ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICHARD KENNETH GALLOWAY,

APPELLANT

APPELLATE CASE NO. 2018-001806

INITIAL BRIEF OF APPELLANT

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4.

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5.

Whether the court erred where it admitted testimony that appellant had written a letter to the complainant's mother apologizing for abusing the mother, where the original writing is generally required to prove the content of the writing, since the original writing was not offered?

STATEMENT OF THE CASE

On September 26, 2017, a Greenville County Grand Jury indicted appellant for criminal sexual conduct with a minor in the first degree and lewd act on a child, offenses alleged to have occurred from 1987 – 1990. R. *(indictments). Appellant was also charged with two additional counts of criminal sexual conduct with a minor in the first degree. Tr. I, 16, ll. 5-22.

Appellant was tried before the Honorable Perry H. Gravely and a jury, from May 14 – 16, 2018. Tr. I, 1. John Christopher Shipman and Jacob Goldstein represented appellant. Tr. I, 1. Justin Holloway represented the state. Tr. I, 1.

Appellant was convicted on two of the four indictments: criminal sexual conduct with a minor in the first degree and lewd act on a minor. R. 577, l. 21 – 578, l. 11. However, the jury found appellant not guilty of a second count of criminal sexual conduct with a minor in the first degree, and it hung on a third count of criminal sexual conduct with a minor in the first degree. R. 577, l. 5 – 578, l. 2.

Appellant was sentenced to consecutive terms of thirty years for criminal sexual conduct with a minor in the first degree and ten years for lewd act on a minor. Tr. I, 590, ll. 18-22; R. *(sentence sheets).

Defense counsel moved the court to reconsider its sentence and a hearing was held on the matter October 4, 2018. Tr. II, 1. Appellant was represented by John Christopher Shipman and the state was represented by Brandi Hinton. Tr. II, 1. The court denied the motion. Tr. II, 10, ll. 16-17.

This appeal follows.

ARGUMENT

1.

The court erred where, during the defense's case in chief, it excluded the testimony of a blind expert in psychology and schizoaffective disorder that schizoaffective disorder could cause false memories, since the complainant was diagnosed with schizoaffective disorder prior to her claim that appellant molested her.

Although the court found Dr. Price was qualified as an expert in schizoaffective disorder, it forbid him from testifying that schizoaffective disorder may produce false memories. The exclusion of this relevant evidence denied appellant his right to present a complete defense since the evidence offered a reasonable explanation of why the complainant might believe she had been molested if she had, in fact, not been.

Standard of review

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting *Douglas*, 369 S.C. at 429–30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." *State v. Grubbs*, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing *Means v. Gates*, 348

S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001)). To show prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing *Means*, 348 S.C. at 166, 558 S.E.2d at 924).

Relevant facts

In 2016, law enforcement officials in Greenville received a letter from the complainant in which she accused appellant of molesting her when she was a child in the 1980's. Tr. I, 73, ll. 21-24; Tr. I, 399, ll. 19-25. Appellant was ultimately charged with three counts of criminal sexual conduct with a minor in the first degree and with one count of lewd act on a minor based on these allegations.

At trial, the complainant testified that she began seeing a therapist in 2011 to treat her for post-traumatic stress disorder (PTSD). The complainant claimed she had PTSD as a result of childhood sexual abuse by appellant. Tr. I, 163, l. 19 – 164, l. 14. According to the complainant, in 2012, she was also diagnosed with schizoaffective disorder. Tr. I, 213, ll. 18-20.

After the state rested, defense counsel proffered the testimony of Dr. David Price, who was ultimately qualified as an expert in psychology, PTSD, and schizoaffective disorder. Tr. I, 431, ll. 2-3; Tr. I, 468, ll. 6-23. Dr. Price had not evaluated the complainant, and he testified as a blind expert. Tr. 453, ll. 12-22. During the proffer, Dr. Price explained that schizoaffective disorder can cause delusions which result in false memories. Tr. I, 451, l. 22 – 452, l. 1. When cross-examined by the solicitor, Dr. Price acknowledged these false memories may produce false accusations in court. Tr. I, 455, l. 23 – 456, l. 3.

