STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Kershaw County

Tanya A. Gee, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES WAYNE MILLER,

APPELLANT

APPELLATE CASE NO 2016-000642

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in denying Appellant's request for a continuance where "good cause" existed, in light of his serious medical condition, which rendered him unable to assist counsel, violating Appellant's right to due process of law?

II. Did the trial court err by permitting Allison Foster to testify as an expert in child abuse assessment where her testimony improperly bolstered the complaining witness's credibility and there was insufficient evidence of the reliability of the subject matter of her testimony?

STATEMENT OF THE CASE

A Kershaw County grand jury indicted Appellant for criminal sexual conduct in the second degree (2012-GS-28-1381) and incest (2012-GS-28-1382).[1] R. 602-603; R. 605-606. The state, represented by Kathryn Cavanaugh and Karlen Senn, called the case for trial on March 14, 2016, before the Honorable Tanya A. Gee and a jury. R. 1. Anna Good represented Appellant. R. 1.

The jury began its deliberations on March 17, 2016, at 1:50 p.m. R. 558, ll. 9-11. Within an hour, the jury sent a note requesting transcripts of the testimony from the complainant, complainant's mother, complainant's twin sister, from three police officers, a doctor, and the state's closing argument. R. 559, ll. 3-11; R. 598. The judge informed the jurors that transcripts could not be provided, but that testimony could be re-played. R. 560, l. 22 – R. 561, l. 3. She permitted the jury to discuss the request further, but did provide a computer so the jurors could watch videos as requested. R. 561, l. 24 – R. 562, l. 10. Approximately two hours later, the jury requested to hear the testimony from the complainant, her mother, and three police officers, along with the law on reasonable doubt. R. 563, ll. 2-13; R. 599. The judge re-instructed the jury on reasonable doubt. R. 565, ll. 6-22. The court reporter began playing the testimony for the jurors at 5:55 p.m. R. 567, ll. 16-20. At 7 p.m., the judge ordered a break for the jury to have

[1] According to the face of the indictments, the grand jury convened on October 17, 2012. R. 602-603; R. 605-606. However, the signature lines indicating the grand jurors true-billed the indictments were dated March 9, 2016. R. 602-603; R. 605-606. Further, the indictments were filed on March 9, 2016, with the Kershaw County Clerk of Court. R. 602-603; R. 605-606. Although the indictments were marked "Amended," there was nothing in the record to indicate why the indictments were amended or whether such an amendment required re-submission to a grand jury. Nevertheless, there were no objections made at the trial regarding the indictments or the grand jury process. However, this fact was important for the discussion on Appellant's motion for continuance.

dinner. R. 567, ll. 21-25. At 8 p.m., the court reporter resumed playing the testimony. R. 568, ll. 7-9.

During this time, a juror asked what would happen if the jury could not reach a unanimous verdict. R. 568, ll. 12-21; R. 600. The judge instructed the jury "if it's not going to be an all guilty or an all not guilty, if you can't come to a unanimous verdict, then I would have to declare a mistrial. When I declare a mistrial, nobody wins." R. 568, ll. 22-25. She further explained the case would have to be "retried" in front of twelve other people selected from the same county who would receive the same evidence. R. 568, l. 25 – R. 569, l. 5. The judge expressed her "hope" that the jury would "continue to deliberate" and instructed them "to keep an open mind, to listen to each other and to continue to try." R. 569, ll. 7-16. She told the jury to "try" their "hardest to come to a unanimous verdict because ... nobody wins when there's a mistrial." R. 570, ll. 17-19. At midnight, the judge allowed the jury to go home for the evening and reconvene the following day at noon. R. 571, ll. 5-9.

The following day, the jury requested to hear testimony from the doctor who examined Complainant, a hard copy of the definitions of the charges, and instructions on how to interpret the law. R. 572, l. 17 – R. 574, l. 6; R. 600. The judge provided the instructions to the jury in written form and then allowed the jury to hear the requested testimony. R. 578, l. 16 – R. 581, l. 6. Finally, at 3:45 p.m., the jury requested the definitions of cunnilingus and fellatio, which the judge provided. R. 581, l. 19 – R. 582, l. 3; R. 601. The jury returned with a verdict at 4:42 p.m. R. 582, ll. 19-20.

The jury found Appellant guilty as charged. R. 583, ll. 7-19. After the jury returned its verdict, but prior to imposing the sentence, the judge noted that she thought her "sentence speaks for itself." R. 593, ll. 16-17. However, there was "one thing" she thought was "important" to

say to Complainant: "I believe you. I believe you." R. 593, ll. 17-19. Thereafter, on March 18, 2016, the judge sentenced Appellant to twenty years imprisonment for criminal sexual conduct and ten years imprisonment for incest. R. 593, l. 20 – R. 594, l. 1; R. 604; R. 607. She ordered the sentences to be served consecutively. R. 594, ll. 1-2; R. 604; R. 607.

On March 24, 2016, Appellant filed and served his notice of appeal. This brief follows.

STATEMENT OF FACTS

Appellant met his future wife, Tammy, in third grade. R. 198, ll. 1-2. Tammy married Appellant when she was only sixteen years old. R. 198, ll. 8-9. At the age of seventeen, Tammy gave birth to twins, the couple's first children. R. 198, ll. 10-12. The pair went on to have three more children. R. 197, ll. 6-14.[2] Appellant worked construction, providing for his growing family. R. 200, ll. 8-12; R. 102, ll. 1-2. Tammy stayed home with the children, and even homeschooled them for the most part. R. 200, ll. 17-25; R. 101, ll. 1-21.

The couple's twins were girls – Complainant and Breana. Breana was "[v]ery passive, quiet. A follower." R. 203, ll. 7-9. She enjoyed "[d]rawing and painting" and being inside with her mother. R. 203, ll. 14-16; R. 102, ll. 16-18. She helped "cook, clean" and with her younger siblings. R. 203, ll. 16-17. Complainant preferred to be "outside," "[c]limbing trees, skinning foxes." R. 203, ll. 20-24; R. 102, ll. 18-19. Appellant taught Complainant how to build things – "cut tile, cut wood, measure and put down laminate flooring." R. 204, ll. 1-6; R. 104, ll. 2-8.

