THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LAURENS COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2018-001684

The State,.. Respondent,

v.

Michael Cliff Eubanks, ... Appellant.

Final Brief of Appellant

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STATEMENT OF THE CASE

On May 16, 2017, J.L. alleged her stepfather, Michael Cliff Eubanks,[1] sexually assaulted her. The next day, the Laurens County Sheriff's Office arrested Mr. Eubanks and obtained an arrest warrant for third-degree criminal sexual conduct with a minor, alleging "[t]hat on May 1, 2017," Mr. Eubanks "did engage in sexual battery[2] by having the victim sit in his lap rubbing his penis with her buttocks for sexual gratification causing him to ejaculate while still clothed." R. 7 (footnote added).

On June 16, 2017, the Laurens County Sheriff's Office obtained an arrest warrant for first-degree criminal sexual conduct with a minor, alleging "[b]etween January 1, 2010 and January 1, 2016" Mr. Eubanks "did engage in sexual battery by having sexual intercourse with the minor victim J.L." R. 8 (footnoted added).

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[1] Mr. Eubank's family and friends call him "Cliff," which is how he will be referred to in this brief.

[2] The warrant incorrectly invokes the term "sexual battery." *State v. Elliott*, 346 S.C. 603, 552 S.E.2d 727 (2001) *overruled on other ground by State v. Gentry*, 610 S.E.2d 494, 501, 363 S.C. 93, 106 (2005) ("'Sexual battery' does not mean any battery of a sexual nature. Rather, it is statutorily defined to include only certain specific acts, which can be loosely described as involving penetration of some sort.").

On July 21, 2017, the Laurens County Grand Jury indicted Mr. Eubanks, alleging he committed third-degree criminal sexual conduct with a minor, "on or about May 1, 2016 to on or about May 17, 2017," by lewdly and lasciviously touching the body parts of J.L. R. 9-10.

On August 18, 2017, the Laurens County Grand Jury indicted Mr. Eubanks, alleging he committed first-degree criminal sexual conduct with a minor, "on or between August 15, 2010 and August 15, 2015," by engaging in an unspecified sexual battery with J.L. R. 11-12.

On July 27, 2018, the Laurens County Grand Jury indicted Mr. Eubanks, alleging he committed second-degree criminal sexual conduct with a minor, J.L., "on or about August 15, 2015 to on or about May 16, 2017," by engaging in an unspecified sexual battery with a minor.[3] R. 13-14.

From July 31, 2018 to August 3, 2018, the State tried Mr. Eubanks before the Honorable Frank R. Addy, Jr. and a jury. Deputy Solicitor C. Dale Scott and Assistant Solicitor Julie Kate Keeney, both of the Eighth Circuit Solicitor's Office, prosecuted the case. C. Rauch Wise represented Mr. Eubanks. The jurors convicted Mr. Eubanks as charged. R. 789-91, R. 15. Judge Addy sentenced Mr. Eubanks twenty-five years imprisonment for first-degree criminal sexual conduct with a minor, a concurrent term of fifteen years imprisonment for third-degree criminal sexual conduct with a minor, and a consecutive term of fifteen years imprisonment, suspended with probation for five years, for second-degree criminal sexual conduct with a minor. R. 803-05, R. 1-3.

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[3] During the jury trial, the Deputy Solicitor talked about Mr. Eubanks' case being on the trial docket for months. *E.g.* R. 661, 699. The prosecution never explained adding the charge of second-degree criminal sexual conduct with a minor just four days before trial.

On August 13, 2018, Mr. Eubanks moved for a new trial. R. 16-21. By written order dated September 11, 2018, Judge Addy denied the new trial motion. R. 4-6. This appeal follows.

STATEMENT OF FACTS

A. Introduction.

Cliff Eubanks grew up in Clinton, South Carolina. He and his first wife, Jennifer Newsome, had two children, A.E and P.E. After his divorce from Ms. Newsome was final, Mr. Eubanks contacted Deanie Lyons. Ms. Lyons had two children from a prior relationship, L.L. and J.L. Cliff and Deanie got married in 2010. They moved into Cliff's house. At the time, Cliff worked for International Paper and later the Department of Transportation. Deanie Eubanks worked for Beltram and later at the Laurens County Detention Center. Cliff and Deanie had a child together, B.E. Cliff and Deanie lived paycheck to paycheck. R. 580-86.

Cliff took care of L.L. and J.L. as if they were his own children. L.L. was "more focused on his past and what went on in his past verses what he could have had in his future." L.L. wanted a dad, and Cliff "tried everything possible" to support him. They had talks. Cliff built "a tree house for him." Cliff had raced cars at the Laurens racetrack. Cliff took L.L. to the racetrack, but L.L. wasn't interested in racing. L.L. was a "video gamer," who liked to stay in the house playing video games." J.L. liked to be outside more than L.L. Cliff

> always told the kids, look, I'm not your father, but I'll be whatever you want me to be. I'll be there for you. I'll be your friend, you know. I'm just here for you if you need me. And it was that way with [L.L.] and [J.L.].

R. 589-92.

At his jury trial, Cliff Eubanks' family and friends testified about his relationship with his natural children and stepchildren:

- Elizabeth Eubanks is Cliff Eubanks' mother. She and her husband, Michael Eubanks, had family gatherings almost every weekend. Cliff would attend with his children and stepchildren. Deannie Eubanks attended less after her automobile wreck. She testified Cliff "is a good father." He "played with the children," "never showed special" favoritism, was "fair to all the children," and disciplined them appropriately. She never noticed Cliff engaging in any inappropriate conduct or suspicious touching. Cliff and J.L. had a father-daughter relationship. R. 566-69.

- Michael Eubanks is Cliff Eubanks' father. He and Elizabeth Eubanks had family gatherings and almost every weekend. He observed Cliff with his children and stepchildren. He testified Cliff is "a great father" who played with the children. He never observed Cliff do "anything out of the ordinary" or show favoritism towards one of the children. R. 572-574.

- Jessica Eubanks is Cliff Eubanks sister. She observed Cliff with J.L., L.L., and B.E. almost every weekend at Eubanks family get togethers. A.E. and P.E. were at the get togethers every other weekend when Cliff had visitation. Cliff treated all the children the same – "[v]ery playful with them all." When necessary, Cliff disciplined the children the same as "any other parent should do." She never noticed Cliff showing any favoritism towards J.L. Her daughter, who was fourteen years old at the time of trial, spent time around Cliff, including spending the night at his house. R. 533-36.

- Cristi Cline[4] is Cliff Eubanks' sister. She observed Cliff with his children and stepchildren at his home and family gatherings. Cliff was "good" with the children. She testified, "He never directed any attention towards one particular child. He was always playful with them, doing things with them." She never saw Cliff engage in any inappropriate behavior. She does not have any concerns about Cliff being around her eleven year old daughter. R. 550-53.

- Kathleen Eubanks Schumpert, Cliff Eubanks' aunt, lived across the road from Cliff. She observed Cliff around his children and stepchildren. Cliff played with them in the yard and helped them with homework. He treated

[4] Ms. Cline's first name is spelled "Christy" in the transcript, but the correct spelling is "Christi." This brief also uses the correct spellings of the names of Kathleen Eubanks Schumpert and Alexus Eubanks.

the children equally. She never observed Cliff engage in any inappropriate conduct around the children. R. 562-65.

- Alexus Eubanks is Cliff Eubanks' niece. She observed Cliff with J.L., L.L. A.E., P.E., and B.E. at Eubanks family gatherings. She testified Cliff treated all of children, including the step children, equally. She never observed Cliff engage in any inappropriate conduct with the children. R. 527-31.

- Amy Philson lives with Alexus Eubanks. "The Eubanks took [her] in because [she] didn't have a good childhood." She was twelve when she first started spending time around Cliff Eubanks. She has observed Cliff around his children and stepchildren. She testified Cliff is "just a good loving parent is what I think anyways. He never showed more attention to one child than he did the other." She attended the Eubanks' family gatherings. She never noticed any concerning behavior by Cliff. R. 545-49.

- LouAnn Price knows Cliff Eubanks through church. Cliff also did work for her at her house. She had opportunities to observe Cliff which his children and stepchildren. Cliff treated all the children equally. She testified J.L. is "a very talented girl. She loves to dance and she's a wonderful actor." She described J.L. as "flirty with the guys and everybody." R. 553, 558-60.

In November 2013, Deanie brought Cliff breakfast at work. On the way home, she got into a rear-end automobile wreck in front of the Post Office in Laurens. She ultimately required back surgery. Deanie did not work from November 2013 to May 2016. Initially, Deanie received disability though the State of South Carolina, but the State eventually cancelled this support because the injury was not work related, meaning only Cliff was receiving a paycheck to support the family. They lost their house. Cliff, Deanie, L.L., J.L., and B.E. moved in with Deanie's extended family – her mother, father, and grandmother. A.E. and P.E. joined them every other weekend. R. 586-88.

Deanie's father, Johnny Wilson, had a close relationship with Cliff's daughter, A.E. By the time Cliff and Deanie moved, Mr. Wilson was not in good health and stayed at home all day. Deanie's mother also stayed home all day. She helped by picking up the

children at the end of the school day. Deanie's grandmother "rarely" left the house unless "she had a doctor visit." She "loved" to cook "southern home food." R. 591-94.

After the automobile wreck, Cliff and Deanie's marriage "started going downhill a little." Deanie seemed depressed and "felt worthless" because she could not do all of her normal activities. They stated sleeping in separate beds in the same bedroom. Sometimes, Deanie would sleep in a rollaway bed. Sometimes, Cliff would sleep in the rollaway bed. R. 634-35.