The court ruled that Dr. Price would be allowed to testify about PTSD and schizoaffective disorder generally but ruled that he could not testify about false memory. Tr. I, 458, ll. 6-19.

Specifically, the court found the "nature of the testimony is beyond the standard for the jury . . . I think that he's indicated that he has this knowledge that qualifies him as an expert. Generally, with exception that the substance is reliable as to anything relating to PTSD and schizoaffective disorder." Tr. I, 458, ll. 6-13. "But I am not going to allow any testimony on this whole false memory syndrome[1] or whatever it's called, you could open the door for every single case from that. So I'm not going to allow anything regarding false memory, repressed memory since he has not evaluated this particular person and be[en] able to diagnose[ ] that's what's going on here." Tr. I, 458, ll. 13-19.

Discussion

The court erred when it denied appellant the opportunity to present a complete defense. Defense counsel properly objected to this restriction here, and the grounds of his objection were apparent from his proffer of Dr. Price's testimony and from the context.[2] Tr. I, 458, l. 20.

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies."

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[1] Although the solicitor tried to couch Dr. Price's testimony on false memory in terms of a "disorder" or a "syndrome" during his cross-examination, Dr. Price personally avoided using those terms. Tr. I, 452, l. 20 – 453, l. 5.

[2] *See* Rule 103(a)(2), SCRE, which provides that: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission **were made known to the court by offer or were apparent from the context.**" (emphasis added).

Washington v. Texas, 388 U.S. 14, 19 (1967). "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Id.* "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta,* 467 U.S. 479, 485 (1984)). "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

Rule 401, SCRE provides that "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, the evidence appellant sought to introduce—that schizoaffective disorder could cause false memories—was relevant, since the complainant said she suffered from this disorder, and the ultimate issue to be decided in the case was whether the molestation alleged to have occurred thirty years earlier happened in fact, or happened only in her mind.

Rule 702, SCRE provides that "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "[E]xpert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010).

When executing its gatekeeping duties, the "court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First,

the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." *Id.* at 446, 699 S.E.2d at 175. "Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter." *Id.* "Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable." *Id.*

Here, the court found the subject matter at issue to be beyond the ordinary knowledge of the jury and it found that Dr. Price had acquired the knowledge to qualify him as an expert. Tr. I, 458, ll. 6-10. However, the court aborted its Rule 702 analysis as to the reliability of the false memory testimony and instead stated that its reason for excluding testimony about false memory was because Dr. Price did not evaluate the complainant. Tr. I, 458, ll. 13-19. The court's failure to complete the Rule 702 analysis as to the reliability of Dr. Price's proffered testimony about false memory was an abandonment of its gatekeeping role and was error.

Since the fact that Dr. Price was testifying as a blind expert did not prevent the court from admitting his testimony as to PTSD and schizoaffective disorder, it was an abuse of discretion to find that his status as a blind expert precluded him from offering testimony on how memory can be affected by schizoaffective disorder. Moreover, as discussed in Issue 3 below, the court allowed the testimony of another education witness—Shauna Galloway-Williams—who was a blind expert, when the evidence was offered by the state. The court's exclusion of Dr. Price's testimony here was manifestly arbitrary, unreasonable, and unfair. *See State v. Grubbs*, 353 S.C. at 379, 577 S.E.2d at 496 (court's ruling on the admissibility of an expert's testimony is an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair). That is

particularly so, since the state's witness was allowed to give expert testimony about the impact of trauma on memory.[3] Tr. I, 311, l. 4 – 312, l. 2; Tr. I, 359, l. 14 – 360, l. 4.

