STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HAROLD BENNON CARTWRIGHT, III,

APPELLANT.

APPELLANT CASE NO.2013-000894

FINAL BRIEF OF APPELLANT

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4.

Whether the court additionally erred by qualifying Benedetto as an expert allowing her to bolster the testimony of the alleged victims, where the jury would draw the impermissible inference that the alleged victims were conducting themselves consistently with other victims of child sexual abuse?

STATEMENT OF THE CASE

Appellant was indicted by the Aiken County Grand Jury for eight counts of criminal sexual conduct with a minor in the first degree, sixteen counts of a lewd act with a minor, two counts of criminal sexual conduct with a minor in the second degree, one count of criminal sexual conduct first degree, and one count of criminal sexual conduct in the third degree. R. p. 370 - 425.

His case came on for trial on April 15, 2013 before the Honorable Doyet A. Earley, III, and a jury. Michael Routzong and Dave Hayes represented appellant. Kevin Molony was the assistant solicitor. R. p. 1

On April 18, 2013 the jury found appellant guilty on each count presented to the jury. R. p. 356, l. 14 – 363, l. 22. Judge Early sentenced appellant to concurrent sentences of thirty years imprisonment, twenty years imprisonment, and fifteen years imprisonment. However, the judge imposed a ten-year consecutive sentence for criminal sexual conduct in the third degree. Appellant's sentence was therefore forty years imprisonment. R. p. 368, l. 4 – 369, l. 8.

This appeal follows.

STATEMENT OF FACTS

Prior to trial defense counsel moved to exclude evidence that appellant suicide while in the Aiken County Detention Center awaiting trial. The assistant solicitor noted that at the prior trial, which apparently ended in a mistrial, that the state had introduced evidence of appellant's suicide attempt and photographs to corroborate it. R. p. 5, ll. 4-18. The solicitor argued this evidence was admissible to show "a guilty conscience." He analogized the suicide evidence to evidence of flight. R. p. 5, ll. 11-18.

Defense counsel noted that appellant had turned himself in which showed he was willing to "face these charges." Defense counsel also argued that the state had to establish a nexus between the suicide attempt and the charges against him. In addition, counsel argued that even if this evidence was relevant its unduly prejudicial effect outweighed its probative value under Rule 403, SCRE. R. p. 5, l. 20 – 7, l. 23. Defense counsel finally stated that this evidence diluted the presumption of innocence, and it could also be construed as evidence of bad character. R. p. 6, l. 19 – 7, l. 23.

The judge ruled that, in all likelihood, he would admit this suicide evidence. However, he noted that he understood defense counsel's argument about the nexus and his additional Rule 403, SCRE argument. R. p. 7, l. 24 – 9, l. 3.

Defense counsel also moved to exclude the testimony of witness Dr. Alicia Benedetto. The solicitor said this witness had testified before Judge Early previously. The judge responded: "I know that, ma'am, but I do so many of these I really and truly cannot remember her." The solicitor maintained: "She will be qualified as an expert in child sexual abuse dynamics and will testify as to the behavioral issues of children that have been abused." The solicitor added that Dr. Benedetto could testify that children who are sexually

abused "act out" and she could testify "how factors in the home can affect children that have been sexually abused and things of that nature." R. p. 14, l. 16 – 15, l. 25.

Defense counsel argued this testimony was not admissible under Rule 702, SCRE because it would not assist the jury. Defense counsel also argued that the only issue is whether the alleged victims were testifying truthfully, and that matters of credibility are "strictly within the purview of the jury." R. p. 16, l. 1 – 18, l. 13.

The judge said that testimony dealing with "behavioral characteristics were admissible so as long as it did not invade the province of the jury regarding credibility." Defense counsel and the judge then discussed State v. Weaverling, 337 S.C. 460, 473, 523 S.E.2d 787, 794 (Ct.App. 1999), and State v. Kromah, 401 S.C. 340, 737, S.E.2d 490 (2013). R. p. 16, l. 1 – 18, l. 13. Defense counsel noted that the appellate courts in this state were going in the direction of excluding this type of evidence. R. p. 17, ll. 23-25. Defense counsel further noted that State v. Kromah was the Court's latest holding on the subject, and it supported the defense position that the "expert testimony" in this case should be excluded. The judge observed that the witness had not talked with the minor witnesses, and he stated that he testimony about "general behavioral responses" was admissible. R. p. 16, l. 1 – 21, l. 16.