Elizabeth Eubanks testified about a conversation in November or December 2016 involving her, Michael Eubanks, and Deanie Eubanks. They were on the porch. Deanie said, "I know how to get rid of somebody." Ms. Eubanks was "shocked." R. 569-71. Michael Eubanks recalled Deanie saying she knew how to get rid of Cliff. R. 574-75.

Cliff and Deanie eventually settled the automobile wreck claim with the insurance company for $89,821.55 after medical expenses, attorney fees, and costs. On December 28, 2016, they deposited the proceeds in a joint checking account at the SunTrust Bank in Laurens. In January 2017, they transferred $25,000.00 to a money market account and withdrew $40,000.00 in cash. They placed the $40,000.00 in a safe in a storage shed on Deanie's mother's property. Cliff had the combination to the safe. Deanie did not. Financially, Cliff and Deanie should have been in good shape, but their bank account balance kept decreasing and they began "bickering" about finances. In May 2016, they took several thousand dollars out of the safe for a family vacation. Cliff, Deanie, J.L., and B.E. were all present when they opened the safe.[5] R. 594-606.

[5] J.L. confirmed she knew about the safe with money in the storage building and that she knew the combination to the safe. R. 261-62.

After returning from the May 2017 vacation, Deanie Eubanks took J.L. and L.L. to see Kimberly Little, a counselor, because of L.L.'s depression and grief secondary to several family deaths. That visit is when J.L. first alleged Cliff Eubanks had sexually assaulted her. Ms. Little notified DSS and law enforcement. R. 166-71. J.L. allegations of sexual abuse will be discussed in more detail in Subsection B below.

The day after law enforcement arrested Cliff Eubanks, Michael Eubanks went to Cliff's house to get his medication and some clothing. He went to the storage building to get Cliff's winter clothing. He noticed the safe, which he understood contained $40,000.00 cash, was no longer there.[6] R. 575-77.

B. Allegations of Child Sexual Abuse.

L.L. is J.L's older brother. He was one week from his sixteenth birthday when he testified. On May 16, 2017, L.L. attended counseling with Kimberly Little. He started counseling because of "a lot of deaths," including his great grandpa, grandpa, cousin, and other friends. During the session, L.L. talked about "past depression," "past anxiety," the absence of his biological father, and his relationship with Cliff Eubanks. Although L.L. saw Mr. Eubanks more often than his biological father, Mr. Eubanks "didn't feel like he was my step-dad" because he put J.L "on a pedestal" and did not treat L.L. "like a son." L.L. "always wanted a dad." L.L. testified Mr. Eubanks treated J.L differently than his

[6] During opening statements, counsel for Mr. Eubanks addressed Deanie Eubanks' motive for persuading J.L. to make these allegations. Cliff and Deanie "got married on the rebound." They had a child together, but their "marriage started having problems." Deanie was involved in an automobile accident that resulted in an insurance settlement. Cliff "took the money out of the bank because she was spending it too fast" and put it in a safe "in a barn near that house." Cliff had the combination. Deanie did not. The children "knew about this cash in the safe." After the allegations were made, Cliff's father "went back to the house to get the safe, it was gone and hadn't been seen since." R. 130-31.

two biological daughters that visited every other weekend. Ms. Little wanted to talk to J.L. R. 136-43, 147-48.

The prosecution had L.L. testify about various topics to suggest that Mr. Eubanks treated J.L. more favorably than L.L. and the other children. He claimed the relationship between Cliff and J.L. "became stronger" after Deanie's automobile accident and he began noticing "grabs on the butt." R. 143-44, 146. He testified Cliff and J.L. hung out the barn, which is used for a storage and was Cliff's "getaway place." R. 144-45. He claimed to witness Cliff go inside the bathroom with J.L. while she was not clothed. He claimed Cliff would wrestle with J.L. more than the other children. He claimed Cliff and J.L. would "cuddle under blankets on the couch or in [J.L.'s] room." He claimed Cliff gave J.L. more money for school. He was upset Cliff took J.L. to school, while his grandmother took him to school, even though J.L.'s school was on the way to Cliff's workplace. R. 143-50. On re-direct examination, L.L. claimed Mr. Eubanks "bullied" him at home. R. 156-58.

On cross-examination, L.L. acknowledged Cliff paid for his braces. He also acknowledged he never discussed with his mother his observations of the shower or cuddling under the blanket. L.L admitted Cliff took him fishing, to the Laurens racetrack, and to the Crying Baby Bridge. L.L also acknowledged telling a counselor about the financial impact his stepsisters (Cliff's biological children) had the family finances. L.L. also did not like J.L. being homeschooled for a period of time because he "felt like a lot of attention was going to her," and she would spend more time with their mother. R. 150-56.

Kimberly Little, a licensed professional counselor, testified about her counseling sessions with L.L. for depression, recent deaths in the family, and bullying at school. During the sessions, Ms. Little learned about the family dynamics: L.L. "did not have a relationship with his father and there was a step-father in the home that he wanted a relationship with, but did not have a good relationship with." L.L. "said his parents weren't really getting along," and J.L "was the peacekeeper." Ms. Little "wanted to speak with [J.L.] as well to make sure she was okay." Ms. Little was able to speak with J.L. on May 16, 2017. J.L. was anxious. J.L. made allegations of sexual abuse. As a mandated reporter, Ms. Little "contacted law enforcement and DSS," both of which responded. Mr. Eubanks and his mother, Elizabeth Eubanks, also arrived. T. 166-71.

J.L. testified. She was thirteen, about to turn fourteen, when she testified. She claimed she and her step-sisters argued over her getting more attention from Mr. Eubanks. She testified Mr. Eubanks took her places, bought her things, gave her money for lunch and snacks at school, and would tell her about his arguments with her mother. Mr. Eubanks and Ms. Eubanks argued about money. The attention made her feel special. R. 172-79.

J.L. testified "bad things" started to happen when she was six. She claimed it started with Mr. Eubanks touching her breast, bottom, and genitals underneath her clothing. She testified alleged Mr. Eubanks rubbed his "boy part" against her "girl part." She claimed Mr. Eubanks "boy part" sometimes went insider her "girl part." She claimed Mr. Eubanks would use a "rag" to clean up "white stuff that would come out." She claimed Mr. Eubanks touched her "girl part" with his mouth. She also alleged Mr. Eubanks inserted the tip his "boy part" inside her "butt part." She claimed that Mr.

Eubanks, grabbed her "butt" when she walked around the house, wrestled with her, and "cuddled" a lot with her under blankets, none of which he did with the other children. She claimed the sexual abuse started at the first house and continued at the second house. She also alleged it occurred at the storage shed. She alleged Mr. Eubanks touched her "butt" or rubbed her chest almost every day. R. 179-201, 206-20.

J.L. testified about talking to Ms. Little and Investigator Hunnicutt. R. 228. On June 1, 2017, Heather Bennett interviewed J.L. at Beyond Abuse, which is a Children's Advocacy Center. J.L. was twelve years old at the time of the interviewed. In the interview, J.L. claimed "something happened" to her "from when she was six years old until she was" twelve and at two separate addresses. R. 297-99. J.L. acknowledged that she told Ms. Bennett that she would like to see Cliff Eubanks again despite the allegations. R. 270.

On June 8, 2017, Dr. Lyle Pritchard, M.D. performed a sexual assault medical examination on J.L., including her genitals, using "forensic imaging" that provides extra lighting and magnification to look "for any evidence of any sort of injuries of scars." She did not find any signs of trauma. The hymen was intact. J.L. did not have any sexually transmitted diseases. The medical exam was normal, meaning the exam was "not definitive that there was abuse or not abuse." R. 372-83.

C. Cliff Eubanks' Statements.

On May 16, 2017, Laurens County Sheriff's Deputy Ronald Richey responded to Kimberly Little's office. He interviewed J.L. and contacted the Department of Social Services. While Deputy Richey was at Gilchrist Consultation Group, Cliff Eubanks and

his mother, Elizabeth Eubanks, arrived. Investigator Jared Hunnicutt took over the investigation. R. 158-64, 331-32.

Investigator Hunnicutt contacted Cliff Eubanks on May 17, 2017, and Cliff came to the Laurens County Sheriff's Office. Investigator Hunnicutt advised Mr. Eubanks about J.L.'s allegations that Mr. Eubanks had "touched her on her chest and kissed her on the neck." Mr. Eubanks denied the allegations, stating that if any such touch occurred, then it happened while both were sleeping. He also told Investigator Hunnicutt that he had caught J.L. masturbating and "receiving explicit pictures from some unknown boys on her phone." Mr. Eubanks provided a written statement. R. 333-40; State's Exhibit No. 1.

Investigator Hunnicutt learned from Deanie Eubanks that she had lied to her husband about there being a hidden nanny cam in the barn area. At Investigator Hunnicutt's request, Cliff Eubanks returned to the Sheriff's Office later in the day on May 17, 2017. Investigator Hunnicutt slid a blank "DVD across the table to [Mr. Eubanks] and insinuated that [law enforcement] had footage of the act." Mr. Eubanks told Investigator Hunnicutt about an incident that happened at the barn, which was reduced to the following written statement:

> [A]s far as what went on in the barn was that myself and J.L. was working tearing apart pallets and cleaning up. I went to sit down and J.L. came up to me and sat in my lap and started wiggling on my leg and moving around. I knew it wasn't right, but I tried to push her away but she still did it to arouse me and I ended up ejaculating in my pants.

Investigator Hunnicutt then arrested Mr. Eubanks. R. 341-49; State's Exhibit No. 2.