The court erred when it precluded appellant from presenting a complete defense by excluding relevant evidence offered by a qualified expert. *See Washington v. Texas*, 388 U.S. 14, 19 (1967) (the right to offer the testimony of a witness is, in plain terms, the right to present a defense). Appellant was prejudiced because the exclusion of the evidence left the jury with only one conclusion—the complainant said she was molested because she had, in fact, been molested. Had the jury been presented with another plausible reason for the complainant's testimony—false memory caused by schizoaffective disorder—the jury would likely have found reasonable doubt.

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[3] Galloway-Williams told the jury that "time and date" are "abstract concept[s] that most children don't really master until 12 or 14 years old and still they struggle with. So, you know, to expect that a child, or even an adult can remember the time and date of specific events, traumatic events may be very challenging." Tr. I, 359, ll. 14-20.

2.

The court erred where it admitted expert testimony about risk factors for childhood sexual abuse, since the subject matter of the testimony was not beyond the ordinary knowledge of the jury.

Pursuant to Rule 702, SCRE, the trial court must find that the expert testimony at issue is about subject matter that is beyond the ordinary knowledge of the jury before it may be admitted. Expert testimony that age, developmental delays, emotional problems, behavioral problems, substance abuse, poverty, violence, and single-parent homes with live-in partners were risk factors for sexual abuse was not beyond the ordinary ken of the jury, and so its admission was error.

Standard of review

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting *Douglas*, 369 S.C. at 429-30, 632 S.E.2d at 848) (internal quotations omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." *State v. Grubbs*, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing *Means v. Gates*, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001)). To show prejudice, the appellant must prove "that there is

a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing *Means*, 348 S.C. at 166, 558 S.E.2d at 924).

Relevant facts

The state proffered the testimony of Shauna Galloway-Williams, who was ultimately qualified as an expert in child sexual abuse dynamics and delayed disclosures. Tr. I, 350, ll. 17-20. During the proffer, in addition to testimony about delayed disclosure, the solicitor asked Galloway-Williams to provide the "risk factors" for "childhood sexual abuse situations." Tr. I, 309, ll. 5-7. Galloway-Williams gave the following response.

> So, there are some risk factors that we generally talk about in terms of child maltreatment. One of the—some of the personal risk factors that would be part of the child themselves might be the **child's age, developmental delays, emotional problems, behavioral problems**, things that make a child more vulnerable or somewhat easier target for someone to abuse.
>
> There are familial or household risk factors. **Substance abuse** is one of those risk factors. Also, single-parent homes, particularly **single-parent homes with live-in partners** are particularly high risk factors. We tend to see higher rates of abuse in those households.
>
> Then societal factors, they play a role in that as well. **Violence, high poverty**, race may play a role in abuse and neglect scenarios.

Tr. I, 309, ll. 8-23 (emphasis added).

At the conclusion of the proffer, defense counsel objected to the admission of Galloway-Williams' testimony based on, inter alia, the fact that "the subject matter is not beyond the ordinary knowledge of the jury." Tr. I, 336, l. 21 – 337, l. 5. Counsel correctly argued that, "even nonscientific experts need to meet the foundational requirements of Rule 702." Tr. I, 341, ll. 8-9.

However, the court ruled the evidence was admissible. Tr. I, 343, ll. 17-18. The court stated that "after hearing, I find the subject matter is beyond the ordinary knowledge of the jury. That she has the requisite knowledge and skill to serve as an expert and that I find the subject testimony reliable." Tr. I, 336, ll. 10-14.

Galloway-Williams' testimony before the jury tracked her in camera testimony. Tr. I, 364, l. 6 – 365, l. 5.

Discussion

The court erred when it allowed Galloway-Williams to testify in her capacity as an expert witness as to risk factors for child sexual abuse since the state failed to prove that the subject matter of this testimony was beyond the ordinary knowledge of the jury. Although the witness was an experienced child advocate, her expert testimony should have been limited to delayed disclosures.

The South Carolina Supreme Court explained in *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010), that "in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony." "First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." *Id.* In *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009), the South Carolina Supreme Court clarified that all expert testimony, including nonscientific expert testimony, must satisfy the criteria of Rule 702, SCRE.