Around July 4, 2011, Appellant and his family visited friends in Camden. R. 204, ll. 11-20; R. 104, ll. 21-23. The family decided to move from Summerville to Camden. R. 204, ll. 15-18; R. 104, ll. 23-24. The family found a house on the lake in which they could move, but it needed a little work. R. 205, ll. 1-13. Tammy and all of the children except Complainant returned to Summerville to pack for the move. Appellant and Complainant stayed in Camden in a camper preparing the house for the family's eventual return. R. 205, ll. 14-19; R. 106, ll. 7-12. Within two weeks, the entire family was re-united in the house on the lake in Camden. R. 208, ll. 3-6.

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[2] In 2006, Tammy's father went to prison when it was learned he had been sexually abusing one of the couple's sons.

When the family first moved in, Complainant and Breana, who were sixteen-years old at the time, "shared the big room" upstairs, the youngest daughter had her own room, and the two boys shared a third bedroom. R. 208, ll. 7-12; R. 210, ll. 13-14; R. 116, ll. 11-16. However, this arrangement did not last long because the twins could not get along. Eventually, Complainant got her own room, while Breana shared with her younger sister. R. 208, ll. 13-21; R. 118, ll. 1-21.

On August 11, 2012, the family planned to visit their friends, the Harrelsons. R. 224, ll. 22-25. However, Appellant and Complainant had an argument, and Appellant said Complainant was not permitted to go to the Harrlesons' home. R. 226, ll. 5-13. Upset, Complainant walked to the end of the family's dock over the lake. R. 227, ll. 2-6. Tammy went to talk to Complainant because she was crying. R. 227, ll. 7-25. When Tammy reached Complainant, Tammy asked, "[I]s he touching you?" R. 228, l. 1. Complainant responded, "[E]veryday." R. 228, l. 2. Tammy then called her sister, who called the police to report what Complainant alleged. R. 228, ll. 10-12.

Eventually, Complainant alleged Appellant first sexually abused her while she and Complainant were staying in a camper in Camden while the rest of the family was in Summerville preparing for the move. She claimed she woke up "to [Appellant] performing oral sex on" her. R. 108, ll. 12-13. After pushing Appellant away, she ran to a bathroom. R. 108, ll. 17-20. She claimed Appellant apologized so she exited the bathroom and went to the couch. R. 109, ll. 10-23. However, at some point, she returned to bed and fell asleep. R. 110, ll. 1-6. Nevertheless, according to Complainant, she woke up again – this time to find Appellant on top of her trying to have sex with her. R. 110, ll. 6-7. According to Complainant, Appellant had sex with her, despite her protests. R. 110, ll. 17-23.

Complainant alleged the sexual abuse continued, even when the family moved into the house on the lake. R. 113, ll. 5-7; R. 114, ll. 11-15; R. 116, ll. 9-10. According to Complainant, Appellant had sex with her even while she was sharing a room with her twin sister, Breana. R. 117, ll. 9-19. Complainant alleged that when she got her own room, Appellant slept in her room every night. R. 121, ll. 19-21. Incredibly, according to Complainant, Appellant raped her in the houses where the two worked on remodeling projects, including when other people were present. R. 125, ll. 11-14; R. 126, ll. 2-21; R. 127, ll. 21-25. Essentially, Complainant alleged Appellant had sex with her whenever the two were together and even the slightest opportunity presented itself. R. 132, ll. 1-5; R. 133, ll. 6-14; R. 136, ll. 7-12; R. 142, ll. 1-3; R. 142, ll. 15-23. Despite what Complainant alleged were very open and easily detectable acts of sexual abuse, no one in Complainant's family knew of the abuse or observed a sex act between the two. R. 124, ll. 21-23.

Within two months of Appellant's arrest, Tammy had sold everything the family owned and moved to Pensacola, Florida. R. 242, ll. 15-23. Two months later, she was dating Jason Price, the man who would eventually become her second husband. R. 266, ll. 12-17. Six months later, Tammy sent Breanna and two of the younger children to live with Tammy's sister. R. 244, ll. 16-21. In 2013, Price moved in with Tammy and Complainant. R. 267, ll. 1-2. Complainant continued living with Tammy until 2014, when she moved in with her boyfriend. R. 244, ll. 23-25; R. 245, ll. 4-10.

Eventually, Breana got married and moved to California. R. 246, ll. 5-9. Complainant married too, and moved to Virginia. R. 246, ll. 5-9; R. 97, ll. 16-25. Tammy filed for a divorce from Appellant in 2014, and the pair was divorced in 2015. R. 266, ll. 4-11. Tammy married Price in June of 2015. R. 197, ll. 15-19.

ARGUMENT

I. Violating Appellant's right to due process of law, the trial judge erred in denying Appellant's request for a continuance where "good cause" existed, in light of his serious medical condition, which rendered him unable to assist counsel.

Relevant facts

On March 14, 2016, when the state called the case to trial, defense counsel moved for a continuance. R. 9, ll. 10-11. Counsel explained Appellant suffered from chronic back problems, which had escalated in the last week to the point where he required surgery. R. 9, ll. 12-16. On March 3, 2016, Appellant saw his doctor regarding his severe back pain. R. 9, ll. 16-18. The doctor prescribed hydrocodone for the pain and ordered an MRI. R. 9, ll. 18-19. On March 8, 2016, the MRI was conducted. R. 9, ll. 19-20. The results of the MRI were presented to the trial judge. R. 9, ll. 20-23; R. 595. According to the analysis of the MRI, Appellant suffered from "[l]eft central disc herniation at L 4/5, extending behind superior endplate of L5." This herniation caused compression of the thecal sac. R. 595. Additionally, Appellant suffered from "[r]ight foraminal disc herniation at L5/S1, compressing right L5 nerve root." R. 595. The doctor described this finding as "significant." R. 595. The MRI revealed spondylolysis at L5 as well. R. 595. Appellant suffered from facet degenerative joint disease "at L5/S1 bilaterally." R. 595. This disease, while painful in and of itself, contributed to compression of the L5 nerve root. R. 595. Finally, the MRI revealed "[m]odic type I endplate changes, far right lateral, at L5/SI," which the doctor described as "an inflammatory response" and capable of causing pain. R. 595. The day following the MRI, Appellant was prescribed oxycontin for pain. R. 10, ll. 4-6. Two days later, on March 11, his doctor gave him another steroid and prescribed Lortab for pain. R. 10, ll. 6-8.

