behavior of nonoffending caregivers is admissible in a criminal sexual conduct with a minor trial.

Respectfully Submitted,

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Greenwood, South Carolina

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In The Supreme Court

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Court of General Sessions
Doyet A, Early, III, Circuit Court Judge

Court of Appeals Opinion No. 2018-UP-109

The State of South Carolina, ... Respondent,

v.

Nakia Johnson, ...Petitioner.

CERTIFICATE OF SERVICE

I certify that I have served the Petition for Writ of *Certiorari* and Appendix on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

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