As will be seen infra, appellant testified and denied the sexual abuse. He claimed the accusations stemmed from resentment of him for having the boyfriend of his fourteen-year-old daughter prosecuted for having sex with her. Appellant had also contacted law enforcement about his concerns of her photographs being posted on the internet along with her friends. In addition, he suspected a sexual relationship between his son Hoss and his stepdaughter, and he had found marijuana in his room. Concerning the evidence of

appellant's suicide attempt, which was allowed into evidence over defense objection, appellant attempted to explain that he felt hopeless "at that time" because he was not able make bond, and because some members of his family had had turned on him.

As will also been seen infra, there was also evidence in this case of recantations, and minors "acting out." Witness Benedetto would then give her "expert testimony" that recantations were not uncommon and they did not mean that the children were not sexually abused. Further, Benedetto opined minors "acting out" was also symptomatic of sexual abuse.

Daughter was the biological daughter of appellant and Melinda Lively. She was twenty-eight years old at the time of the trial. R. p. 31, l. 9 – 32, l. 6. Hoss Cartwright and Jamie Cartwright were her natural siblings. Her stepsiblings were Stepdaughter 2 and Stepdaughter 1. R. p. 32, ll. 7–12.

Daughter claimed when she was four years old (i.e. 24 years previously) appellant had her perform oral sex on him. Daughter said she told her mother about this incident but her mother did not believe her. She also claimed appellant threatened to kill her, her mother, and take his own life if she reported the incident. R. p. 32, l. 18 – 35, l. 4.

Daughter maintained the abuse continued from the time she was six years old until she was ten years old when her mother left appellant and moved them to Georgia. R. p. 35, l. 18 – 39, l. 23. Daughter said after the oral sex appellant would buy her things, and give her money. R. p. 39, ll. 2-5.

On cross-examination, Daughter acknowledged she never said anything about the alleged sexual abuse from 1995 until 2011. She acknowledged she married Kevin Autry and that he had served three years in prison for criminal sexual conduct for his conduct

involving her. She acknowledged her husband had to register as a sex offender because of that conviction. She refused to admit that appellant was the person who successfully pushed for law enforcement to prosecute Autry for his improper sexual relationship with her. She acknowledged after her parents were divorced that appellant still had visitation privileges with her. R. p. 47, l. 3 – 50, l.10.

Appellant's ex-wife, Melinda Lively, then testified that Daughter was her oldest daughter. Jamie Cartwright and Hoss Cartwright were her other children. R. p. 53, l. – 54, l. 6. Lively testified that Daughter claimed she was sexually abused when she was four or five years old. Lively maintained she did not contact law enforcement because appellant threatened at gunpoint to kill them if they told anybody. R. p. 54, l. 7 – 55, l. 3.

Lively admitted in her complaint for divorce in 1997 that she did not allege sexual abuse had taken place, and she agreed that appellant was entitled to visitation with the supposedly abused children. She said she did not allege anything, and she did not fight visitation because she did not have "any evidence" against appellant. R. p. 55, l. 9 – 57, l. 6. Lively admitted she remembered appellant alleging that Lively allowed her oldest daughter, Daughter, who was only fourteen-years-old to engage in sexual relationship with a twenty-three year-old man. R. p. 59, l. 8 – 60, l. 14.

Stepdaughter 1 was appellant's stepdaughter. She was twenty-one years old at the time of trial. R. p. 63, l. 2 – 65, l. 10. Stepdaughter 1 said she was seven years younger than Daughter and three years older than Stepdaughter 2. R. p. 64, ll. 4-12.

Stepdaughter 1 testified that when she was in the third grade appellant made her perform oral sex. R. p. 65, l. 17 – 67, l. 1. Stepdaughter 1 said this happened "a few times a month," and that appellant would buy her gifts afterwards. R. p. 67, ll. 1-23. Stepdaughter

1 acknowledged appellant was arrested as a result of her allegations. However, Stepdaughter 1 recanted her allegations when she was about ten years old, and she told the solicitor the sexual abuse complained of never actually happened. She said that appellant moved back into the home shortly after she recanted. R. p. 68, l. 2 – 70, l. 24.