Defense counsel explained that Appellant was "struggling here just to sit." R. 10, l. 9. According to Appellant's aunt and girlfriend, he had "been out in the car blacking out." R. 10, ll. 12-14. Counsel expressed her concern with Appellant's ability to receive a fair trial in light of his inability to assist in his defense:

> [B]ased on the combination of medications that they have him on and based on the fact that he does need surgery to fix this as well as if he's blacking out, ... he cannot aide me in any way and help in cross examining or questions I may need to ask because he would know this case better than I would when it comes to some of the questions as to the victim or the family members who may be testifying against him.

R. 10, ll. 16-24. Counsel continued to express her concerns with Appellant's "capability" "to help in his defense based on the medication" and his level of pain. R. 10, l. 25 – R. 11, l. 3. Counsel noted that Appellant was unable to walk or stand, and had to use a wheelchair to get into the courtroom. R. 11, ll. 4-5.

Counsel acknowledged the case had been pending for over three years, but explained this date was the first time the case had been called for trial. R. 11, ll. 6-9. Although the state previously set trial dates, including a date certain, the state sought additional time due to the availability of witnesses. R. 11, ll. 8-12. Additional delays were due to the case being transferred from one solicitor to another and additional investigative work being conducted. R. 11, ll. 12-16. Counsel noted the defense had never requested a continuance in the case. R. 11, ll. 16-18.

The solicitor agreed with defense counsel's procedural history of the case. R. 11, l. 25 – R. 12, l. 17. According to the solicitor, she was assigned to the case in November of 2015. R. 12, ll. 2-3. At that time, the case was set for trial on December 14, 2015; however, the solicitor noted some evidence had not been tested and she wanted the tests completed. R. 12, ll. 3-11. The solicitor informed defense counsel the case would not be called to trial as planned. R. 12, ll.

11-13. Thereafter, defense counsel and the solicitor agreed the case would be tried on March 14, 2016, and a trial notice was sent. R. 12, ll. 13-17. Objecting to the continuance request, the solicitor explained the state had "flown three witnesses in, one the victim and her sister and her mother. The sister lives in California. We have flown Breana in from California. We have flown [Complainant] in from Virginia and Ms. Miller, Tammy Miller from Florida." R. 12, ll. 20-22. The solicitor acknowledged that on the Friday prior to the case being called for trial, defense counsel informed her of "something major going on with [Appellant's] back." R. 13, ll. 2-6. Without offering any proof, the solicitor argued "the timing is extremely inconvenient for this trial. It happened - - I don't even know exactly what caused the severe back pain, but all of it started occurring last week, the week before trial." R. 13, ll. 13-15; see also R. 14, ll. 11-12. The solicitor further argued against the continuance request because Appellant had not provided anything from a doctor stating he required "emergency back surgery." R. 13, ll. 15-18.

Thereafter, the solicitor cited McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003) and claimed the case stood for the proposition that "antiseizure medication did not render the defendant incompetent to stand trial." R. 13, ll. 19-24. The solicitor also referenced State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2002) for the competency standard, which the solicitor asserted was "whether the defendant has the present ability. Just as long as he has the present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational understanding of the proceedings against him ... that he is able to stand trial and that the defendant bears the burden of proving his lack of competence by the preponderance of the evidence." R. 13, l. 24 – R. 14, l. 9. The solicitor claimed, again without proof, that Appellant had been competent "for the past three and a half years." R. 14, l. 6.

The judge denied the continuance request. R. 15, ll. 16-17. The only reason given was that the case had been pending since 2012. R. 15, ll. 17-18. The judge explained she understood Appellant was "in pain" and promised to take breaks "as necessary." R. 15, ll. 18-19. The judge noted her recent surgery, and expressed that she would do her "best to accommodate" Appellant "with regard to his back pain," but found his condition was "no reason to continue this trial." R. 15, ll. 19-23.

When the trial resumed the following day, defense counsel renewed her motion for a continuance. R. 33, ll. 4-5. Counsel explained that Appellant had "been in the emergency room all night in Columbia" and "still ha[d] not been seen." R. 33, ll. 5-7. Counsel again expressed her concern with Appellant's ability to proceed to trial based on the medication he was taking, his lack of sleep, and his physical pain. R. 33, ll. 11-14. Offering no reasoning, the judge denied the request. R. 33, ll. 24-25.

During the trial, defense counsel explained that the jail had refused to permit Appellant to take the prescription medication while being detained at the jail during the pendency of the trial. R. 482, ll. 4-8; R. 482, ll. 19-22. Further, counsel, while providing the medications to the judge, requested the judge instruct the jail that Appellant be permitted to have his medication or take the medication in court. R. 482, ll. 4-8. The judge then instructed that two of the five prescription medications, which had been presented for her examination, be transported with Appellant to the jail and that he be permitted to take one of the pills at that moment during the proceedings. R. 483, ll. 2-24. Thereafter, the judge engaged in a colloquy with Appellant regarding his right to testify. R. 484, l. 13 – R. 486, l. 18.

Discussion

The Fourteenth Amendment to the United States Constitution guarantees criminal defendants the right to due process of law. U.S. Const. amend. XIV. "The authority of the court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases. This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants." Williams v. Bordon's, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). The South Carolina Rules of Criminal Procedure provide that the presiding judge may grant a continuance based upon "a showing of good and sufficient legal cause." Rule 7(c), SCRCrimP. As such, "[t]he granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion." State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); see also State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249–50 (Ct. App. 2006)("An abuse of discretion occurs when the trial court's ruling is based on an error of law").

"It is axiomatic that determination of [a motion for continuance] must depend upon the particular facts and circumstances of each case." State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012)(quoting State v. Babb, 299 S.C. 451, 454-455, 385 S.E.2d 827, 829 (1989)). While "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process," the decision must rest upon "the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." Ungar v. Sarafitr, 376 U.S. 575, 589 (1964).

The South Carolina Supreme Court recently decided a case concerning the granting of a continuance. In Winkler v. State, Op. No. 27685 (S.C. Sup. Ct. filed Nov. 23, 2016)(Shearouse Adv. Sh. No. 45 at 13), the Court held the trial judge erred in failing to grant Winkler an extension of time in order to investigate evidence of brain damage. After Winkler was convicted, he filed an application for post-conviction relief and was appointed counsel. Id. Approximately two months into the representation, counsel suspected Winkler may suffer from brain damage. Id. Counsel requested funding to investigate, which was approved, and engaged a neuropsychologist. Id. The neuropsychologist recommended neuroimaging and consulting a neurologist or neuropsychiatrist. Id. Counsel, thereafter, requested funding for neuroimaging. Id. The judge approved the request. Id. Subsequently, counsel moved to extend the deadlines in the scheduling order by ninety days, explaining the testing and analysis would require approximately ten weeks. Id. The judge extended the deadline for filing an amended application, but refused to extend the PCR trial date. Id.