During opening statements, counsel for Mr. Eubanks asserted Mr. Eubanks' innocence and addressed his statement to law enforcement "in which he admits to an act

that he is not proud of. That he is frankly embarrassed about." Counsel noted the act was not a crime because it was "not done with the intent to satisfy that lust of a person." Counsel explained:

> [Mr. Eubanks] comes in the barn and he sits down. And [J.L] comes and sits in his lap and starts wiggling around and jumping up and down. And he puts in his statement, and I have to put it in the statement. Have to tell you because it's there, that frankly her jumping up and down on him caused him to ejaculate. That is an act. But you will find there was no intent on his part to have her sit on his lap to the point that he was satisfying his lustful desires. There was no intent. And if the intent is not there, the act is not illegal. It is, call it what you want to, but you can't call it illegal because of the lack of intent.

R. 131-33.

D. State's Trauma Expert Witnesses.

The State's case against Cliff Eubanks heavily relied on the expert testimony of Samantha Black, Dr. Eman Sharawy,[7] and Shauna Galloway-Williams.

Samantha Black, a therapist employed by the Beckman Mental Health Center, provided counseling services to J.L. at Beyond Abuse, which is a Children's Advocacy Center, providing "assessments and therapy with children that have been abused."[8] She has a Master's Degree "in marriage and family therapy," is a licensed professional counselor, and is "certified and registered in trauma focused cognitive behavioral therapy." On June 14, 2017, Ms. Black met J.L. and "got her background, history, family, abuse allegations, symptoms and [] did assessment measures" to determine what type of treatment to provide. R. 300-02.

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[7] This witness' name is sometimes spelled "Sharway" in the transcript. *E.g.* R. 27, 729. This brief uses the spelling "Sharawy" because that is how the South Carolina Department of Labor, Licensing, and Regulations lists her name for her medical license.

[8] Ms. Black is married to Eighth Circuit Assistant Solicitor Micah Black.

Ms. Black testified she provided J.L. trauma focused cognitive behavior therapy, Mr. Eubanks objected because testimony by Ms. Black about the treatment "for the psychological ramifications of the abuse" constitutes vouching for the credibility of J.L. prohibited by *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). The trial judge convened a hearing outside the presence of the jurors. Counsel for Mr. Eubanks explained this evidence does not have any probative value to Ms. Black's testimony if she planned to opine she "determined there to be a problem because [J.L.] was, in fact, abused." The prosecution indicated another witness would testify about a diagnosis of Post-Traumatic Stress Disorder ("PTSD"). Mr. Eubanks then objected to any testimony about PTSD. R. 302-04.

Mr. Eubanks pointed out that PTSD does not appear in any of Ms. Black's therapy notes. The prosecution, however, intended for Ms. Black "to testify about the trauma-based cognitive therapy that she offered the minor" and Dr. Eman Sharawy would testify about "the actual diagnosis of PTSD." Dr. Sharawy saw J.L. for "one counseling session," reviewed Ms. Black's notes," and "diagnosed her with PTSD." The prosecution relied on *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993), *overruled on other grounds by State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016), *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997), *overruled on other grounds by State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), and *State v. Barrett*, 416 S.C. 124, 785 S.E.2d 387 (Ct. App. 2016). R. 304-08.

The trial judge reviewed *Barrett*, noting that case cited to *Schumpert* and *State v. White*, 361 S.C. 407, 414-15, 605 S.E.2d 540, 544 (2004), and concluded testimony about PTSD to be admissible. The trial judge, however, acknowledged the court still "has to

engage in a probative value prejudicial effect 403 type analysis." Mr. Eubanks argued that an expert testifying J.L. suffers from PTSD "is doing nothing but vouching for the credibility" of her testimony and "is terribly more prejudicial than probative." The trial judge reasoned this testimony would not be precluded by *Kromah* as long as the prosecution does not elicit testimony that the PTSD was caused by the child sexual abuse.[9] R. 308-312.

Over objection, Samantha Black testified the goals of trauma-focused cognitive behavioral therapy are to "learn coping skills," "change any thought distortions," and "complete a trauma narrative"[10] about the first, last, and worst incident of sexual abuse, which "takes care of the symptoms the way that the therapy is researched." The trauma narrative focuses on a child's thoughts about the trauma "to get rid of any distortions they have," such as thinking the abuse was their fault. The following exchange occurred between the prosecutor and Ms. Black:

Q. Okay. And so, the purpose really isn't for Court?

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[9] The trial judge considered testimony about PTSD in a child sexual abuse case to be similar to a medical doctor testifying about the life threatening nature of a gunshot wound, without opining whether the injury was unlawfully inflicted or the result of self-defense. R. 320-21.

[10] J.L. testified about her trauma narrative. R. 237, 239, 256-58, 262, 269, 273, 275-76, 288-90; State's Exhibit 10. On cross-examination, defense counsel asked J.L.:

> But when you did your trauma narrative, you didn't say that you felt different later. I mean, in your trauma narrative you said, "I was worried that he did something to me. I was wondering if he but his boy part on my girl part." I mean, you never said then that you thought something happened.

J.L. responded it was something that she "remembered" when she talked to the Deputy Solicitor. R. 259-60.

> A. No. It's not investigative at all. It's purely therapeutic and it's just to help them move on with their life to get past the trauma.
>
> Q. Just to talk about it?
>
> A. Uh-huh.
>
> Q. And be open and talk about it?
>
> A. Yes.

R. 312-315.

Dr. Eman Sharawy, a medical doctor, is the Medical Director at the Beckman Mental Health Center. Dr. Sharawy's completed a medical degree at the Medical College of Georgia, competed a psychiatric residence at the Medical University of South Carolina, and is board certified in adolescent psychiatry and adult psychiatry. Over objection, the trial judge qualified Dr. Sharawy as an expert in child and adolescent psychiatry. Dr. Sharawy explained:

> PTSD stands for posttraumatic stress disorder and it's a disorder that people experience after having come in contact with significant trauma in their lives. It – there are four categories of symptoms. So the first category would be re-experiencing symptoms where people re-experience the trauma in different ways. They have recurrent thoughts, memories, nightmares, flashbacks, intrusive thoughts that just pop into your mind during the day during normal routine activity. Secondly, they can have avoiding behavior where people avoid things that remind them of the trauma that might trigger some of the symptoms and responses. Next is hypervigilance where a person is very on the edge all the time, very anxious, jumpy. Anxiety is a big component of that. And lastly people have mood problems and cognitive distortions. Mood problems consisting of depression, sleep and appetite disturbance, anxiety, poor concentration, irritability.

R. 318-23.

Dr. Sharawy interviewed J.L. on August 31, 2017 for one hour, reviewed Samantha Black's notes, and diagnosed PTSD. Dr. Sharawy prescribed Remeron (an

antidepressant which helps with sleep) and ordered continued trauma focused cognitive behavioral therapy. The prosecutor inquired "some of the symptoms" J.L displayed that are indictive of PTSD, and Dr. Sharawy testified:

> A. [J.L.] came in and she was very anxious, very avoidant, even the discussion related to, you know, *the history she was providing*. I remember that she was really guarded and withdrawn, looking down. She reported nightmares, bad dreams. *She reported intrusive thoughts and recollections of the traumatic event.* She was having depressive symptoms, low mood, anxiety, avoidant type behaviors, erratic – erratic appetite, poor sleep, poor concentration.
>
> Q. And so, all those taken together in her interview, your professional observations, Samantha Black's notes, you were able to come up with a diagnosis of PTSD?
>
> A. Yes.

R. 323-27 (emphasis added).[11]

Shauna Galloway-Williams, a licensed professional counselor, is the executive director of the Julie Valentine Center, a Children's Advocacy Center, which she described as "a trauma abuse and sexual assault recovery center that serves Greenville and Pickens County [sic]." She has "a Bachelor's degree in psychology from Winthrop University and a Master's degree in counseling from Clemson." The trial judge qualified her as a "blind expert in the field of child abuse dynamics." R. 383-88.

Ms. Galloway-Williams initially testified, "[W]e would expect that a child or an adult is going to tell every single detail or every single event that they've experienced related to child abuse at one time." R. 388. Later she testified disclosure can be tentative, "which is where most children's disclosures fall, where they share some pieces

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[11] On cross-examination, Dr. Sharawy acknowledged that a "basically honest" person stating "something that's not true," could have a "stressful reaction" that "affects their life," but she opined it would not be PTSD. R. 327-28.

of information but not all of it." She does not "expect a child to report every single detail of his or her abuse in one interview." Age, frequency of abuse, comfort level with the interviewer, knowledge of anatomy, and sexual knowledge could be factors. Children might delay disclosure of sexual abuse because of fear or relationship with the alleged perpetrator. R. 389-93

Ms. Galloway-Williams testified "90 percent of the time children are abused by someone that's known to them." She testified:

> Grooming is a term that we use to refer to developing a trusting relationship with a child in order to gain access to them in order to essentially abuse them. So it's developing a relationship with them and developing trust. And there are certain ways that that happens. One of those ways might be by giving a child special attention or special favors, giving them extra time on their video games, allowing them to stay up later at night, watch movies, do things that like. It may involve giving a child actual tangible items. Buying them a cell phone, giving them money, things like that. Grooming might be just giving them special attention. And it could include introducing children to sexual behavior. Normalizing sexual behavior with them. So that can involve introducing them to sexual jokes, sexual pictures, you know, perhaps showing them nude pictures and talking to them about that. Making it as if it's something that's normal and okay because it's introduced by a trusting adult, and then gradually using those things to gain access to the child.

R. 393-94.

Ms. Galloway-Williams testified the emotional or behavior characteristics of a child that has been sexually abused could range from "no mood changes and they internalize the trauma" to symptoms of depression and anxiety child might include changes in grades, insolation, bed wetting, nightmares, self-harm, obesity, or weight loss. R. 394-98.