The state failed to demonstrate that the expert testimony was beyond the knowledge of the jury. Galloway-Williams testified that age, developmental delays, emotional problems, behavioral problems, substance abuse, poverty, violence, and single-parent homes with live-in

partners were all risk factors for sexual abuse. Tr. I, 309, ll. 8-23. This information was not outside of the ordinary knowledge of the jury, and it did not assist the jury with determining a fact at issue or understanding the evidence. When the proffered evidence failed the first step of the Rule 702 inquiry as laid out in *Ford Motor Co.*, the court should have prohibited the testimony.

In *State v. Brown*, 411 S.C. 332, 341–42, 768 S.E.2d 246, 251 (Ct. App. 2015), a case involving this same expert witness, this Court found that "Galloway-Williams' specialized knowledge of the behavioral characteristics of child sex abuse victims was relevant and crucial in assisting the jury's understanding of why children might delay disclosing sexual abuse, as well as why their recollections may become clearer each time they discuss the instances of abuse." *Accord State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999) (expert testimony on behavioral characteristics of child sexual assault victims "assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor.")

Here, unlike in *Brown* and in *Weaverling*, the witness' testimony was not confined to behavioral characteristics of child sexual assault victims, but also included testimony about general risk factors for child abuse. The admission of expert testimony on this topic was error.

The admission of this testimony was not harmless. As the South Carolina Supreme Court observed in *State v. Kromah*, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013), "although an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts."

3.

The court erred where it allowed a witness to testify as an expert in child sexual abuse dynamics and disclosures, despite the witness' failure to comply with a subpoena duces tecum that commanded her to bring any research, publications or reports that she relied on as an expert, since the state failed to prove the reliability of the substance of the expert's testimony.

Despite being served with a subpoena duces tecum that commanded her to bring any "articles, publications, treatises, books, manuals, [and] data" upon which she relied, the witness offered no support for her testimony in the form of written materials—this was despite her testimony that she relied on research in formulating her opinions. The admission of her testimony as an expert here was error, since the state failed to prove the reliability of the subject matter about which she testified.

Standard of review

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting *Douglas*, 369 S.C. at 429-30, 632 S.E.2d at 848) (internal quotations omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." *State v. Grubbs*, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing *Means v. Gates*, 348 S.C. 161, 166,

558 S.E.2d 921, 924 (Ct. App. 2001)). To show prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing *Means*, 348 S.C. at 166, 558 S.E.2d at 924).

Relevant facts

The state proffered the testimony of Shauna Galloway-Williams, the executive director of the Julie Valentine Center, a child abuse and sexual assault recovery center in the Greenville area. Tr. I, 295, l. 24 – 295, l. 6. In addition to her role as executive director, Galloway-Williams said she also taught classes at the University of South Carolina Upstate in child advocacy. Tr. I, 297, ll. 16-24. Galloway-Williams shared that in her professional capacity, she maintained forty hours of continuing education credits every two years, and she had over one hundred and fifty hours of skills-based training in assessing maltreated children. Tr. I, 297, ll. 7-15.

Galloway-Williams was offered as a blind, nonscientific expert. Tr. I, 319, l. 23 – 320, l. 10; Tr. I, 334, l. 24 – 335, l. 1. She was ultimately qualified as an expert in child sexual abuse dynamics and delayed disclosures. Tr. I, 350, ll. 17-20.

During the proffer, Galloway-Williams acknowledged that she did not perform research in these fields herself but said that her testimony was based on "**decades of research**." Tr. I, 334, ll. 10-16 (emphasis added). According to Galloway-Williams, research on delayed disclosure was done by "surveying victims or looking at previous case files." Tr. I, 326, ll. 19-25. Galloway-Williams also offered that "[s]ome research even supports that many adult[ ] [victims of child sexual abuse] don't report until they are adults." Tr. I, 303, ll. 22-23.