Although Winkler obtained the recommended MRI scan, he was unable to obtain the recommended PET scan because of elevated blood glucose levels. Id. Thereafter, counsel began working to treat Winkler's previously undiagnosed and untreated diabetes. Id. Despite Winkler receiving diabetes treatment, weeks later, a physician explained his blood sugar was still too high to perform an accurate study of his brain, and that an additional six to eight weeks of treatment would be required, followed by an additional six to eight weeks for analysis. Id. Counsel filed a second motion to extend the deadlines, requested a continuance of six months to file his final amended PCR application and adjustments of other dates, including the trial date. This request was denied. Id.

The Supreme Court explained that the PCR statute, much like the Rules of Criminal Procedure, provided that additional time should be granted "if 'good cause is shown to justify a continuance.'" Id. (quoting S.C. Code Ann. § 17-27-160(c)). The Court found the PCR court abused its discretion in denying Winkler's second motion for additional time because Winkler presented "good cause" for the continuance. Id. The Court emphasized the diligence with which counsel acted at each stage. Id. The Court found no evidence to support the PCR judge's finding that PCR counsel had "'ample opportunity'" to investigate and develop the evidence related to potential brain damage. Id. In fact, the Court found "it would have been impossible for PCR counsel to obtain PET scans in time to have an expert review them and be prepared to testify at the PCR trial." Id. Thus, Winkler provided "good cause" to justify a continuance. Id. According to the Court, the PCR court's denial of the continuance request "left PCR counsel in a position from which they could not present evidence to support the claim that trial counsel was ineffective for failing to investigate Winkler's brain damage." Id.

In State v. McMillian, 349 S.C. 17, 24, 561 S.E.2d 602, 605 (2002), the South Carolina Supreme Court held the trial court abused its discretion in denying McMillian's motion for continuance in order to obtain the transcript of his first trial, which ended in a hung jury, in order to prepare for his second trial. McMillian requested the transcript timely, but the second trial started prior to his receipt of the transcript. Id. at 19, 561 S.E.2d at 603. He moved for a continuance to obtain the transcript in order to impeach the witness against him, but this request was denied. Id. The Court explained that "[t]he only 'neutral' witness for the state during McMillian's second trial was Dorothy Williams Rumph." Id. at 21, 561 S.E.2d at 604. As such, the Court found "her credibility was essential to McMillian's defense." Id. This fact was reinforced by the fact that the first jury deadlocked, 8-4, after re-hearing her testimony. Id.

According to the Court, "[t]he crucial nature of Rumph's testimony cannot be overstated." Id. In fact, the Court concluded "the verdict hinged upon her credibility, and that McMillian was hindered in his ability to impeach her" without the transcript from the first trial. Id. at 23, 561 S.E.2d at 605.

In another continuance case, State v. Tanner, 299 S.C. 459, 462, 385 S.E.2d 832, 834 (1989), the South Carolina Supreme Court held the trial judge erred in failing to grant a continuance. Tanner and Taylor were in a car accident in which two people died. Id. at 461, 385 S.E.2d at 833. At trial, the evidence was conflicting as to whether Tanner or Taylor was the driver, with Tanner's defense being he was not the driver. Id. Although Tanner's counsel was aware that blood, skin, and hair samples were taken from the car in which he and Taylor were occupants, the solicitor informed counsel that the samples were lost or misplaced. Id. at 462, 385 S.E.2d at 834. Ten minutes before the pre-trial hearing, SLED brought the samples to court, and defense counsel learned of their availability. Id. Requesting a continuance, Tanner's counsel asked to conduct an independent examination of the samples, or at least to wait for a SLED analysis. Id. Denying the request, the judge ruled the state could not use the samples in its case against Tanner. Id.

The Court found that the trial judge abused his discretion in denying the defense's motion for continuance because the judge failed to consider the potential exculpatory value of the samples. Id. at 463, 385 S.E.2d at 834. In light of Tanner's defense that he was not the driver, the samples were "critical" to the case because "[a] testing of the samples could have supported Tanner's contentions that he was merely a passenger by demonstrating that some of Ms. Taylor's hair or blood was located on the driver's side of the car. Discovering who the samples belonged to and the samples' exact location in the car may also have aided Tanner's accident

reconstruction expert in arriving at his opinion about who was driving." Id. Thus, the Court held, "the eve of trial production of these samples warranted the granting of a continuance so that the defendant could adequately ascertain the samples' full evidentiary harm," and that "[n]o real harm would have befallen the state from this continuance." Id.

The Court held a defendant was entitled to a continuance where his attorneys were incapacitated due to illness. Varn v. Green, 50 S.C. 403, 403, 27 S.E. 862, 862 (1897). One attorney was "confined to his bed and unable to attend court," and the other, "who, although attending court was unable to articulate above a whisper, and only then with great pain, owing to an attack of grip and sore throat." Id. The trial judge refused to grant the continuance request because the case "had been so long upon the docket." Id. "Considering all the circumstances," the Court held the defendant was entitled to a continuance of the case on account of the illness of his counsel, and that the circuit judge abused his discretion in forcing the case to trial under the circumstances." Id. The Court concluded the judge committed an error of law by allowing his exercise of discretion "be controlled by his custom to require clients to employ other counsel when the counsel engaged were too sick to conduct the cause, and the cause had been long on the docket." Id.

The Court found error in refusing to grant a continuance where the defendant's wife, who was a crucial witness in the case, was unable to attend court due to her advanced stage of pregnancy. State v. Williamson, 115 S.C. 315, 315, 105 S.E. 697, 698 (1921). Wife's doctor submitted an affidavit, stating it would be dangerous for her to testify at the trial. Id. at 315, 105 S.E. at 697. However, it was undisputed, she was "a most important witness for her husband; the killing of [the decedent] having occurred on account of alleged opprobrious language used to her by him a few days before the killing, ... and she was present and witnessed the homicide." Id.

The Court held the trial judge "was manifestly in error in not continuing the case, on showing made and under all of the facts and circumstances of the case." Id. at 315, 105 S.E. at 698.