Stepdaughter 1 claimed after appellant returned to the household that he would "hump" her leg about "three to seven times a week." He continued to buy her gifts, and take her shopping. Stepdaughter 1 alleged that appellant threatened to kill the entire family, and then himself if she told. R. p. 70, l. 12 – 73, l. 13. Stepdaughter 1 testified the oral sex ceased from the time she was nine years old until she was fifteen. At fifteen, Stepdaughter 1 said she agreed to have sexual intercourse with appellant under duress. R. p. 73, l. 11 – 80, l. 19.

On cross-examination Stepdaughter 1 admitted she became involved in drugs with Timothy Bowman. She acknowledged that she became very rebellious. R. p. 93, l. 1. – 94, l. 13.

Michelle Prince was a DSS employee who investigated Stepdaughter 1's allegations. Prince acknowledged she was aware Stepdaughter 1 had recanted them. R. p. 96, l. 25 – 100, l. 12.

Stepdaughter 2 was appellant's other stepdaughter. Stepdaughter 2 was eighteen-years-old at the time of appellant's trial. She testified she had a good relationship with appellant when she was younger but she maintained that changed when she was about thirteen-years-old. She said appellant then began "humping" her on the leg, and that she despised him. R. p. 101, l. 4 – 103, l. 8. Stepdaughter 2 said appellant would buy her items

after the sexual abuse. She also said appellant would become angry and threaten to kill the entire family. R. p. 104, l. 15 – 105, l. 16.

Stepdaughter 2 said she later was homeschooled in a shed by appellant, and at some point they began having sexual intercourse. Stepdaughter 2 said she began taking birth control pills, and she maintained that was appellant's idea. R. p. 107, l. 10 – 109, l. 14.

Stepdaughter 2 admitted that appellant became very upset because there were photographs of her on the internet. Stepdaughter 2 said she did not have any reason to be embarrassed about the photographs because appellant was mistaken in thinking they were photographs of her. R. p. 129, l. 5 – 131, l. 6. Appellant would later strongly dispute the assertion of mistaken identification. Stepdaughter 2 also said that she did not have a romantic relationship with appellant's son, Hoss, as appellant suspected. R. p. 131, ll. 3-12.

The testimony of Buffy Brown was read to the jury since a medical condition since the first trial prevented her from testifying live. R. p. 139, l. 21 – 141, l. 15. Buffy married appellant in December of 1999 and their divorce was just finalized prior to her testimony in 2013. Buffy testified that Stepdaughter 1 had alleged appellant sexually abused her. Buffy admitted that Stepdaughter 1 recanted her allegations, and Buffy now maintained that she "probably did put some pressure on Stepdaughter 1 [to recant] because he [appellant] had convinced me he had done nothing wrong." R. p. 142, l. 4 – 143, l. 25.

Appellant moved back in after Stepdaughter 1's recantation. R. p. 144, ll. 1-12. Buffy said that appellant's stepdaughters, Stepdaughter 1 and Stepdaughter 2], always referred to him as "Daddy." She did not believe they were being molested. She also acknowledged that Stepdaughter 1 had "some problems" such as sneaking out of the house.

However, she was not positive that Stepdaughter 1 also had began drinking at a young age. R. p. 151, l. 22 – 155, l. 1.

Brown denied she tried to protect appellant, and she simply did not believe anything of a sexual nature had been going on with the minors. R. p. 155, ll. 2-18. Brown said she may have been "naïve." R. p. 155, ll. 19-22.

Eighteen-year-old Hoss Cartwright testified that appellant made vulgar comments to his stepsister, Stepdaughter 2, while they were growing up together. R. p. 169, ll. 2-19. Hoss also said he found appellant's inspections of Stepdaughter 2 's clothes before school "odd." R. p. 169, ll. 8-17.

Hoss denied appellant ever caught him smoking marijuana. Hoss essentially admitted he was smoking marijuana but he maintained that appellant never caught him. R. p. 175, ll. 7-20. Hoss confirmed that appellant thought he was having sex with his stepsister. R. p. 175, ll. 16-20.

Benedetto testimony

As seen, appellant objected to the testimony of Dr. Alicia Benedetto prior to trial. R. p. 203, ll. 5-17. Benedetto testified she worked with the Assessment and Resource Center (ARC). Benedetto said "most of what the ARC does is forensic interviews when there are allegations of abuse." R. p. 204, ll. 17-20.

Benedetto had a Ph.D. from St. Johns University in Psychology. R. p. 205, ll. 4-7. She had conducted a five day training on Finding Words for prosecution officials. R. p. 206, ll. 1-21. Benedetto said her experience was not based "in books" but on the fact "I interview children every day. That's basically what, what I do. So, at the ARC, I conduct forensic interviews on a daily basis. I've done that for the past 12 years." R. p. 207, l. 20 – 208, l. 6.