During closing arguments, the prosecution emphasized the testimony of Ms. Galloway-Williams. R. 710-12, 715-17, 760. The Deputy Solicitor next referenced J.L.'s "[f]ifteen therapy sessions" with Samantha Black and then argued:

> Dr. [Sharawy] – do y'all remember her? That was the doctor who she met with. She's Samantha Black's supervisor, and she met with [J.L.] once or twice. I can't remember what the exact testimony was, but she met with her, reviewed Samantha's assessment of the girl. Spoke with [J.L.] and diagnosed her with PTSD. That's Post Traumatic Stress Disorder. That's stuff we see in combat vets. She talked about how it is the after effects of somebody experiencing something traumatic, and she had seen this in this twelve-year-old girl. She's a doctor and her opinion was this girl was exhibiting symptoms of PTSD.

R. 729; *see also* R. 762 (arguing, "Then, somehow you're going to have to trick the expert into diagnosing you with PTSD.") and 754 (arguing, "I want you to remember what Samantha Black testified to. This is not meant for law enforcement. It is not meant to be a piece of evidence in court. This is meant for therapy.")

E. Adult Pornography.

During cross-examination, counsel for Mr. Eubanks asked J.L. about her interview with Heather Bennett where she alleged, when she was six or seven years old, seeing Cliff Eubanks make YouTube searches on his iPhone for provocative videos, including ones called "Birthday Sex"[12] and "step-dad having fun with daughter." J.L told Ms. Bennett that she told her mother about the YouTube searches.[13] Her mother never investigated these allegations. R. 248-53.

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[12] On direct examination, Mr. Eubanks testified "Birthday Sex" is a video on YouTube with someone "singing about birthday sex," which does not contain any pornography. R. 635-36.

[13] On re-direct, J.L. claimed the YouTube searches were on the iPhone with a broken screen. R. 286. As seen in Question VII, this testimony is directly related to Mr. Eubanks motion to continue so that his iPhone 5 could be examined.

On-redirect, the prosecutor asked J.L. if she knew about Mr. Eubanks keeping a lot of pornographic videos in the storage shed. Counsel for Mr. Eubanks objected, and the trial judge convened a hearing outside the presence of the jurors. The prosecutor argued defense counsel asking questions about "cell phone searches . . . . opens the door to other pornographic imagery he's showing or being shown in front of her." The prosecutor anticipated J.L. "knowing where this enormous tub of pornography was" kept. Mr. Eubanks argued, "Asking the witness about a statement she made about seeing a video on the cell phone hardly opens the door to what he considers a box of pornographic material." The purpose of asking about the internet searches was "showing that she could talk to her mother about one thing and did." Mr. Eubanks argued the evidence is "more prejudicial than probative, because there's no way of proving that" is what she saw. The trial judge ruled, "Porn, is porn, is porn" and allowed the testimony. R. 276-82.

After the jury returned to the courtroom, J.L. testified about showing law enforcement where to find a container containing pornography in a storage building, which she claimed to have observed Mr. Eubanks looking at when they lived at the first house. R. 282-86. Investigator Hunnicutt, however, testified on direct examination that Deanie Eubanks showed him where to find the container of pornography. R. 358-60.[14]

During direct examination, defense counsel asked Cliff Eubanks about the "big, green box" of pornography. He testified it has been accumulated over years since when he lived with Jennifer Newsome. He testified the box was kept "in the top of my closet where nobody could get to it." He shared that closet with Deanie Eubanks, and "[s]he

[14] Mr. Eubanks renewed his prior objection, and the trial judge allowed Investigator Hunnicutt to "generally state the contents of the box without going into specifics as far as titles, publications, etcetera." R. 358-59.

knew it was up there."[15] When they moved from the first house to the second house, Mr. Eubanks placed the pornography into the "green bin," "put a lid on it," "taped it with grey duct tape," and "wrote a note on top of it, Cliff's stuff, do not open." After the move, the green bin was kept in the storage shed. J.L. did not know what was inside the green bin, and Mr. Eubanks never opened it in front of her. R. 631-34.

The prosecutor cross-examined Cliff Eubanks extensively about the container of pornography. The prosecutor asked Mr. Eubanks, "Tell me your favorite storylines" from the videotapes. The trial judge overruled defense counsel's objection. The prosecutor accused Mr. Eubanks:

> Instead of being with your wife, you looked at porn in hopes that would boost your testosterone. And tell me some of your favorite storylines. What does Cliff Eubanks – I keep asking all your family. You know, what are your sexual interests and desires? What are you attracted to?

R. 651-54.[16] The trial judge overruled defense counsel's objection and instructed, "Mr. Scott, please continue, sir." The Deputy Solicitor continued:

> Q. All right. I'm going to ask the million dollar question. Are you attracted to young girls?
>
> A. If they're over 18. Yes, sir.
>
> Q. Okay. Over 18. Are you attracted to teens?
>
> A. If they're over 18.
>
> Q. Are you attracted to younger looking females?
>
> A. If they're over 18.

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[15] During direct examination, Deanie Eubanks denied knowing about the container of pornography.

[16] Indeed, the Deputy Solicitor asked Alexus Eubanks (R. 532), Mitchell Eubanks (R. 536), LouAnn Price (R. 553), and Michael Eubanks (R. 579) if they knew about Cliff Eubank's sexual interests.

Q. I'm not asking you if you're attracted to women over 18. Are you attracted to younger appearing females?

A. No, sir. I mean, you need to describe how –

Q. All right.

A. – what you mean by young.

Q. All right. I will. Let me ask you about a couple.

MR. WISE: Your Honor –

THE COURT: This [is] now fair game.

Q. Let me ask you if you've heard of any of these –

MR. WISE: Your Honor, I'd like to be heard.

R. 654-55.

The trial judge convened a hearing outside the presence of the jurors. The prosecutor referred to Mr. Eubanks direct testimony about intent and argued, "That's what I was waiting for and they went for it and [it] was the intent." Defense counsel argued the evidence is not relevant because the prosecution had "not even come close to establishing that any of these sites are illegal. Counsel further argued the prosecution was trying to introduce propensity evidence, referring to *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998), prohibiting the introduction of propensity evidence. Finally, counsel argued the evidence "is more prejudicial than probative."[17] The trial judge allowed the

[17] The transcript reflects defense counsel cited to Rule 404.3. R. 658, line 21. Please see the concerns raised by Question XII, *infra*. More than likely, counsel cited Rule 404(b), SCRE as *Nelson* is a notable case applying that rule. As Justice Kittridge observed, dissenting, albeit in an unpublished opinion with no precedential value pursuant to Rule 268(d), SCACR, "It would be regrettable" if the outcome of an appeal is "due to sloppy transcription." *Hughey v. State*, No. 2010-170387, 2015 WL 2231252, at

prosecution to introduce the evidence because Mr. Eubanks had denied the intent to commit third-degree criminal sexual conduct with a minor when he accidentally ejaculated while J.L. was sitting on his lap. Defense counsel questioned "how searching a porn site of adults establishes . . . a specific intent on that" crime. The trial judge, however, limited the prosecution to one question about whether Mr. Eubanks accesses pornography online.[18] R. 656-62.

When the jurors returned to the courtroom, the following exchange occurred:

Q. Had you done internet searches where you looked for young looking girls?

A. I have done searches.

Q. Have you done searches where you looked for younger looking girls?

A. Yes, sir.

R. 663. The prosecution questioned Mr. Eubanks about pornography again. R. 654. The prosecutor again asked Mr. Eubanks, "And you're attracted to younger looking

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*3 (S.C. May 13, 2015). Contemporaneously, with serving his Initial Brief of Appellant, Mr. Eubanks is submitting a second challenge to the trial transcript.

[18] When the prosecutor protested the trial judge's ruling because the case had "been on the docket for six months," defense counsel's frustration with the Deputy Solicitor's handling of the entire case became apparent:

> Your Honor, I am tired of that, and I'm going to tell you why. They didn't know about those websites until this week. I asked him specifically, when I started to spend several hours looking at that download, is there anything – any obscene pictures on there. No, there isn't. Thank you very much. I closed the file and I quit looking. And then they're coming in here today, or yesterday, and they tell me, oh, there are these cookies on there that we found the day before. So, to say I'm to blame is simply not correct.

The Deputy Solicitor responded, "In discovery, don't take a Solicitor's word for what you may find." R. 661.

girls?" Mr. Eubanks responded, "I'm attracted to young girls, but over the age of 18." R. 654.

During closing arguments, the prosecution emphasized the container of pornography and the internet searches. The prosecutor argued Deanie Eubanks "didn't know about the enormous collection of pornography" or what her husband "was up to on the internet." R. 713. The prosecutor referred to the container as "that giant green tub of some of the most obscene pornography you've ever seen."[19] And, the prosecutor argued:

> I asked him about the porn. This was a classic response. Well, Mr. Scott, I just like the articles. I'm kind of a collector. Really, that's why I have them. I said well, what about all those DVDs in there. There's a bunch of them. Listen, I'm not some puritan, okay? I'm not saying there's anything wrong with pornography, but if on one hand you're saying I think hip-hop dancing is vulgar. I think this little girl is provocative. I think these dances are disgusting. How do you reconcile that with his interests? How do you do it? You can't. It makes no sense. Mr. Scott, I like the story lines in those movies. I said tell me about your favorite story lines. Oh, well that's personal.

R. 724-25.

And:

> I suspect if you're looking at that much pornography and you're making it that much a part of your life, because I think pornography is progressing. If you start off with Playboy it can begin and end there, or you can choose to up it a notch and get into more hardcore stuff. And then you can go into other rabbit holes. Into that genre or that genre. And you can look at all kinds of stuff until it's an unhealthy addiction. And you're looking on the internet and your sexual desires become such that you can't control them. *I don't know what makes somebody become like a Cliff Eubanks.*

R. 736 (emphasis added).

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[19] The jurors, of course, had not "seen" the pornography because the trial judge did not allow the container and its contents to be introduced into evidence because of the trial court's concerns about unfair prejudice under Rule 403, SCRE. R. 354-57.