As noted by the solicitor, defense counsel's request for a continuance in the instant case involved concerns regarding Appellant's competency to stand trial. An individual's constitutional right to due process of law as provided in the Fourteenth Amendment to the United States Constitution prohibits the conviction of an incompetent defendant. Medina v. California, 505 U.S. 437, (1992); Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966). Therefore, states must provide procedures adequate to protect this right. Pate, 383 U.S. at 378. South Carolina statutory law provides that whenever a judge "has reason to believe that a person on trial before him, charged with the commission of a criminal act ... is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or assistant in his own defense as a result of lack of mental capacity," the judge *shall* order an examination of the individual by the Department of Mental Health. S.C. Code Ann. § 44-23-410. The test for determining competency to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." State v. Weik, 356 S.C. 76, 81, 687 S.E.2d 683, 685 (2002) (citing Dusky v. United States, 362 U.S. 402 (1960)); State v. Bell, 293 S.C. 391, 395-396, 360 S.E.2d 706, 708 (1987). Competency to stand trial relates to the time the defendant is before the court for trial, not the time of the alleged offense. Monahan v. State, 365 S.C. 130, 616 S.E.2d 422 (2005).

The trial judge abused her discretion by denying Appellant's continuance request where Appellant established good cause for the continuance. Appellant presented medical documentation and prescription medication to show that he was suffering from debilitating back pain. Not only

was Appellant's physical capacity to endure the trial at risk, but Appellant's mental and cognitive capacity was at risk. Defense counsel repeatedly expressed her fear that Appellant was unable to assist counsel – presently – due to his extreme pain and the intoxicating effects of the prescription medications. At a minimum, the judge should have inquired as to Appellant's competency, as the statute required. Further, the evidence presented by Appellant established "good cause" to overcome any desire by the state to try the case that week. The only reason given by the judge for not granting the request was that the case had been pending for over three years. Yet, the delay in calling Appellant's case rested solely at the feet of the state, not Appellant, because the state controls the docket in General Sessions. Further, the undisputed evidence was that the state had not been ready to try his case previously. In fact, while the charges against Appellant had been pending for years, the indictments used by the state to try Appellant were only presented to the grand jury on March 9, 2016 – less than one week before the state called his case to trial. Thus, the state could not have called the case to trial prior to March 14, 2016. The trial judge abused her discretion in denying Appellant's request for a continuance where Appellant presented good cause – his physical and mental capacity, including concerns about his competency – to continue the case.

II. The trial court erred by permitting Allison Foster to testify as an expert in child abuse assessment where her testimony improperly bolstered the complaining witness's credibility and there was insufficient evidence of the reliability of the subject matter of her testimony.

Relevant facts

Motion to exclude

Prior to trial, the state informed the judge of its intent to call Dr. Allison Foster as an expert witness "in the field of child abuse assessment." R. 16, ll. 19-22. According to the state, Foster was "a completely blind witness. She's never met [Complainant], the victim, in this case. She has never reviewed any of The CARE House interviews or even seen those recordings so she has had no direct interaction with this case." R. 16, l. 22 – R. 17, l. 2. The solicitor clarified the intent to "qualify her as an expert in child abuse assessment" to permit testimony on "just the different range of responses and the factors that play into victims of sexual abuse." R. 17, ll. 7-24.

Defense counsel objected, explaining the state proposed to have the witness testify to "child sexual abuse accommodation syndrome," which was not a recognized disorder. R. 18, ll. 1-19. Defense counsel explained the subject of Foster's testimony was "not peer reviewed, ... not done in a clinical setting to determine how these different things affect children." R. 18, ll. 19-22. The judge agreed to permit the state to proffer Foster's testimony prior to ruling on its admissibility. R. 19, ll. 16-24.

Proffer

Later in the trial, the state proffered Foster's testimony. Foster explained that she is a licensed clinical psychologist employed as the chief psychologist at the Assessment and Resource Center (ARC), a children's advocacy center, and as a psychologist in private practice.

R. 406, ll. 10-19. Additionally, she serves as "senior faculty for a five day forensic interview training course called Child First," which has been in existence for fifteen years. R. 408, ll. 4-6. According to Foster, she had "been conducting forensic interviews of children who are suspected of being victims for 21 years." R. 407, ll. 7-14. When asked if she developed training and programs for different agency personnel regarding suspected child abuse, Foster responded that she trains "in national conferences," develops "the curriculum for the Child First forensic interview training course," and teaches others, including other forensic interviewers, regarding the techniques. R. 408, ll. 7-15. Regarding her publications, Foster explained she had "published a monograph for the American Prosecutors Research Institute on child development," published "a book chapter" "about the assessment of mental disorders in custody evaluations," and had "research in preparation on a couple of matters involving forensic interview techniques," which were not published. R. 408, ll. 16-25.

Foster claimed the "subject" of her "field" of study was "child abuse assessment or dynamics of child abuse." R. 409, ll. 11-14. She further claimed the field is studied because "there are a lot of factors that are not necessarily a lay person, within a lay person's understanding and also because it's important for us to understand children's development, linguistics, how memory works, how processes like coercion, parent/child relationships or offender/child relationships, how those play into the dynamics of abuse." R. 409, ll. 15-23. Foster claimed "there are a lot of behavioral issues as well as developmental issues that are researched in the behavioral science literature to help us understand the best way to evaluate these situations as well as the best way to explain to lay people dynamics that they might not otherwise understand." R. 409, l. 23 – R. 410, l. 3.

An example of "dynamics" included "things like the fact that delay in reporting by victims is a very robust finding in the research." R. 410, ll. 4-7. Foster claimed, "We know behaviorally that the majority of substantiated cases of child sexual abuse include a very large delay even into adulthood before victims often report childhood sexual abuse." R. 410, ll. 7-10. Such was "not necessarily logical to somebody who is not trained in the field," she asserted. R. 410, ll. 10-12. Other examples of the "dynamics" were "[s]ome of the ways children accommodate abuse in situations they can't control," and "recantation," which "jurors might not otherwise understand if they didn't have the benefit of education." R. 410, ll. 15-18. Finally, "secrecy" was a dynamic. R. 410, ll. 19-20.

At this point, the state sought to qualify Foster in the field of "child abuse assessment." R. 410, ll. 21-24. Defense counsel posed no objection to the qualification. R. 411, l. 6.