Benedetto said she had been qualified before as an expert in "child sex abuse dynamics." R. p. 208, ll. 15 – 209, l. 3.

On cross-examination defense counsel inquired about exactly what "child abuse dynamics" involved. Benedetto said it "refers to how children experience abuse, and that's oftentimes what, what I'm qualified in." R. p. 209, ll. 3-17. When asked how many studies she had been involved in regarding child abuse dynamic, Benedetto answered that she conducted interviews and not studies. She was not a researcher on the subject. R. p. 210, ll. 16-22.

Defense counsel Hayes then objected to Benedetto being qualified as an expert witness, and allowing her to give expert testimony. He noted that she testified and admitted her background was doing forensic interviews, and she was not involved in studies and research. The state had not shown that her testimony was objectively reliable R. p. 211, ll. 1-12.

The judge denied the motion to exclude her testimony, and he ruled that Benedetto was qualified to give her opinion testimony regarding "child abuse dynamics." R. p. 211, l. 13 – 212, l. 12. The judge said he would later give an instruction on expert opinion testimony to the jury. R. p. 212, ll. 7-13.

Benedetto maintained she did not know anything about the facts of this prosecution. She said that "Child Sexual Abuse Accommodation Syndrome" involved a pattern of behavior "that a child may engage in that would otherwise seem to not make sense to us." R. p. 213, ll. 7-21. Benedetto said because a child responded differently than an adult to sexual abuse that did not mean that the child was not telling the truth. R. p. 214, ll. 4-7.

Benedetto said that victims of child sexual abuse were told not to tell about the abuse. She said it was not unusual for an abuser to buy gifts for the abused children. R. p. 214, l. 10 – 215, l. 14. In addition, she said the children often thought they may be harmed if they did not keep the abuse a secret. R. p. 217, l. 5 – 220, l. 4.

Benedetto was then specifically asked about recantations. Benedetto answered that a child recanting or taking back their allegation of abuse did not mean that the abuse did not happen. She claimed "we're open to the possibility that it's a true recantation, but we also know that *many times a child recants because of what happens after they tell, and so we want to be sure not to miss those cases."* R. p. 223, l. 21 – 224, l. 11. (emphasis added). Benedetto maintained that sometimes children recanted because they feared having to change schools or other consequences based on their allegations. R. p. 224, ll. 12-22.

Benedetto also told the jurors that sexual abuse can cause minors to begin drinking or using drugs which have a negative influence on their health. R. p. 225, ll. 9-13. Benedetto added that minors "acting out" was also not unusual when they were being sexually abused. R. p. 225, l. 14 – 226, l. 17. Benedetto said also if a child does not get upset or act out or show emotion that did not mean that they were not sexually abused. R. p. 226, ll. 18-21.

Suicide Attempt

The state proffered the testimony of Aiken County Detention Guard James Hettich. Hettichs testified on April 13, 2011 he observed appellant hanging in his jail cell with a sheet tied from his bunk. R. p. 249, l. 5 – 251, l. 2. Hettich testified that the sheet was tied tight, and that appellant was unresponsive while hanging from the neck. "His touch was

cold and clammy. He was unresponsive. He wasn't speaking. He was breathing however." R. p. 251, ll. 1-21.

Defense counsel told the judge that he did not have any additional arguments about why this suicide evidence should be excluded. The judge then cited this court's opinion in State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct.App. 2011) as support for the suicide evidence being admitted. [1] The judge ruled the evidence was admissible. R. p. 253, l. 5 – 254, l. 1.

Jury in

Hettich then testified that while working as a correctional officer at the Aiken County Detention Center on April 13, 2011 he was notified that appellant was trying to harm himself. Hettich saw appellant hanging from the top bunk by a sheet. He along with another deputy were able to untie the knot from the bed sheet. They laid appellant on the floor. Two photographs, State's Exhibits 12 and 13, of appellant's jail cell where the suicide attempt occurred were then entered introduced to corroborate the objectionable testimony. R. p. 257, l. 3 – 260, l. 15.