After defense counsel responded to the prosecutor's argument about pornography (R. 748, 752-53, 755-56), the prosecutor replied:

> Isn't it funny though that the same people who find hip hop dancing – and the lawyer said it was his opinion too that hip hop dancing was offensive. For some reason, they are just unoffended by an enormous collection of pornography. Of all kinds of depraved acts. They are unoffended by internet searches. They're unoffended by a Defendant that admits he is attracted to very young appearing girls.
>
> I'm sorry, y'all. I don't mean to – I've got to cover everything. I'm so scared that something he just said that makes absolutely no sense will gain traction. I hope it doesn't, and maybe I'm just arguing too hard. Some of the things I hear just blow my mind.

R. 767-68.

STANDARD OF REVIEW

> In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown. An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law.

State v. Blackwell, 420 S.C. 127, 136, 801 S.E.2d 713, 718 (2017) (internal citations and quotations omitted).

ARGUMENTS

Question I

***State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993), and similar cases, should be overruled (or the holdings in *Schumpert* and similar cases limited) to the extent that those holdings allow a prosecution expert witness to offer an opinion about whether a complaining witness suffers from trauma, when that expert's opinion is largely based on the hearsay statements of the complaining witness, because that type of opinion testimony is inconsistent with *State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566 (2018) and the *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) line of cases.[20]**

[20] As will be seen, Mr. Eubanks does not advocate for a rule excluding testimony about the presence or absence of trauma symptoms. Nor does he seek the reinstatement of *Hudnall*. Rather, he seeks a limitation *Schumpert* that excludes opinion testimony, based on hearsay, bolstering the credibility of a complaining witness.

Relying on *Schumpert,*[21] the prosecution made J.L.'s PTSD a central part of its presentation through the testimony of Samantha Black, Dr. Eman Sharawy, and Shauna Galloway-Williams. Mr. Eubanks objected based on the *Kromah* line of cases and Rule 403, SCRE. The prosecution emphasized the testimony of Ms. Black, Dr. Sharawy, and Ms. Galloway-Williams during closing arguments. Mr. Eubanks moved for a new trial because the trial judge erred in admitting evidence of J.L.'s PTSD when "the evidence was more prejudicial than probative," the prosecution "used the evidence in its closing argument to bolster the testimony of the complaining witness," and the "admission of this testimony deprived Mr. Eubanks of due process of law in violation of the 14th Amendment to the Constitution of the United States of America and Article I, § 3 of the Constitution of the State of South Carolina." R. 17. The trial judge erred by relying on *Schumpert* to admit opinion testimony when the diagnosis was largely based on the statements of J.L. that bolstered her credibility as the complaining witness.

Any discussion about overruling *Schumpert* should begin with *State v. Hudnall*, a case overruled by *Schumpert.* In *Hudnall,* "a pediatrician[] testified over appellant's objection regarding common characteristics exhibited by child victims of sexual abuse." 293 S.C. 97, 99, 359 S.E.2d 59, 61 (1987), *overruled by State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993). The *Hudnall* Court reasoned "the evidence was admitted to bolster the child's testimony that the crime had in fact occurred and was not offered to explain any seemingly inconsistent response to the trauma" and held "this irrelevant and prejudicial expert testimony was error which could not have been harmless in view of the

[21] The prosecution also relied on *Morgan* and *Barrett*. These cases will be discussed later in this section of the brief.

paucity of evidence against appellant." *Id.* 293 S.C. at 100-01, 359 S.E.2d at 62. The Court also noted, "A doctor's testimony regarding a patient's history is admissible only insofar as it relates facts given by the patient upon which the doctor relied in reaching his medical conclusions." *Id.* (finding reversible error in allowing the pediatrician to testify "regarding appellant's identity as the perpetrator") (citing *State v. Brown,* 286 S.C. 445, 334 S.E.2d 816 (1985).

In *Schumpert*, the South Carolina Supreme Court overruled *Hudnall* and "held trauma testimony of a rape victim is relevant to prove the elements of criminal sexual conduct since such evidence makes it more or less probable that the offense occurred." 312 S.C. at 506, 435 S.E.2d at 861-62. The Supreme Court further held the admission of such evidence is subject to a prejudice analysis now codified in Rule 403, SCRE. *Id.* The Court of Appeals struggled with the implication of *Schumpert* in *Morgan.* Morgan challenged the admissibility of two behavioral science experts because "there was no scientific basis that the facts or data was of a type reasonably relied upon by experts in the particular field forming opinions or inferences upon the subject." 326 S.C. at 508, 485 S.E.2d at 115. Bound by *Schumpert*, the Court of Appeals held "that the admissibility of the two behavioral science expert opinions at issue was not subject to admissibility challenges based upon reliability." *Id.* The *Morgan* Court reasoned:

> The *Schumpert* court never expressly addressed the two other central concerns of *Hudnall,* however. Although *Schumpert* briefly mentioned *Hudnall*'s limitation to rebuttal purposes, the *Schumpert* court never truly confronted the bolstering issue, but apparently equated character evidence with substantive evidence of sexual abuse. Moreover, *Schumpert* was silent as to another crucial aspect of *Hudnall*: whether behavioral science could reliably ascertain whether a victim was telling the truth or whether some event did in fact occur in the past. While we are reluctant to read *Schumpert*'s silence on these two linchpins of *Hudnall* too broadly, it is difficult to avoid the conclusion that the court implicitly overruled these

> two aspects of *Hudnall* as well as the relevancy aspect. Accordingly, Morgan's arguments that the opinions were admitted as improper bolstering evidence and were not sufficiently reliable cannot stand in light of *Schumpert.*

326 S.C. at 511-12, 485 S.E.2d at 117. The Supreme Court overruled *Morgan* in *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009) (holding the trial court's gatekeeping function in assuring reliability of expert testimony applies to nonscientific evidence).

Despite *Schumpert* not addressing "the bolstering issue" and "whether behavioral science could reliably ascertain whether a victim was telling the truth or whether some event did in fact occur in the past," our appellate courts steadfastly maintained the prohibition of a witness improperly bolstering the credibility of a child witness in a child abuse case. *E.g. State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (error in admitting portions of forensic interviewer's written reports that contained improper vouching was not harmless); *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989) (psychiatrist's testimony that alleged victim's "symptoms are genuine" improperly vouched for credibility); *State v. McKerley,* 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012) (testimony of forensic interviewer who conducted interviews with complainant indicated belief in complainant's truthfulness and was thus inadmissible); *South Carolina Dept. of Social Services v. Lisa C.,* 380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2008) (testimony of therapist indicating "Child gave a consistent disclosure and that as a result of that conclusion she recommended therapy" improperly bolstered Child's credibility); *State v. Dempsey,* 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000) (testimony from a child abuse counselor that child tells the truth 95% to 99% percent of time abuse is alleged improperly vouches for child's credibility). In *Kromah*, the Supreme Court held testimony by forensic interviewer of victim that victim had given a "compelling finding"

of child abuse was inadmissible and identified categories of admissible and inadmissible testimony. 401 S.C. at 359-60, 737 S.E.2d at 538.

In *State v. Anderson,* the Supreme Court held, "The trial judge's refusal to determine [the State's witness'] qualification as a 'child abuse assessment' expert was patent error." 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015). In doing so, the Court acknowledged it is proper to allow and expert to "testify to the behavioral characteristics of sex abuse victims." *Id.* (citing *Schumpert,* 312 S.C. 502, 435 S.E.2d 859 (1993); *State v. Weaverling,* 337 S.C. 460, 523 S.E.2d 787 (Ct.App.1999); and *State v. White,* 361 S.C. 407, 605 S.E.2d 540 (2004)). The Court explained:

> The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility. *Compare State v. Brown,* 411 S.C. 332, 768 S.E.2d 246 (Ct.App.2015) (distinguishing improper bolstering cases because in *Brown* the behavioral expert did not examine the victim). Here, [the State's witness] vouched for the minor when she testified only to those characteristics which she observed in the minor.

Anderson, 413 S.C. at 218-19, 776 S.E.2d at 79. The *Anderson-Brown* procedure allowing an independent "blind expert" to testify about the characteristics of child abuse victims is now the common practice in criminal sexual conduct with a minor trials in our state.[22]

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[22] As seen, the prosecution cited and the trial judge reviewed *State v. Barrett. Barrett* merely held, "Under the specific facts of this case, we affirm as we find no error in [the Children's Advocacy Center interviewer's] qualification as an expert mental health professional, the testimony she offered regarding general behavioral characteristics was admissible, and she did not improperly vouch for Victim's credibility." 416 S.C. at 130, 785 S.E.2d at 390. The Court acknowledged the preferable *Anderson-Brown* procedure. *Barrett* is distinguishable; however, to the extent that it supports the admission of the PTSD testimony in this case, *Barrett* should be overruled.

In *State v. Simmons*, the Supreme Court held the "hearsay testimony [of a medical doctor] ventured far beyond the parameters of Rule 803(4), SCRE,[23] for much of the testimony was unrelated to medical diagnosis or treatment." 423 S.C. 552, 567, 816 S.E.2d 566, 574 (2018) (footnote added). The Supreme Court expressly declined to "sanction the State's use of Dr. Simmons as a conduit for this glaringly inadmissible hearsay to be brought before the jury." 423 S.C. at 565, 816 S.E.2d at 573. The Court noted, "If this tactic were permitted, the legitimate use of the Rule 803(4), SCRE, medical diagnosis and treatment exception would be undermined and the general approach of Rule 801(d)(1)(D), SCRE,[24] would be thwarted." *Id.* (footnote added). Stated another way, an expert witness "recounting" of a complaining witness' "statements amounted to nothing more than 'hearsay shrouded in a doctor's white coat.'" *Id.*

In this case, the testimony of Shauna Galloway-Williams complied with the constraints of the *Anderson-Brown* procedure. Indeed, similar testimony by Ms. Galloway-Williams has been approved by our appellate courts. *E.g. State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018); *Brown, supra.* If the prosecution had limited its

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[23] Rule 803(4), SCRE, providing an exception to the hearsay rule, provides, "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion."