Continuing with the proffer of testimony, Foster testified regarding what she claimed were some of the behavioral characteristics not known to the average individual, including that "a lot of child sexual abuse occurs at the hands of a family member, an adult who is in a role of an authority figure, a parental figure or step parent figure." R. 412, ll. 8-20. In those situations,

> [T]he abuse tends to be chronic meaning that it occurs over a sustained period of time and so for that relationship to be sustained without the offending behavior being detected there are certain dynamics that are known to occur in those cases along the lines of how an offender exploits his authority, the sense of love, dependency, the complexities of that kind of relationship and how they can manipulate that to maintain a victim's secrecy and cooperation or compliance.

R. 412, l. 20 – R. 413, l. 3. She continued to explain they "dynamics that the victims experience," typically described as "helplessness," "entrapment and the fact that they need to accommodate the abuse because they're really in a situation that they feel powerless to change." R. 413, ll. 4-8.

Next, Foster delved into "about 30 years of ... retrospective research." R. 413, ll. 19-21. She described this as "where researchers have looked back over a 30 year time span of studies that conclude that two-thirds of child sexual abuse victims in America don't come to anybody's attention until adulthood." R. 413, ll. 21-24. She claimed these "statistics [] come from cases that have been well substantiated." R. 414, ll. 3-12. This led her to draw the conclusion that "delayed disclosure is a common aspect to the experience of child sexual abuse." R. 414, ll. 1-2. When questioned about the "reliability of the behavioral science" on which she was basing her testimony, she claimed there were "a lot of studies," but she mentioned only "a meta analytic study that was published a few years ago by Steven Ceci, Carl London, Maggie Roth," which involved the review of "research spanning this 30 plus year time frame" with any specificity. R. 415, ll. 9-22. She then shifted to discuss the work of Roland Summit on "the phenomenon of chronic sexual abuse and delayed disclosure." R. 416, ll. 6-8. In this publication, Summit explained "the manner in which children become trapped first by a stage of secrecy ... they are manipulated, lured, threatened into believing they need to keep the behavior secret." R. 416, ll. 8-12. According to Foster, the child enters a "stage of helplessness," which causes the child to "live in some period of time that's described as a state of entrapment and accommodation." R. 416, ll. 18-19. During this state, the child is "still going along with the business of life," including school, visiting friends, participating in activities, doing chores, and otherwise acting normally. R. 416, ll. 19-25.

The "dynamics and the behavioral characteristics" described by Foster were not used as "a diagnostic tool," but were used to "describe phenomenon that could otherwise seem illogical or counter intuitive." R. 417, ll. 12-18. She posited that understanding "some of those behavioral dynamics that have to do with manipulation, coercion, the different sort of power

dynamics that are in relationships, it can assist the trier of fact in understanding the phenomenon." R. 417, l. 22 – R. 418, l. 1.

On cross-examination, Foster revealed that the five factors identified in the Summit article comprising child sexual abuse accommodation syndrome were secrecy, entrapment, helplessness, delayed disclosure, and potential recantation. R. 418, ll. 13-21. According to Foster, studies following Summit's article included those conducted in a clinical setting, but more involved "data analysis from forensic cases." R. 419, ll. 1-6. When asked if the studies she referenced were "peer reviewed," Foster responded they were "absolutely" "peer reviewed" because "[a]nything that's published in a journal" is peer reviewed and she would not cite research unless it were the product of peer review and had been published in a journal or a book that would be considered a treatise edited by experts in their field. R. 419, ll. 13-23.

Argument on the motion to exclude

Defense counsel objected to the substance of Foster's testimony because it would "bolster" the complaining witness in the case by stating that in "substantiated" cases of abuse, certain behavioral characteristics were noted and those characteristics are also exhibited by the complaining witness. R. 422, ll. 4-16. Further, defense counsel objected that using the word "phenomenon" to describe the conduct would bolster the complaining witness's testimony because the very term phenomenon means an occurrence. R. 422, ll. 23-25; R. 423, ll. 17-20; R. 424, ll. 3-5.

Additionally, defense counsel objected to evidence of child sexual abuse accommodation syndrome because the so-called syndrome was not recognized in the scientific community. Specifically, counsel noted the studies referenced by Foster had not been "peer reviewed enough" to show "the dynamics that are definitely something that fall within Rule 702." R. 423,

ll. 1-9. As Foster admitted, the behavioral characteristics comprising the syndrome were "not a diagnostic tool" and were "not tested in the clinical sense." R. 423, ll. 13-16.

The solicitor argued Foster had not testified "anything about a syndrome," "just ... as to behavioral characteristics that are often displayed in victims that have come forward related to sexual abuse." R. 424, ll. 7-11. She further argued "this behavioral science ... fall[s] outside of the normal understanding or the general knowledge of the jury." R. 424, ll. 12-18. Turning to the reliability of Foster's testimony, the solicitor pointed to the testimony "that [for] over 30 years there have been studies conducted of victims that come forward with allegations of sexual abuse." R. 424, ll. 21-25. She stated "that a portion of that sample that have been studied are further substantiated." R. 425, ll. 1-2. The solicitor claimed "it is a recognized field" that "is heavily researched." R. 425, ll. 8-9.

Ruling

In ruling on defense counsel's objection to Foster's testimony, the trial judge noted that everyone agreed Foster satisfied the qualifications requirement of the evidentiary rule. R. 426, l. 22 – R. 427, l. 1. The judge then found that "child abuse assessment is reliable" based upon the testimony of Foster that the behavioral characteristics "are based on 30 years of research," of which "some" "are from a clinical setting" and "[m]any ... are from data analysis." R. 427, ll. 2-7. She determined the "journal articles ... are peer reviewed" that discuss "this particular science." R. 427, ll. 7-9.

Testimony before the jury

Thereafter, the solicitor called Foster as a witness in front of the jury. R. 430, ll. 17-18.[3] Much of Foster's testimony mirrored her *in camera* testimony. In describing "child abuse assessment," Foster told the jurors that the field "encompasses a lot of things from understanding children and their developmental states [to] understanding how abuse can affect children at different developmental stages." R. 434, ll. 17-22. The "field" also included how children "can remember and relate information." R. 434, ll. 22-23. According to Foster, the "field" also encompassed the "[p]sychological effects of abuse depending on the relationship between the perpetrator and the victim and the age of the victim." R. 434, ll. 23-25. Related to all of this was "the process of how to gather information from children and understanding the process of disclosure. How children tell and when they tell and that sort of thing." R. 435, ll. 2-5.