Appellant testifies

Appellant took the stand in his own defense, and denied he had molested his children or stepchildren. Appellant noted that Stepdaughter 1 had recanted her allegations, and that he later discovered photographs of Stepdaughter 2 on the internet. Appellant said despite her denial regarding the photographs he recognized all of the girls involved in the

[1] Certiorari was granted by the Supreme Court on October 17, 2012. This Court can take judicial notice of the fact that petitioner Orozco voluntarily dismissed his appeal after certiorari was granted by the Supreme Court on the issue of whether this Court erred by holding evidence of his suicide attempt was admissible.

internet photographs. He testified that he notified Channel 12 News, and the North Augusta Police Department about the internet photographs. R. p. 280, l. 17 – 284, l. 12.

Appellant confirmed that he found marijuana in Hoss's bedroom. He testified that Hoss and Stepdaughter 2 both became angry with him. R. p. 285, l. 1 – 289, l. 3.

As for the suicide attempt, appellant attempted to explain that he turned himself in after being accused of these crimes. Appellant thought he understood why the false allegations were lodged against him. However, appellant could not make bond, and he stood accused of heinous crimes. Appellant offered that his biological daughter now hated him, and "at that time I did not feel like I wanted to live anymore." R. p. 289, l. 17 – 291, l. 17.

ARGUMENT

The court erred by admitting evidence appellant attempted to commit suicide while incarcerated on the charges in this case since this evidence was irrelevant, and even if relevant its probative value was substantially outweighed by its unduly prejudicial effect under Rule 403, SCRE. The introduction of the two photographs corroborating the suicide attempt was error for the same reasons. (Arguments 1& 2).

As seen, defense counsel objected to the state introducing evidence of appellant's suicide attempt. Defense counsel noted that appellant had turned himself in which showed he was willing to "face these charges." Counsel also argued that the state had to establish a nexus between the suicide attempt and the charges against him. Further, even if this evidence was relevant its unduly prejudicial effect outweighed its probative value under Rule 403, SCRE. R. p. 5, l. 20 – 7, l. 23. The suicide evidence also diluted the presumption of innocence, and it could also be construed as evidence of bad character. R. p. 6, l. 19 – 7, l. 23.

In State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct.App. 2011) this Court noted that whether evidence of attempted suicide is probative of the accused's consciousness of guilt was an issue of first impression in South Carolina." This Court noted that flight evidence was relevant when there was a nexus between the flight and the offense charged." R. p. 7.

This Court reasoned evidence of the suicide attempt was relevant and admissible because the totality of the evidence created an inference that Orozco's actions in attempting suicide were motivated as a result of his belief that sexual misconduct allegations had been made against him.

There was no South Carolina authority supporting admission of evidence of a suicide attempt as evidence of consciousness of guilt as this Court recognized in Orozco. Further, the analogy to flight and guilty knowledge is deeply troubling for problems well beyond the defendant being aware of charges against him or that he is being sought by the police for purposes of arrest. However, petitioner will deal first with the nexus which should involve much more than the defendant merely understanding charges have been lodged against him. Cf. State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006); State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982); See, also, State v. Brown, 528 A.2d 1098 (R.I.1987); Commonwealth v. Jones, 457 Pa. 563, 576, 319 A.2d 142, 150 (1974) (circumstances justify inference that accused's actions were motivated as result of his belief that officers were aware of his wrongdoing and *were seeking him* for that purpose), cited in State v. Beckham, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999).

In State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (S.C. 2006), the Supreme Court held that proof that the accused was aware of the charges and sought to avoid them was critical. The Pagan Court held that without proof that the accused was aware of the charges against him at the time of his flight, the evidence of flight was irrelevant and its admission was erroneous.

Beyond the nexus of attempted suicide to the awareness of an accusation or an arrest warrant or that police are looking for a person, this evidence is troubling not only at as a legal matter but as a moral matter. As defense counsel argued, appellant turned himself in to face the charges in this case. This indicated a belief in the criminal justice system, and a belief he would be exonerated.

However, suicide is often a matter of despair rather than desperation. Meaning, it is *many times much more complicated than understanding the sad case of a suspect surrounded by armed police killing himself rather than being captured.* This case provides such an example. Appellant thought that life was no longer living at "that time."

Suicide, as in this case, is often attributable to the feeling that the sheer number of obstacles in one's life have become too much to overcome. Here, appellant mourned the fact that his own daughter had turned on him.

To use a suicide attempt in a court of law in this state as evidence of guilt of a criminal offense to achieve a conviction should *most respectfully*, be distasteful and not allowed. This Court can take judicial notice that all Five Justices of the Supreme Court in Orozco voted to decide this very important legal and moral question before Petitioner Orozco decided to drop his appeal.