[24] 801(d)(1)(D), SCRE provides, "A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident."

presentation of trauma evidence to the testimony of Ms. Galloway-Williams, then this question would not be before this Court now. The testimony of Samantha Black and Dr. Eman Sharawy, however, crossed the line into impermissible bolstering and vouching for the credibility of J.L. Although employed by the Beckman Center for Mental Health, Ms. Black provided J.L. counseling services though Beyond Abuse, the statutorily mandated Children's Advocacy Center in the Eighth Judicial Circuit.[25] According to the testimony of J.L. and Ms. Black, the counseling was directly related to J.L.'s allegations that Cliff Eubanks sexually abused her. J.L. shared with Ms. Black the first, last, and worst incidents of the alleged sexual abuse. J.L. prepared a trauma narrative, a redacted version of which was admitted into evidence. Ms. Black testified she made notes about J.L.'s statements about her allegations of abuse and claimed trauma symptoms. Dr. Sharawy reviewed Ms. Black's notes, met with J.L. only once, and opined J.L. suffers from PTSD. The jurors were very aware that Dr. Sharawy's opinion was based on the hearsay statements of J.L. Dr. Sharawy's opinion "amounted to nothing more than 'hearsay shrouded in a doctor's white coat.'" *Simmons*, 423 S.C. at 565, 816 S.E.2d at 573.

The prosecution and trial judge relied on *Schumpert* when admitting the testimony of Ms. Black and Dr. Sharawy. Because this testimony crossed the line into the bolstering and vouching for the credibility of J.L. that is prohibited by *Simmons* and the *Kromah* line of cases, *Schumpert* should be overruled (or the holding in *Schumpert* limited) to the extent that the holding is *Schumpert* allows a prosecution expert witness to offer an opinion about whether a complaining witness suffers from trauma, when that

[25] S.C. Code Ann. § 63-11-310.

expert's opinion is largely based on the statements of the complaining witness. This Court should order a new trial.

Question II

The trial judge erred by admitting evidence of J.L.'s Post-Traumatic Stress Disorder when the "probative value [of this evidence was] substantially outweighed by the danger of unfair prejudice," pursuant to Rule 403, SCRE, and the prosecution used this evidence in its closing argument to bolster the credibility J.L.'s testimony, thereby denying Cliff Eubanks due process of law in contravention of the Fourteenth Amendment to the United States Constitution and Article I, § 3 of the South Carolina Constitution.

Mr. Eubanks objected to the testimony of Samantha Black and Dr. Eman Sharawy based on the *Kromah* line of cases and Rule 403, SCRE. Mr. Eubanks moved for a new trial because the trial judge erred in admitting evidence of J.L.'s PTSD when "the evidence was more prejudicial than probative," the prosecution "used the evidence in its closing argument to bolster the testimony of the complaining witness," and the "admission of this testimony deprived Mr. Eubanks of due process of law in violation of the 14th Amendment to the Constitution of the United States of America and Article I, § 3 of the Constitution of the State of South Carolina." R. 17. If this Court declines to overrule or limit *Schumpert*, then this Court should order a new trial because, even under *Schumpert*, the trial judge should have excluded the testimony of Ms. Black and Dr. Sharawy because the prejudicial effect of this testimony substantially outweighed and probative value.

Schumpert held, "[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect." 312 S.C. at 506, 435 S.E.2d at 862. Rule 403, SCRE provides, "Although relevant, evidence may be excluded if its probative value

is substantially outweighed by the danger of unfair prejudice." "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). The South Carolina Supreme Court has defined "unfair prejudice" as an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991). Although *Alexander* pre-dated the adoption of the South Carolina Rules of Evidence, our appellate courts continue to cite it for the definition of "unfair prejudice." *E.g. State v. Gray*, 408 S.C. 601, 616, 759 S.E.2d 160, 168-69 (Ct. App. 2014). *Alexander*, in fact, is a companion case to *Schumpert* in holding evidence of "mental trauma is relevant to prove the elements of criminal sexual conduct." 303 S.C. at 381, 401 S.E.2d at 149. *Alexander* ultimately held, "Applying the test to the unique facts of this case, we hold that the emotional trauma evidence is unduly prejudicial and should have been excluded." 303 S.C. at 382, 401 S.E.2d at 149.

Here, an emotional appeal to the jurors was the cornerstone of the prosecutor's case. In opening statements, the prosecution explained the case was about "disloyalty," "deception," and "betrayal." R. 121. The prosecutor attacked the character of Mr. Eubanks and his witnesses. During closing arguments, the prosecution compared J.L. to "combat vets" when recalling Dr. Sharawy's testimony about J.L.'s PTSD. Under the facts of this case, the danger of unfair prejudice substantially outweighed any prejudicial value and should have been excluded. This Court should order a new trial.

Question III

The trial judge erred by allowing the prosecution to question J.L. on re-direct examination about her knowledge of an "enormous tub of pornography" in response to defense counsel asking J.L. limited questions about the titles of two iPhone internet searches when this testimony was not relevant, pursuant to Rule 401, SCRE, improper character evidence pursuant to Rule 404(b), SCRE, and the prejudicial effect of the testimony substantially outweighed its probative value, pursuant to Rule 403, SCRE?

During her interview at Beyond Abuse, J.L. talked about two very specific internet searches, which counsel for Cliff Eubanks argued could be refuted or placed into context if the trial judge would have continued the trial for Mr. Eubanks' iPhone 5 to be examined.[26] In response, the prosecution brought an "enormous tub of pornography" into the courtroom to question J.L. and Cliff Eubanks.[27] The Deputy Solicitor argued testimony about this pornography was admissible for the limited purpose of responding to defense counsel's questioning J.L. about these two internet searches. The Deputy Solicitor's questioning of Mr. Eubanks and his closing argument revealed the true purpose of introducing this evidence, which was to attack Cliff Eubanks' character and accuse him of having a propensity to sexually assault young children. During cross-examination, the Deputy Solicitor questioned Mr. Eubanks about collecting adult pornography, the "story lines" that appealed to him, and his attraction to younger appearing women over the age of eighteen. During closing arguments, the prosecutor mocked Mr. Eubanks for reading the stories in the magazine and not sharing with the jurors his fantasies about "story lines." The prosecutor referred to the container as "that giant green tub of some of the most obscene pornography you've ever seen," questioned

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[26] *See* Question VII, *infra*.

[27] The Deputy Solicitor also asked Michael Eubanks if he and Cliff "used to collect old Playboys and stuff." R. 579.

why the defense was "just unoffended by an enormous collection of pornography," and argued, "I don't know what makes somebody become like a Cliff Eubanks." The trial judge should have excluded this evidence for three reasons.

Frist, the evidence was not relevant to prove any element of the crimes charged and should have been excluded by Rule 401, SCRE. None of this evidence made it more or less probable that Cliff Eubanks committed the offenses of criminal sexual conduct with a minor in the first, second, or third degree. S.C. Code Ann. § 16-3-655.

Second, this evidence was improper character evidence. *Nelson* reminded:

> In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue. In a similar vein, evidence of other crimes or bad acts is generally inadmissible to prove the crime charged unless the evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity. Both rules are grounded on the policy that character evidence is not admissible for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged.

331 S.C. at 6, 501 S.E.2d at 718-19; *and see* Rule 404(b). Our appellate courts consistently exclude character evidence about a propensity to commit a crime. *E.g. State v. Peake*, 302 S.C. 378, 396 S.E.2d 362 (1990); *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999); *Nelson.*

Third, the evidence was not admissible because the prejudicial effect substantially outweighed its probative value pursuant to Rule 403, SCRE. As seen in Question II above, Rule 403, SCRE protects an accused from "unfair prejudice" which is an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Alexander*, 303 S.C. at 382, 401 S.E.2d at 149. Although arguing the evidence was admissible for a limited purpose, the prosecution used it to launch an

emotional and merciless attack on Cliff Eubanks' character. The evidence should have been excluded, and this Court should order a new trial.

Question IV

The trial judge erred by allowing the prosecution to cross-examine Cliff Eubanks about his internet searches of legal adult pornography when such evidence did not "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," pursuant to Rule 401, SCRE, was inadmissible character and propensity evidence pursuant to Rule 404(b), SCRCP, and the "probative value [of this evidence was] substantially outweighed by the danger of unfair prejudice," pursuant to Rule 403, SCRE.

As seen, the Deputy Solicitor argued in favor of the admissibility of the container of pornography to respond to defense counsel's limited questions about two iPhone 5 internet searches. The Deputy Solicitor, however, made no pretenses about why he wanted to question Cliff Eubanks about his internet searches for adult pornography of younger appearing women over the age of eighteen. He began this line of questioning by asking, "All right. I'm going to ask the million dollar question. Are you attracted to young girls?" R. 654-55. The trial judge ultimately allowed the prosecutor to ask Mr. Eubanks, "Have you done searches where you looked for younger looking girls?" R. 663. This question left the jurors with the impression that Mr. Eubanks searched for underaged girls on the internet when, in fact, there is not a scintilla of evidence that he ever searched for, viewed, or possessed child pornography.

