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

Supreme Court Appellate Case No. 2018-001355
Court of Appeals Opinion No. 2018-UP-109

The State of South Carolina, ... Petitioner-Respondent,

v.

Nakia Johnson, ... Respondent-Petitioner.

Reply to State's Return to his Petition for Writ of Certiorari by Respondent-Petitioner Nakia Johnson

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT IN REPLY

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" *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) because David "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 State concedes this "comment was not proper" under *Kromah* and *Anderson*. State's Return to Petition for Writ of *Certiorari* to the Court of Appeals (hereinafter "State's Return"), at 6. The State then asserts the Court of Appeals "correctly concluded the prejudice to Johnson by the comment was minimal and did not warrant a mistrial." *Id.* The Court of Appeals did conclude, "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." A. 589-90. This conclusion of law, however, resulted from incorrectly applying a prejudice analysis, not from any view that the prejudice was "minimal." The court below 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*[1] 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. Thus, the Court of Appeals erred—and the State's Return, at 7, repeats the error—by focusing on the testimony of the complaining child's mother. Neither the Court of Appeals, nor the State's Return, explains why this error was did not affect the outcome of the trial.

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.

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

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.").

Also, the State makes a hyper technical argument regarding inadmissibility of the evidence evidence verses the need to grant a mistrial. State's Return, at 3, 5-6. This argument is the proverbial "red herring," as a new trial for Mr. Johnson results under either scenario.

Finally, the State contends, "[T]he Court of Appeals overlooked the highly significant fact that Johnson never requested a curative instruction for the trial court." State's Return, at 8. The trial judge never offered a curative instruction, and the State does not explain the value of a curative instruction when the judge refused to strike the testimony. Furthermore, "it is difficult, if not impossible, to unring a bell." *State-Record Co. v. State*, 332 S.C. 346, 356, fn. 19, 504 S.E.2d 592, 597, fn. 19 (1998) (internal quotations omitted).

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 State continues to argue this testimony was not improper bolstering, State's Return, at 10, even though the trial judge ruled it inadmissible. As discussed in Mr. Johnson's petition for writ of *certiorari*, at 16, Dr. Foster's testimony exceeded the procedure approved by *Anderson* and *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct.

App. 2015). The State's brief does not address the issue raised by this Court in *State v. Jones*, Opinion No. 2016-001933, 2018 WL 3297908 (S.C. July 5, 2018), to wit: the admissibility of expert testimony about the characteristics of nonoffending caregivers of a child alleging sexual abuse. As discussed in Mr. Johnson's petition for writ of *certiorari*, at 17, *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. Prosecutors will continue this strategy until this Court addresses the issue. Mr. Johnson's case presents the perfect vehicle for this Court to speak to this strategy.

Question III

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

As discussed in Mr. Johnson's petition for writ of *certiorari*, this Court should order a new trial based on the cumulative error doctrine based on the matters he preserved for appellate review during his trial. The State's Return, at p. 14-15, however, conflates the "cumulative error doctrine" with the "plain error rule" by misapplying the Court of Appeal's analysis in *State v. Beekman*, 405 S.C. 225, 746 S.E.2d 483 (Ct. App. 203). Beekman asked that Court to apply the "cumulative error doctrine" based on his unspecified objections sustained during trial and other alleged errors that he did not object to during trial. Under those circumstances, the Court of Appeals properly concluded Beekman was attempting to invoke the "plain error rule" that is not recognized in our State. *Id.* 405 S.C. at 236-38, 746 S.E.2d at 489-90. As seen, Mr. Johnson raised both issues at trial that he asserted in his opening brief, and the State does not contend

those issues are not preserved for appellate review.[2] Specific objections to both issues are all that is required to invoke the cumulative error doctrine on appeal. This Court's intervention is needed to clarify the distinction between the "cumulative error doctrine" with the "plain error rule."

Here, both issues in Mr. Johnson's appeal involve improper bolstering. If this Court concludes that neither issue, standing alone, is sufficient to grant a new trial, then this Court should order a new trial based on the cumulative error doctrine.

CONCLUSION

For the reasons set forth in Nika Johnson's petition for a writ of *certiorari* and this reply, this Court should grant the writ and consider the issues.

Respectfully Submitted,

By _____

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[2] Although the Court of Appeals did not grant Mr. Johnson relief based on the cumulative error doctrine, that Court did not decide the issue based on error preservation grounds.

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Certificate of Service

I certify that I have served the Reply to State's Return to his Petition for Writ of *Certiorari* 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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