In addition to delayed disclosures, Galloway-Williams proffered testimony covered a number of topics: grooming; risk factors for childhood sexual abuse; and the impact of trauma on memory. Tr. I, 307, l. 4 – 308, l. 10; Tr. I, 309, ll. 5-23; Tr. I, 311, l. 4 – 312, l. 2.

At the conclusion of the proffer, defense counsel explained to the court that Galloway-Williams had not complied with a subpoena duces tecum he issued to her. "**I sent Ms. Galloway a subpoena, I know the Court's familiar with that. We sent it last week. I asked her and directed her to bring with her to court today all the articles, publications, treatises, books, manuals, data that she would be relying upon. She chose to bring to court one article about forensic interviewing. She's not testifying as a forensic interviewer, so she didn't respond to the subpoena. That's it. She didn't bring anything** . . ." Tr. I, 341, l. 22 – 342, l. 7 (emphasis added). "There's no way [for the defense] to test the accuracy of [her] information." Tr. I, 342, ll. 18-19.

Defense counsel argued against the admission of Galloway-Williams' testimony as an expert, since the state had not met the foundational requirements of Rule 702, SCRE as to reliability. Tr. I, 341, ll. 3-4. Counsel noted that per "*State v. White* and the Ford Motor Company case, even nonscientific experts need to meet the foundational requirements of Rule 702. I don't think there's an exception in the law for reliability." Tr. I, 341, ll.6-11. Counsel also cited *State v. Chavis*,[4] and argued there must be "some evidence demonstrating that the individual expert is able to draw reliable results from the procedures which he consistently applies." Tr. I, 341, ll. 11-21.

[4] *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015).

However, the court ruled that "after hearing, I find the subject matter is beyond the ordinary knowledge of the jury. That she has the requisite knowledge and skill to serve as an expert and that I find the subject testimony reliable." Tr. I, 343, ll. 17-18; Tr. I, 336, ll. 10-14.

Despite her failure to bring any publications or data relevant to her field pursuant to being subpoenaed to do so, Galloway Williams testified before the jury on direct examination that delayed disclosure, "It's very common. It's more common than not from my experience and from the training and research." Tr. I, 354, ll. 8-11. Although Galloway-Williams held out to the jury that she was relying on research, defense counsel was unable to cross-examine her on the research underpinning her testimony since he was unable to view it.

Discussion

Appellant served a subpoena duces tecum on the witness pursuant to Rule 13, SCRCrimP, which ordered her to bring to court any printed materials and data upon which she relied as an expert in the fields in which she was testifying, but the witness instead brought a lone article on a different topic—forensic interviewing.

Galloway-Williams testified that she taught university classes, attended hundreds of hours of continuing education, and considered research in formulating her opinions. The fact that she allegedly did so without possessing any printed materials about her field should have alarmed the trial judge. Absent **any** written materials to support the reliability of the subject matter about which she testified, when she had been subpoenaed to bring them, the court's finding that her testimony was admissible under Rule 702, SCRE was an abuse of discretion.

The South Carolina Supreme Court explained in *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010), that "in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury

may consider expert testimony." "First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." *Id.* Next, "the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter." *Id.* "**Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.**" *Id.* (emphasis added).

In *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009), the South Carolina Supreme Court clarified that all expert testimony, including nonscientific expert testimony, must meet "a reliability threshold for the jury's ultimate consideration." "Reliability is a central feature of Rule 702 admissibility . . ." *Id.* In *State v. Chavis*, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015) the South Carolina Supreme Court explained, that "*State v. White* should apply in qualifying child abuse assessment experts because their testimony is non-scientific."

"Under *White*, two threshold determinations must be made. First, the qualifications of the expert must be sufficient, and, second, there must be a determination that the expert's testimony will be reliable." *Chavis*, 412 S.C. 106-07, 771 S.E.2d at 339.