In Pettie v. State, 316 Md. 509, 560 A.2d 577 (1989) the court held it was error to admit evidence of an alleged suicide attempt as evidence of the accused's consciousness of guilt. The court cited various reasons for its holding.

These reasons included that the inmate accused of various sex offenses may have feigned attempted suicide to invite mitigation on the sentence he was serving when the alleged sexual offense occurred. The court also noted that the suicide note itself was never even offered into evidence nor was it contents explained to the jury. The court refused the answer the question whether evidence of a suicide attempt *was ever admissible.*

In State v. Mann, 132 N.J. 410, 625 A.2d 1102 (1993), the court found it was reversible error to admit evidence of an attempted suicide without first conducting a full pretrial hearing on the issue. The defendant argued he had a preexisting propensity to

commit suicide because of other factors in his life, and the court cautioned that such ambiguities weigh strongly in favor of extreme caution before such evidence can be admitted. A defendant's psychological, social or financial situation may play a role in the suicide attempt. In short, an accusation of criminal wrongdoing can be the last straw in an otherwise troubled life.

The court in Mann also reasoned that if evidence of a suicide attempt *was ever properly admitted that jury instructions were necessary* that if the jury could credit *any alternative explanation* for the suicide attempt it could not infer consciousness of guilt. In South Carolina, of course, the analogy to flight in this context is equally troubling *since instructions of evidence of flight are improper.* See, State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980).

The court in State v. Coudotte, 7 N.D. 109, 72 N.W. 913 (1897), opined that a jury should never be able to treat a suicide attempt as evidence of guilt. The court reasoned that the one who flees seeks to escape punishment where one who attempts suicide *seeks to avoid the disgrace* that attaches to being charged with a crime. The court stated that this motive "of delicacy" would be more powerful in an innocent, rather than a guilty person. While it may have been a cultural truth the court also wrote the incidence of suicide was higher among innocent than guilty persons.[2]

The court in State v. Onorato, 171 Vt. 577, 762 A.2d 858 (2000) held that the probative value of an attempted suicide and suicide note was substantially outweighed by unfair prejudice and a confusion of the issues. The court noted that the reasons for an attempted suicide are "*numerous and complex, and may be even less indicative of guilt*

than flight evidence." The Court went on to say that evidence of attempted suicide is "highly equivocal and circumstantial" such that its admissibility "may introduce remote, secondary concerns that might confuse the jury."

In People v. Foster, 56 Ill.App.3d 22, 371 N.E.2d 961, 13 Ill.Dec. 869 (1977), the court held that evidence of the defendant's suicide attempts were not admissible because there was not a sufficient nexus between the actions taken and the crime charged. The court found that not only was there too much time between the suicide attempt and the offense *but also* the defendant's psychological problems and interactions with police could be credited for his behavior.

Appellant here recognized that child sex cases have become "heinous crimes." This Court has repeatedly recognized the extreme prejudice inherent in an accusation in child sex or abuse cases, and explained that our criminal justice system must be cautious of adding undue prejudice to an already explosive allegation and situation through the use of evidence that raises a spurious tendency to seek a conviction based on an improper basis. See State v. Kromah, 2013 WL 239070 (filed January 23, 2013); State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App.2012)[3]; State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009).

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[2] There was also a North Dakota statute that mandated an accomplice's testimony must be corroborated to maintain a conviction.

[3] The Attorney General dismissed the certiorari petition to this Court in McKerley.

Moreover, as defense counsel argued, even if this evidence was properly admitted as relevant under Rule 401, SCRE, it should have been excluded under Rule 403, SCRE because its probative value was substantially outweighed by its unduly prejudicial effect and its tendency to *confuse* the jury and invite a verdict on an improper basis. See Rule 403, SCRE.

Photographs

The same argument against admission of this evidence applies to the two photographs corroborating the fact appellant attempted to commit suicide. Those photographs are on file with this Court. The Court is not engaging a "gruesome photographs analysis" in this case. Rather, the photographs simply drew further attention to the fact that appellant attempted suicide.

The solicitor mocked appellant's testimony about his despondent feelings at the time he attempted to kill himself. R. p. 322. Defense counsel had correctly argued the suicide evidence diluted the presumption of innocence that is fundamental in a criminal case.