She told the jurors about delayed disclosure and that according to the research, "two-thirds of [people known to have been victimized as children] won't come to anyone's attention until adulthood." R. 435, l. 20 – R. 436, l. 6; R. 439, ll. 7-10. Related to delayed disclosure, Foster explained stages of disclosure, including denial, tentative, and active. R. 439, l. 20 – R. 440, l. 14. She told the jurors about "entrapment" and "accommodation" during child abuse. R. 441, ll. 5-24. She also told the jurors about children of abuse entering a state of helplessness. R. 442, ll. 1-20. Those stages, she explained, were called "child sexual abuse accommodation dynamics." R. 442, ll. 16-18.

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[3]Defense counsel did not object to Dr. Allison Foster's testimony contemporaneously. However, no objection was necessary to preserve this error for appellate review because the judge entertained the *in camera* testimony and ruled upon its admissibility immediately prior to the state calling Foster as a witness to testify before the jury. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001); State v. Govan, 372 S.C. 552, 557, 643 S.E.2d 92, 94 (Ct. App. 2007).

Foster then told the jurors about the most common situation for child sexual abuse was for it to occur in the home. R. 442, l. 21 – R. 443, l. 2. Regarding whether all children in the home would be abused, Foster claimed that if the abuser were a parent, then the abuser would chose the child over whom the parent had a particular emotional and/or behavioral relationship. R. 443, ll. 3-17.

Importantly, Foster told the jury that her testimony was based upon the research in the "field" and from her experience as a psychologist who had "evaluated about 2000 children suspected of sexual abuse." R. 446, ll. 2-8.

State's closing argument

After defining the elements of the charged offenses, the solicitor told the jurors that the South Carolina "legislature recognizes that these are crimes of secrecy and they are shameful so unlike armed robberies and unlike murders, sometimes, oftentimes there are no other witnesses." R. 491, ll. 5-10. Accordingly, "the law does state as it relates to criminal sexual conduct in the State of South Carolina, the testimony of the victim need not be corroborated." R. 491, ll. 14-17. Thereafter, the solicitor used the testimony from Foster to bolster Complainant's credibility and argue to the jury that she should be believed because her conduct mirrored the conduct of those individuals who suffered child sexual abuse, as described by Foster.

According to the solicitor, Appellant had selected Complainant because of his close relationship with her, "[j]ust like Dr. Foster said." R. 504, ll. 17-21. To explain why Complainant did not tell about the alleged abuse earlier, the solicitor implored the jurors to rely on Foster's explanation "that the large majority of people, of children do disclose a lot later.... Two-thirds of the population that has been studied relating to sexual abuse child victims come forward later. It is not an uncommon situation." R. 510, ll. 2-12. She then talked to the jury

about "latent disclosure" and partial disclosures. R. 510, ll. 13-23. To explain why Complainant did not "tell the entire story" initially, the solicitor relied upon "the research, the studies" and told the jurors to rely on their "common sense and knowledge of human nature" to determine that "the very first time she's not going to sit there and give it all out there." R. 511, ll. 9-19. According to the solicitor, "[t]he first day she told what she needed to tell her. Not unusual. Dr. Foster's been in this field for 30 years. Not unusual." R. 511, ll. 20-23.

Next, the solicitor reminded the jury of "the factors that play into that delayed disclosure" as testified to by Foster. R. 511, ll. 24-25. Specifically, the solicitor talked about "helplessness and accommodation and the secrecy." R. 511, l. 25 – R. 512, l. 1.

> Helplessness. The family is all she had. ... [T]hey have had very few friends. They have moved over 20 times. They're home schooled. They're in that house. ... So when he threatens her, I'm gonna ruin you. You're gonna ruin this family. You're gonna have no one, why wouldn't she believe that? That's all she's ever known is her family.
>
> Accommodation. Dr. Foster ... talked about accommodation. What that means is that after the first couple of times that it happened, even if it's against your will, even if you fight it off, but once it happens, you feel like it, she feels like it's something that she just has to succumb to essentially. Blames herself. That is a factor that also comes into play with child sexual abuse of victims.

R. 512, ll. 2-23. Continuing to rely upon Foster's testimony to bolster Complainant's testimony, the solicitor noted that Foster "also testified ... that just because as far as who the particular perpetrator chooses, which child the perpetrator chooses has a lot to do with the relationship." R. 512, l. 24 – R. 513, l. 2; see also R. 522, ll. 8-19.

The solicitor boldly told the jurors that Foster did not interview Complainant or watch the forensic interviews, and yet she "corroborate[d] everything" that was presented by the state. R. 513, ll. 2-6. The solicitor described Foster's testimony concerning memory as corroborative of Complainant, especially in light of Complainant's repeated testimony regarding events, not just

allegations of sexual abuse, that she could not remember. According to the solicitor, "Dr. Foster testified about the fact that the first memory is often very clear and [Complainant] has a very clear memory when that first time it happened." R. 514, ll. 23-25. The solicitor offered nothing more than Foster's testimony to explain away the inexplicable – why Complainant could not remember simple things like what she liked to hunt or why her testimony contrasted with that of others concerning whether she wore bikinis.

Discussion

The South Carolina Rules of Evidence and case law govern the admission and scope of expert testimony. Pursuant to the Rule, "[i]f 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." Rule 702, SCRE. In Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), the South Carolina Supreme Court specified the following three-prong test for expert testimony:

> [E]xpert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, 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. 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. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.

Id. at 446, 699 S.E.2d 169, 175 (internal citations omitted) (emphasis added). "All expert testimony must satisfy the Rule 702, SCRE, criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for

the jury's ultimate consideration." State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

A review of South Carolina's jurisprudence concerning the propriety of expert testimony in child sex abuse cases sheds light on the issue presented. Starting in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), the South Carolina Supreme Court proclaimed: "[W]e state today that we can envision no circumstance where [a forensic interviewer's] qualification as an expert at trial would be appropriate." Id. at 357 n.5, 737 S.E.2d at 499 n.5. In State v. Douglas, 380 S.C. 499, 502-503, 671 S.E.2d 606, 608 (2009), the South Carolina Supreme Court found the trial court erred in qualifying a forensic interviewer as an expert because the testimony simply did not require expert qualification. The forensic interviewer's testimony concerned only "her personal observations and experiences, and her interview with the Victim in th[e] case." Id.