Galloway-Williams gave expert testimony on a number of topics: delayed disclosures; grooming; risk factors for childhood sexual abuse; and the impact of trauma on memory. However, the state did not establish that her testimony would be reliable as to any of these topics—this failure is made plain by the lack of any written documentation supporting any of the witness' claims. Although Galloway-Williams testified that she accrued the required continuing education credits and training for her employment, "evidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able

to draw reliable results from the procedures of which he or she consistently applies." *Chavis*, 412 S.C. at 108, 771 S.E.2d at 339.

In *State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018), the South Carolina Supreme Court addressed an argument as to the reliability of this exact witness' testimony. In *Jones*, the defendant alleged "it was error to admit Galloway-Williams' testimony [about delayed disclosure and the role of non-offending caregivers] because there was no evidence demonstrating her opinions were accurate or reliable. Specifically, Jones alleges Galloway-Williams failed to identify or name studies any supporting her opinions, nor did she state whether any of the literature she relied on had been peer reviewed." *Id.* at 638, 817 S.E.2d at 271-72.

In finding the trial judge did not abuse his discretion in admitting Galloway-Williams' expert testimony, the South Carolina Supreme Court reasoned that, "Although Galloway-Williams did not identify by name the articles serving as the basis for her opinions, she indicated she could provide citations if given an opportunity to gather them. Additionally, she explained her opinions were supported by peer-reviewed journals and trade publications, all of which were uniformly accepted and recognized by child sexual abuse experts and professionals." *Id.* at 639, 817 S.E.2d at 272.

Here, Galloway-Williams was invited to provide such articles and publications when she was served with a subpoena duces tecum prior to her appearance in court, and she did not do so. Her failure to provide these materials pursuant to subpoena demonstrated that the subject-matter of her testimony was unreliable.

The admission of the expert testimony here was not harmless error. In this case, there was no physical evidence and there were no eyewitnesses to the alleged molestation, which was

alleged to have occurred over thirty years ago. The state's use of Galloway-Williams to testify about delayed disclosures under these circumstances was an important part of its case. The state also relied on Galloway-Williams' proffered testimony on the topics of grooming; risk factors for childhood sexual abuse; and the impact of trauma on memory—to support its otherwise thin case.

The complainant's testimony was the primary evidence against appellant. Under these circumstances, where the complainant claimed she was molested thirty years earlier, the erroneous admission of such evidence cannot be found harmless beyond a reasonable doubt. *See State v. Mizzell*, 349 S.C. 326, 333–34, 563 S.E.2d 315, 319 (2002) (finding error is harmless beyond a reasonable doubt if the "reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt"); *State v. Chavis*, 412 S.C. 101, 110-11, 771 S.E.2d 336, 340-41 (2015) (finding error was harmless where multiple witnesses corroborated the victim's testimony about her abuse, medical evidence supported her claims, and the defendant had taken provocative pictures of the victim in states of undress).

4.

The court erred where it admitted evidence that appellant had physically abused the complainant's mother, where evidence of prior bad acts is limited to the uses enumerated in *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) and Rule 404(b), SCRE, since the evidence did not fit within an exception to Rule 404(b) or *Lyle*.

Evidence that appellant behaved violently against and threatened to kill the complainant's mother was evidence of prior bad acts. The state did not even contend that the evidence fit within a *Lyle* exception, and the court's admission of this evidence without conducting the requisite analyses under Rule 404(b), *Lyle*, and Rule 403, was error.

Standard of review

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. *State v. Whitner*, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Whitner*, 399 S.C. at 557, 732 S.E.2d at 866.

In order to admit evidence of bad acts not resulting in conviction, the trial court must, "[a]s a threshold matter, . . . determine whether the proffered evidence is relevant." *Clasby*, 385 S.C. at 154, 682 S.E.2d at 895; *see State v. Wallace*, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). "If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence [is admissible under the terms] of Rule 404(b)" to show, inter alia, the existence of a common scheme or plan. *Clasby*, 385 S.C. at 154, 682 S.E.2d at 895. If the testimony is relevant and proffered for a permissible purpose, the trial court must next

conduct a balancing test, pursuant to Rule 403; where the testimony's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. *See State v. Gillian*, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007); *see also* Rule 403, SCRE ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...").