The suicide evidence was offered to have the jury conclude the defendant found taking his life was a better option than the punishment for his crime. Jurors are not supposed to be concerned with punishment and this was exactly what this evidence encouraged them to think about. Such speculation about punishment versus suicide is unbecoming, respectfully, of our criminal justice system. See Pettie v. State, 316 Md. 509, 560 A.2d 577 (1989); State v. Coudotte, 7 N.D. 109, 72 N.W. 913 (1897). Even if the

photographs, as is the case with the suicide evidence itself, were relevant, they should have been excluded given their unduly prejudicial effect under Rule 403, SCRE.

As seen above, appellant's defense was that some in his own family had turned against him, and wanted him put away for spite. The sheer number of allegations against appellant made a fair trial difficult enough without this spurious evidence of guilt in the nature of his suicide attempt. Appellant should be granted a new trial.

2.

The court erred by allowing Dr. Alicia Benedetto to be qualified as an expert in "child sexual abuse dynamics" where she frankly acknowledged her job was to conduct interviews and not conduct research or studies and the judge thus abused his discretion by qualifying her as an expert to render opinion testimony under Rule 702, SCRE in this case. Further, the erroneous qualification of her as an expert witness allowed her to give highly prejudicial bolstering testimony. (Issues 3-4).

Issue 3: Dr. Alicia Benedetto should not have been qualified as an expert in "child sexual abuse dynamics" which allowed her to give her opinion testimony.

In State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 499, n.5, (2011) the Supreme Court noted that there was no objection to the qualifications of the witness *in that case.* However, the Court noted it had previously observed that the witness might not even need to be qualified as an expert. See, State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009).

The Supreme Court held that it could "envision no circumstance where their qualification as an expert at trial would be appropriate" in the *"forensic interviewer" type context.* Although the Court was speaking of forensic interviewers, the testimony of Benedetto here on "child abuse dynamics" was offered for the same purpose, which was to imply to the jury that someone who worked in this "specialty" of abused children could offer expertise which allegedly would assist the jury in deciding whether the minors were being truthful. The testimony would allegedly assist the jury within the confines of Rules 702 and 703, SCRE.

Defense counsel correctly argued that Benedetto would simply have the jury conclude that the alleged minor victims in this case acted consistently or shared behavioral characteristics with other victims of sex abuse. As seen, Benedetto was unapologetic that she was a forensic interviewer and not a research professional. She should not have been qualified as an expert in this case. See, State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009).

Issue 4: The opinion testimony itself

Further, her testimony about recantations not meaning sexual abuse did not occur, about abusers buying gifts for the abused, and about the abused being threatened about disclosure of the abuse all certainly struck the jury as the same evidence as what occurred in this very case.

The same is true of Benedetto's testimony that sexual abuse can cause minors begin drinking or using drugs which have a negative influence on their health. R. p. 225, ll. 9-13. Benedetto also added that minors "acting out" was also not unusual when they were being sexually abused. R. p. 225, l. 14 – 226, l. 17. This Court is aware that solicitors are seeking to avoid allegations of bolstering by no longer putting up forensic interviewers as experts. However, the same bolstering occurred here under the guise of "child abuse dynamics." State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012).

This "child sexual abuse dynamics" evidence served the same evil that State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 499, n.5, (2011), held can no longer exist. State v. Weaverling and Kromah can no longer be reconciled and Weaverling should respectfully be overruled as it is the pre-gatekeeping case that is being used to justify impermissible

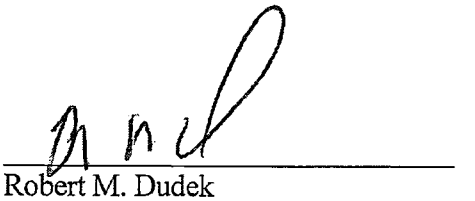
bolstering such as occurred in this case. Certification to the Supreme Court therefore may be in order in this Court's discretion.

The jury in this case heard that the actions of the state's complaining alleged child sexual abuse witnesses were on all fours with the actions and characteristics of other victims of child sexual abuse. The witness should not have been qualified as an expert and her testimony was explosively prejudicial. Appellant should be granted a new trial.

CONCLUSION

By reason on the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the Aiken County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of January, 2015.

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, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 20, 2015

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County
Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HAROLD BENNON CARTWRIGHT, III,

APPELLANT.

APPELLANT CASE NO.2013-000894

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief in the above referenced case has been served upon David Spencer, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 20th day of January, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of January, 2015.

Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.