"It is undeniable that the primary purpose for calling a 'forensic interviewer' as a witness is to lend credibility to the victim's allegations. When this witness is qualified as an expert the impermissible harm is compounded." Kromah, 401 S.C. at 358, 737 S.E.2d at 499. "[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." State v. Portillo, 408 S.C. 66, 71, 757 S.E.2d 721, 724 (Ct. App. 2014)(quoting Kromah, 401 S.C. 340 at 358, 737 S.E.2d at 499). "The assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Therefore, it is improper for a witness to bolster the testimony or credibility of another witness. See Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010)(finding a "forensic interviewer's . . . opinion testimony improperly bolstered the victim's credibility").

In McKerley, the trial court allowed a witness to testify as an expert in "forensic interviewing and child abuse assessment." 397 S.C at 463, 725 S.E.2d at 141. The witness had interviewed the alleged victim twice and concluded that both interviews were "compelling" for sexual abuse. Further, the witness determined that the alleged victim's statements were consistent with other information in the case. Id. at 466, 725 S.E.2d at 142. The Supreme Court determined that there was no other way to interpret the language used in the expert's testimony other than to mean she believed the victim was being truthful. The Court further held, "In light of [the expert's] extensive inadmissible testimony bolstering the credibility of the victim . . . we cannot say the erroneous admission of [the expert's] testimony did not contribute to the jury's decision," therefore finding harmful error. Id. at 467, 725 S.E.2d at 143.

The Supreme Court has also held that it is improper "for an expert to comment on the veracity of a child's accusations of sexual abuse." State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011). Jennings involved a challenge to the testimony of Shauna Galloway-Williams. Galloway-Williams interviewed the three alleged victims of sexual abuse and issued separate reports for each child that were admitted into evidence. She concluded in her reports that each child provided a "compelling" disclosure of abuse by the defendant and that the children provided details that were consistent with the background information received. 394 S.C. at 476-481, 716 S.E.2d at 92-95. The Court held the conclusions in Galloway-Williams' reports improperly vouched for the children's veracity and thus the trial court abused its discretion by admitting the reports into evidence. It further held the error was not harmless because there was no physical evidence presented at trial and the children's credibility was the sole issue in the case. Id. at 94-95, 716 S.E.2d at 480.

Recently, in State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), the South Carolina Supreme Court held that State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) 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." Id. (citing White, 382 S.C. at 273, 676 S.E.2d at 688). The Court found that the trial court improperly qualified the child abuse assessment expert in Chavis because there was "simply no evidence that her conclusions or impressions taken from [the] interviews were accurate." Id. Although the Court established "no formulaic approach for determining the foundational requirements of qualification and reliability in non-scientific evidence," the Court explained "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." Id.

The Court in Chavis found that one of the "expert" witnesses should not have been qualified as an expert because there was no evidence that her conclusions or impressions taken from the forensic interviews she conducted were accurate and her only peer review was another interviewer reviewing her work to ensure she was using the RATAC protocol. Id. at 108, 771 S.E.2d at 339. The Supreme Court also found the testimony of the other so called "expert" that the child should not be allowed around Chavis anymore, for any reason, could only be interpreted as the "expert" believing the victim's claim that Chavis sexually abused her. Id. at 109, 771 S.E.2d at 340.

Like the "experts" in Chavis, there was no evidence that Foster's conclusions and claims were accurate or reliable. Foster admitted that her testimony was the product of what she had read and what she had learned from her experience as a psychologist who had "evaluated about 2000

children suspected of sexual abuse." R. 446, ll. 2-8. The state presented no evidence regarding the methodologies employed by Foster in arriving at the conclusion she drew from her reading or from her own practice. In light of the dearth of evidence of the reliability of Foster's conclusions and statements, the court failed to properly execute its gatekeeping function by qualifying her as an expert in "the dynamics of child sexual abuse."

In closing argument, the prosecutor argued that the jury should believe Complainant because of Foster's testimony. Specifically, the solicitor used Foster's testimony regarding so-called "child abuse assessment" and "child abuse accommodation syndrome" to bolster Complainant's credibility and argue to the jury that she should be believed because her conduct exactly mirrored the conduct of those individuals who were known to have suffered child sexual abuse and had been studied by a "field" of "experts," as described by Foster. The solicitor used Foster's testimony to describe and attempt to explain away why Complainant was the one who was allegedly abused and none of the other children in the home, including Complainant's twin sister, were abused. R. 504, ll. 17-21. Unsurprisingly, the solicitor used Foster's testimony to describe the Complainant's delay in making an accusation as "not an uncommon situation." R. 510, ll. 2-12. Foster was also used to explain why Complainant did not "tell the entire story" initially," which, according to Foster, who has "been in this field for 30 years," was "[n]ot unusual." R. 511, ll. 9-23.

Using the testimony of Foster, the solicitor set up an image of the typical child victim of sex abuse and, then, told the jurors to believe Complainant when she claimed she suffered sex abuse because Complainant displayed the same behavioral characteristics as the typical child victims described by Foster. Specifically, she told the jurors about a typical child victim's feelings of helplessness, and claimed Complainant felt helpless as well. R. 511, l. 25 – R. 512, l.

1; R. 512, ll. 2-23. Additionally, the solicitor claimed Complainant's failure to make the accusation earlier and her seeming to behave "normally" at times was due to "accommodation," another behavioral characteristic of typical child victims. R. 512, ll. 2-23. Finally, the solicitor claimed Complainant was believable because everyone agreed she and Appellant were close, which would explain why Appellant had chosen to prey upon her in light of Foster's testimony that a perpetrator selects an individual with whom the perpetrator has a close relationship. In sum, the solicitor told the jurors that Foster "corroborate[d] everything" Complainant claimed. R. 513, ll. 2-6.

The admission of this testimony in this case, where the jury's decision depended upon Complainant's credibility and the record evidence demonstrates the jury's struggle with rendering a verdict, was prejudicial error that requires reversal. The qualification of Foster as an "expert" in "child abuse assessment" was erroneous and prejudicial to Appellant. "The label of expert should be jealously guarded by the court and never loosely bandied about." Kromah, 401 S.C. at 357, 737 S.E.2d at 499. As our Supreme Court noted in Kromah, "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." Id. In light of the prosecutor's capitalization of the testimony during her closing argument to argue the jury should believe Complainant due to the testimony of an "expert" witness who had been doing this type of work for thirty years and described Complainant's situation without having any knowledge of Complainant, this Court must find the error was not harmless. See Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)("Improper corroboration testimony that is *merely cumulative to the victim's testimony*, however, cannot be

harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.")(emphasis in original).

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.

Susan B. Hackett
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Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of July, 2017.

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 Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 20, 2017

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