Relevant facts

The state asked the complainant about the nature of her mother's relationship with appellant. Tr. I, 142, ll. 19-23. The complainant said the two had physical fights, and defense counsel objected pursuant to Rule 404(b), SCRE. Tr. I, 142, l. 25 – 143, l. 5. The solicitor replied that "the State does not seek to admit this under 404(b). This is not common scheme or plan evidence, Your Honor. This is relevant evidence." Tr. I, 143, ll. 7-10. The court ruled, "I'm going to allow the testimony. Objection overruled." Tr. I, 143, ll. 12-13.

Pursuant to the court's ruling, the complainant testified that appellant was an "angry" and "violent" person, and during one "really bad" incident appellant threatened to kill her mother. Tr. I, 143, l. 19 – 144, l. 1. The complainant said appellant frequently had "violent event[s]" and "violent outburst[s]." Tr. I, 144, ll. 4-8.

Discussion

Testimony that appellant behaved violently against the complainant's mother and threatened to kill her was prior bad act evidence that should have been excluded pursuant to Rule 404(b), SCRE, *Lyle*, and Rule 403, SCRE.

"Evidence of other bad acts is generally inadmissible to prove a defendant's guilt for the crime charged; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule

404(b), SCRE." *State v. King*, 424 S.C. 188, 199, 818 S.E.2d 204, 210 (2018). The notes to Rule 404(b) provide that "unlike the federal rule which does not limit the purposes for which evidence of other crimes may be admitted, the South Carolina rule limits the use of evidence of other crimes, wrongs, or acts to those enumerated in *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923)."

Here, the state agreed the evidence did not fall within a *Lyle* exception. The testimony did not go to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. The solicitor admitted, "the State does not seek to admit this under 404(b). This is not common scheme or plan evidence, Your Honor. This is relevant evidence." Tr. I, 143, ll. 7-10. The court simply overruled the objection. Tr. I, 143, ll. 12-13.

The court's failure to conduct the required Rule 404(b) analysis was an abuse of discretion. The failure to exercise discretion is an abuse of that discretion. *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015). "When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred." *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

"Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE." *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009); *accord State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). The court must determine "whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *State v. King*, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018).

Here, the trial court failed to conduct any analysis under Rule 403, SCRE. In *Spears*, *supra*, this Court held that where it was not implicit or apparent from the record whether the trial court considered whether the probative value of a prior bad act was substantially outweighed by

unfair prejudice, "the trial court erred by failing to conduct an on-the-record balancing test." *State v. Spears*, 403 S.C. at 254, 742 S.E.2d at 881.

Although there was evidence of other bad acts admitted without objection, that testimony was so outlandish in nature, and unsupported by any documentation, that defense counsel used the "outlandish details" of those other bad acts to support his position that the complainant was "storytelling" rather than testifying to facts.[5] Tr. I, 529, l. 25 – 532, l. 8.

However, the testimony that appellant assaulted the complainant's mother and threatened to kill her was not outlandish and simply painted appellant as a bad man with a violent character. The erroneous admission of this prior bad act evidence was not harmless. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. King*, 424 S.C. at 201, 818 S.E.2d at 211 (quoting *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). Here, given the lack of physical evidence and eyewitness testimony, the admission of this bad character evidence was not harmless beyond a reasonable doubt.

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[5] The complainant claimed that appellant shot at her mother's house, shot at a Texaco station where her mother worked, shot at her grandparents' house, forced a car chase down the road to a judge's office, and broke in and kidnapped her brother from a motel. Tr. 195, l. 8 – 196, l. 11. Although the complainant claimed some of these events "made the news," or involved law enforcement, Investigator Robert Perry, who had been a police officer for thirty-two years, did not find any police reports or news reports to corroborate these claims. Tr. I, 216, l. 4 – 221, l. 18; Tr. I, 402, ll. 20-23; Tr. I, 416, l. 6 – 418, l. 10.