The Deputy Solicitor's character attack and propensity insinuation became more obvious during closing arguments when he mocked Mr. Eubanks about "lik[ing] the articles, his "favorite story lines," and sexual "interests." R. 724-25. Later, the Deputy Solicitor accused Mr. Eubanks of having an "unhealthy addiction" and argued, "I don't know what makes somebody become a Cliff Eubanks." R. 736. In his reply argument,

the Deputy Solicitor urged the jurors to be offended by the "enormous collection of pornography," "internet searches," and Mr. Eubanks "admit[ting] his is attracted to very young appearing females." R. 767-68.

For the same reasons discussed in Question III above, evidence of Mr. Eubanks' internet searches was not relevant and inadmissibly character evidence. *Peake, King,* and *Nelson, supra*; Rules 401 and 404(b), SCRE. Alternatively, this evidence should have been excluded because the prejudicial effect of this evidence substantially outweighed the probative pursuant to Rule 403, SCRE. *Alexander*, *supra.*

Question V

The trial judge erred by allowing the prosecutor to call Cliff Eubanks down from the witness stand to demonstrate to the jurors how J.L. was "wiggling" when she sat on his lap, when the only purpose for the demonstration was to humiliate Mr. Eubanks and to obtain fodder for the prosecution's closing argument that repeatedly mocked Mr. Eubanks.

During cross-examination, the Deputy Solicitor instructed Cliff Eubanks to "step[] off the stand" and demonstrate how J.L. was "wiggling" when she sat on his lap. The Deputy Solicitor instructed, "Yeah, move your seat out. If they can see it, because I want you to show them the dance and the wiggle and the –." Defense counsel objected, and the trial judge overruled the objection by stating, "If he's able to pull it off, then he's able to pull it off. Let's see if he can do it. Go ahead." The Deputy Solicitor then instructed:

Q. You play [J.L.] Okay?

A. I play [J.L.]?

Q. I want to see how she was wiggling in your lap. Do you want me to sit in the chair and you wiggle on me?

A. No. You're a man. I'm not –

Q. All right. Stand up. Pretend there's somebody sitting in the chair. Now wiggle like she was doing.

R. 671-72.[28]

The South Carolina Supreme Court has held some courtroom demonstrations so inflammatory and prejudicial so as to require a new trial. *E.g. Northcutt*, 372 S.C. at 222, 641 S.E.2d at 881 (During closing argument, Solicitor "enacting a funeral procession complete with a black shroud covering the baby's crib" required new trial). The demonstration ordered by the Deputy Solicitor was not proper, and this Court should order a new trial.

Question VI

This Court should grant Cliff Eubanks a new trial based on the Deputy Solicitor's highly inflammatory closing arguments that were a direct and dehumanizing attack on the character of Cliff Eubanks and his cousin Mitchell Eubanks.

Mitchell Eubanks is Cliff Eubanks cousin. He had opportunities to observe Cliff with his children and stepchildren. On one occasion, he was at Cliff's house when J.L. had some friends over and they were "twerking," meaning moving "their butt up and down," which he considers "very vulgar." He also observed J.L. dancing on the laps of her mother and grandfather. He considered the clothing and make up J.L. wore at dance recitals to be age inappropriate. The Deputy Solicitor asked Mitchell Eubanks to "stand

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[28] The Deputy Solicitor also asked Mitchell Eubanks, Cliff Eubanks' cousin, who testified he finds "twerking vulgar," to "stand up" and "[s]how us what twerking is." Mitchell Eubanks declined because its "vulgar." R. 536-64. The Deputy Solicitor's conduct regarding Mitchell Eubanks will be discussed in Question VI, *infra.* If there was any legitimate reason for the Deputy Solicitor to insist on these "twerking" demonstrations, then the State should explain that reasons in its Brief of Respondent.

up" and "[s]how us what twerking is." Mitchell Eubanks declined because its "vulgar." R. 536-64. During closing argument, the Deputy Solicitor argued:

> Do y'all remember Mitchell twerking Eubanks? He's not here today. I looked for him after his examination yesterday. It was pathetic. I looked for him. I wanted to talk to him but he was out the door.

R. 536-64, 738; *see also* R. 767 (referring to the witness as "Mitchell twerk Eubanks").

As already seen, during closing arguments, the Deputy Solicitor mocked Mr. Eubanks about "lik[ing] the articles, his "favorite story lines," and sexual "interests." R. 724-25. Later, he accused Mr. Eubanks of having an "unhealthy addiction" and argued, "I don't know what makes somebody become a Cliff Eubanks." T. 736. The Deputy Solicitor concluded his closing argument by arguing:

> See this for what it is. Do you believe *grinning Cliff* or do you believe that strong little girl? I'm asking you to believe that strong little girl and what the evidence showed you this week. I'm asking you to *find Cliff smirking smiling Eubanks* guilty of criminal sexual conduct first, but not just the first, the second and the third. Find him guilty for everything he's done. Let the truth speak. Thank you.

T. 739 (emphasis added).

Counsel for Mr. Eubanks did not object; however, a narrow exception to our state's error preservation rules allows this Court to consider this misconduct. "[E]ven in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) (citing *South Carolina Highway Dept. v. Nasim,* 255 S.C. 406, 179 S.E.2d 211 (1977)); *cf. Major v. Alverson*, 183 S.C. 123, 190 S.E. 449, 450 (1937) ("referring to defendant as a 'bare faced liar'" during closing argument required new trial). This narrow exception "excuses the failure to make a contemporaneous objection only where the challenged argument

constitutes abuse of a party or witness," as it did in this case. *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 259, 509 S.E.2d 269, 272 (1998). *And see Bennett v. Stirling*, 842 F.3d 319 (4th Cir. 2016) (held that state courts unreasonably determined that prosecutor's references to defendant during closing arguments were not appeals to racial prejudice and that his right to due process was not violated); *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (Solicitor's closing argument "dehumanizing Appellant" required remand for new trial).

The Deputy Solicitor's closing argument and reply argument were highly inflammatory and constituted a humiliating, degrading, and dehumanizing attack on the character of Cliff Eubanks and Mitchell Eubanks. This argument was improper, and this Court should order a new trial.

Question VII

The trial judge erred by not continuing the trial to allow time for examination of Cliff Eubanks' iPhone 5, thereby denying Mr. Eubanks his due process right to a fair trial and his Sixth Amendment rights to present a complete defense and confront and cross-examine J.L. about observing sexually explicit movies on this phone.

Prior to the trial court swearing the jurors, Cliff Eubanks provided several cell phones to the State and moved to continue the case to have his iPhone 5 analyzed. Mr. Eubanks provided his PIN numbers for the phones. The State accessed all of the phones, except the iPhone 5 with the broken screen. The prosecutor acknowledged J.L. described this iPhone in "her forensic interview," alleging she saw "some porn on that phone." The Solicitor conceded the State might have been able to access the phone if it had received it sooner or if the screen was not broken. Counsel for Mr. Eubanks informed the trial judge that the damaged iPhone

> is important because apparently that's the cell phone that the complaining witness is going to be saying she saw some pornography on it, and she makes reference to some pretty crude stuff in her forensic interview. I need that analyzed.

R. 97-99, 102-05.

Defense counsel informed the trial judge that J.L. "named two specific movies:" "Stepdaddy Does Daughter" and "Birthday Sex." Counsel informed the Court that Lars Daniel, a digital forensics expert, in North Carolina, could examine the iPhone 5 despite the broken screen. The prosecution acknowledged the relevance of the iPhone. The trial judge denied the motion to continue, considering it "a collateral issue" that was not "central to the ultimate issue in this particular case." R. 99-111.

The trial judge erred in considering the examination of the iPhone 5 to be a "collateral issue" and merely "an impeachment type of an issue." Defense counsel cross-examined J.L. about the same two internet searches identified during J.L.'s interview by Heather Bennett and motion to continue. This cross-examination led to the introduction of the container of pornography. The failure to examine the iPhone was an issue during the closing arguments. The Deputy Solicitor stated he "wants to know what was on that phone" and insinuated the results would be damaging to Mr. Eubanks. R. 748, 756, 769.

The Solicitor's Office, not the trial judge, called Mr. Eubanks' case to trial. R. 31. The trial courts have a due process obligation "to control the order of its business to safeguard the rights of litigants." *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012). When a defendant feels that his rights are prejudiced by reason of the calling of his case at any particular time, he may apply to the judge for a continuance." *State v. Mikell*, 257 S.C. 315, 322, 185 S.E.2d 814, 817 (1971); *and see* Rule 7, SCRCrimP.

Here, the trial judge denying the motion to continue denied Mr. Eubanks his due process right to a fair trial and his Sixth Amendment rights to present a complete defense and confront and cross-examine J.L. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"); *Pennsylvania v. Ritchie*, 480 U.S. 39, 51(1987) ("The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."); *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985) ("although some cross-examination of a prosecution witness was allowed, the trial court did not permit defense counsel to 'expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.'"). Thus, it was error for the trial judge to consider the examination of the iPhone 5 as "collateral issue" and merely "an impeachment type of an issue." This Court should order a new trial.

Question VIII

The trial judge erred by not continuing the remainder of the trial until the following Monday so that Cliff Eubanks could call Dr. Joanne Brownlee as a witness to reply to Deanie Eubanks' testimony and corroborate Mr. Eubanks' medical condition.

During direct examination, Deanie Eubanks testified she "didn't think that [Cliff Eubanks] could get an erection" after she was involved in the automobile wreck. Mr. Eubanks had high blood pressure and "[o]ne of his testicles had separated." After Mr.