5.

The court erred where it admitted testimony that appellant had written a letter to the complainant's mother apologizing for abusing the mother, where the original writing is generally required to prove the content of the writing, since the original writing was not offered.

Appellant objected that evidence of the letter's contents must be proved by production of the letter, but the court instead ruled the evidence was admissible as a hearsay exception. Without any knowledge of whether the letter had been lost or destroyed, and whether it could otherwise be obtained, admitting testimony about the contents of the letter was error.

Standard of review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*; *see also State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Relevant facts

The complainant's mother testified that during the timeframe of the alleged sexual misconduct, the mother had broken up with appellant. The mother claimed that shortly thereafter, appellant wrote her a letter in which he apologized for being abusive and tried to rekindle their relationship. Tr. I, 257, ll. 21-24; Tr. I, 261, ll. 12-18.

Defense counsel objected to hearsay and pursuant to "the best evidence rule." Tr. I, 261, ll. 19-22. "If they're going to talk about the contents of the letter, they need the letter to prove it." Tr. I, 261, ll. 22-24. The court asked the solicitor whether he had the letter, and the solicitor

replied that he did not. Tr. I, 261, l. 25 – 262, l. 2. The solicitor said, "Your Honor, there is no letter, so there's no way to have better evidence—" Tr. I, 262, ll. 1-2. The court did not inquire any further into the circumstances of the letter, and ruled, "I am going to allow it in I think based on state of mind." Tr. I, 262, ll. 7-8.

The complainant's mother went on to testify that in the letter, appellant "apologized for being mean to us and he said he wouldn't do it anymore and he really wanted us to come back." Tr. I, 262, ll. 12-14.

Discussion

Rule 1002, SCRE provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Rule 1004, SCRE allows in relevant part that, an original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or . . . [n]o original can be obtained by any available judicial process or procedure."

In order to admit evidence of the contents of a letter without the original letter or a copy, the proponent of the evidence—the state—was required to show that the original was lost or destroyed, that the loss or destruction was not in bad faith, and that the original could not be obtained by any available judicial process or procedure, and it did not do so. Instead, the solicitor only said, "there is no letter," before the court ruled.

Assuming arguendo that the evidence fell within the hearsay exception of a then-existing mental or emotional condition, the evidence was still admitted in violation of the best evidence rule. The proponent of the evidence did not meet its burden to show what happened to the letter

and explain why it could not be obtained by judicial process. The court's admission of testimony about the letter without performing an analysis under Rule 1004, SCRE, was error.

This error was not harmless. Although evidence of other bad acts was admitted without objection during the trial, that testimony favored the defense in that it was was outlandish in nature and unsupported by any documentation.[6] Testimony that appellant apologized for abusing the complainant's mother, however, was not outlandish and it painted appellant as an abusive man. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. King*, 424 S.C. at 201, 818 S.E.2d at 211 (quoting *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). Here, given the lack of physical evidence, eyewitness testimony, or other corroboration, the admission of propensity evidence of appellant's abusive nature cannot be considered harmless beyond a reasonable doubt.

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[6] The complainant claimed that appellant shot at her mother's house, shot at a Texaco station where her mother worked, shot at her grandparents' house, forced a car chase down the road to a judge's office, and broke in and kidnapped her brother from a motel. Tr. 195, l. 8 – 196, l. 11. Although the complainant claimed several of these events "made the news," or involved police, Investigator Robert Perry, who had been a police officer for thirty-two years, did not find any police reports or news reports to corroborate these claims. Tr. I, 216, l. 4 – 221, l. 18; Tr. I, 402, ll. 20-23; Tr. I, 416, l. 6 – 418, l. 10.

CONCLUSION

Based on the foregoing arguments, appellant respectfully asks this Court to reverse his convictions and sentences and remand for a new trial.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of October, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Initial 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 Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 7, 2019.

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ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICHARD KENNETH GALLOWAY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Richard Kenneth Galloway, 376354, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 7th day of October, 2019.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of October, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028