Eubanks would see Dr. Bradley,[29] he would say that his "testosterone level came back a zero and that he couldn't get an erection." Ms. Eubanks claimed Mr. Eubanks never "brought home any paperwork" about his medical condition. Ms. Eubanks claimed the last time she and her husband had sex was January 1, 2013, not long after her automobile wreck. R. 444-47.

During direct examination, Cliff Eubanks testified he had low testosterone and erectile dysfunction. Over objection by the prosecutor, the trial judge admitted into evidence a written report from Dr. Joanne Brownlee. When defense counsel asked Mr. Eubanks about the medical history of low testosterone and erectile dysfunction, the prosecution objected again, and the trial judge convened a hearing outside the presence of the jurors. The trial judge expressed concern about the date of creation of Dr. Brownlee's report. Defense counsel informed the report "was not going to be relevant in this case until" Deanie Eubanks testimony about Mr. Eubanks "lying to her about low testosterone." Defense counsel indicated Dr. Brownlee could testify about her report. The trial judge stated, "[I]t may be necessary to do that," so Dr. Brownlee could provide more information about Mr. Eubanks medical history, testing, and treatment. The trial judge removed Dr. Brownlee's report from evidence. After the jurors returned to the court room, Mr. Eubanks testified he has low testosterone and erectile dysfunction that have been reported to his doctor. R. 626-31; Defense Exhibit 6.

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[29] "Dr. Bradley" likely refers to Dr. Joanne Brownlee. As Justice Kittridge observed, dissenting, albeit in an unpublished opinion with no precedential value pursuant to Rule 268(d), SCACR, "It would be regrettable" if the outcome of an appeal is "due to sloppy transcription." *Hughey* at *3. Contemporaneously, with serving his Initial Brief of Appellant, Mr. Eubanks is submitting a second challenge to the trial transcript.

The trial judge delayed the start of trial the next day (a Friday) so that defense counsel could contact Dr. Brownlee. R. 690. When court began, defense counsel explained Dr. Brownlee's office is closed and Mr. Eubanks had not been able to contact her. Mr. Eubanks "request[ed] the Court continue this case to Monday so that [the defense] can have Dr. Brownlee available." The prosecution objected, acknowledging Mr. Eubanks "has every right to call the witnesses he thinks are necessary to defense the case," but arguing he should not be allowed to call Dr. Brownlee because she was not on the witness list. Defense counsel explained he received the report in February but did not intend to call Dr. Brownlee until Deanie Eubanks' testimony. Reversing the court's earlier position, the trial judge ruled Dr. Brownlee's testimony would not "add anything substantial or germane" and was not "absolutely necessary." R. 608-700.

As seen in Questions VII above, the Constitution guarantees Cliff Eubanks "a meaningful opportunity to present a complete defense." *Holmes*, 547 U.S. at 324. Dr. Brownlee's testimony corroborated Mr. Eubank's testimony and was necessary to prevent a complete defense. By not continuing the trial to the following Monday, the trial judge failed to protect Mr. Eubank's rights as a litigant. *Langford.* This Court should order a new trial.

Question IX

The trial judge erred by not excluding juror Tony Bailey from the jury panel after Mr. Bailey, a real estate agent, revealed he had sold a house to a relative of J.L, who was present in the courtroom for the trial, when this information was not available to Cliff Eubanks prior to jury selection and would have been the basis of a peremptory strike had this information been disclosed timely.

The trial court selected twelve jurors and one alternate. Mr. Eubanks used eight of his ten preemptory challenges. R. 68-75. The trial judge appointed Tony Bailey, the

first juror selected, to be the foreperson of the jury. T. 112. Immediately after opening statements, the trial judge excused all of the jurors except for Mr. Bailey. Mr. Bailey had informed the bailiff that his "ex-wife was related to certain members of the Lyons family." They had "been divorced eleven years and have two children together." Mr. Bailey, a real estate agent, had sold a house to "Jenna," an aunt of J.L., in the last two-three years. Mr. Bailey denied talking to the Lyons family on a regular basis and represented he could be fair and impartial. The trial judge retained Mr. Bailey as a juror. R. 134-36.

Mr. Eubanks moved for a new trial because the trial judge

> erred in failing to exclude juror Tony Bailey from the panel after Mr. Bailey revealed he had sold a house to a relative of the minor child testifying. The relative was present in the courtroom during the trial. This information was not available before jury selection and would have been a basis for the defense to use a peremptory strike had this information been known.

R. 17-18.

By written order dated September 11, 2018, the trial judge denied this motion, explaining the court had "inquired of whether the juror could remain fair and impartial despite his limited contact with the victim's family." At the time Mr. Bailey revealed the real estate transaction, the trial judge was under the impression Mr. Bailey had "limited contact with the victim's family" involving a "prior one-time business transaction with a member of the victim's family [that] was extremely limited in scope." In denying the motion for a new trial, the trial judge further relied on the subsequent removal of juror number sixteen who recognized a defense witness,[30] theorizing "the number of jurors

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[30] At the very beginning of the direct examination of Lou Ann Price, the trial judge excused the other jurors to have a private conversation with Juror Number 16,

would have dropped to eleven (11) has the Court previously removed Juror Bailey, thereby likely necessitating a mistrial." R. 5-6.

Pursuant to the Sixth Amendment of the United States Constitution, Article I, Section 14 of the South Carolina Constitution, and S.C. Code Ann. § 14-7-1020, the tiral court has an obligation to place potential jurors on their oath and asked questions to determine whether any potential juror "has any interest in the cause, has expressed or formed any opinion, or is sensible to any bias or prejudice." Courts have long recognized the tricky nature of analyzing jurors' bias. *See Smith v. Phillips*, 455 U.S. 209, 221-2 (1982) (O'Connor, J., concurring) (recognizing that jurors may be incapable of acknowledging their own bias); *Crawford v. United States*, 212 U.S. 183, 196 (1909) ("Bias or prejudice is . . . an elusive condition of the mind . . . and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence"); *United States v. Burr*, 25 F. Cas. 49, 50 (D.Va.1807) (a person under the influence of personal prejudice "is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony" for such person may declare that "notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him').

Carolyn Blackstock, where Ms. Blackstock disclosed she works the prior witness, Cristy Cline "in the lunch room in Hickory Tavern." The trial judge was under the impression that counsel for Mr. Eubanks had not provided a defense witness list. Counsel had provided the defense witness list to the trial judge's law clerk and assumed the trial judge intentionally did not read it during *voir dire*. Ms. Blackstock assured the trial judge she "still could be fair to both the State and the Defendant and judge this case based on the law and the evidence even though" knowing this witness. R. 553-58. The trial judge subsequently removed Ms. Blackstock from the jury, at her request, following an off-the-record hearing convened in chambers. R. 692-93.

The possibility that a juror might not recognize his own bias is one of the reasons our General Assembly allows an accused ten preemptory challenges in a criminal sexual conduct with a minor case. S.C. Code Ann. § 14-7-1110. Even the unintentional withholding of this type of information warrants remove of the juror once it is discovered. *E.g. State v. Coaxum*, 410 S.C. 320, 764 S.E.2d 242 (2014) (juror's unintentional concealment of information regarding possible familial relationship with defendant warranted mid-trial removal). This Court should order a new trial.

Question X

The trial judge erred by denying Cliff Eubank's motion for a new trial, without convening a hearing and taking testimony, after Cliff Eubanks learned that juror Tony Bailey is friends on Facebook with Darlene Newsome and Jared Hunnicutt when Mr. Bailey did not disclose this information in response to the voir dire questions by the trial court.

As seen in Question IX above, when Juror Tony Bailey disclosed he was the real estate agent in a transaction with one of J.L.'s aunts, the trial judge was under the impression Mr. Bailey had "limited contact with the victim's family" involving a "prior one-time business transaction with a member of the victim's family [that] was extremely limited in scope."

After the trial, counsel for Cliff Eubanks "learned Mr. Bailey is friends on Facebook with Darlene Newsome, the grandmother of one of the witnesses for the State" and "Jared Hunnicutt, the chief investigator in this case." In his motion for a new trial, Mr. Eubanks specifically requested the trial judge "conduct a hearing with Juror Bailey to determine why his friendship with these two people was not disclosed in *voir dire* questions asked by the Court." Mr. Eubanks attached "[c]opies of the Facebook pages establishing these facts" and an exhibit to this motion for a new trial. R.19-24.

Rather than convening a hearing on this motion, the trial judge committed multiple errors of law when denying the motion. First, footnote one of the order denying Mr. Eubanks' motion for a new trial states, "The Court subsequently received affirmative confirmation via email from the Deputy Solicitor that Juror Bailey and Investigator Hunnicutt only became Facebook friends after the trial had concluded." Reliance on an email from the Deputy Solicitor was error because "[a]court cannot consider facts appearing only in argument of counsel." *Shinn v. Kreul*, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) (citing *Gilmore v. Ivey,* 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct.App.1986). *Cf. McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.").

Second, the trial judge's finding of fact that Mr. Bailey being a Facebook friends with Ms. Newsome and Investigator Hunnicutt "is not synonymous with a 'close business or social relationship' or being related by blood or marriage," is not supported by the record because the trial judge declined to convene a hearing on Mr. Eubanks' motion. *Blackwell, supra; McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013)

Third, the trial judge opined that it is not possible to seat independent jurors "in smaller, more rural counties," such as Laurens County,[31] and "the empaneling of an impartial jury was accomplished in this case." These finding of fact and conclusions of law are error. The Sixth Amendment obligation for the trial judge to seat "an impartial jury of the state and district wherein the crime shall have been committed" is no less

[31] The United States Census Bureau estimated the population of Laurens County, on January 1, 2018, to be 66,994. Quick Facts, Laurens County, South Carolina (found at https://www.census.gov/quickfacts/laurenscountysouthcarolina (last viewed June 22, 2019).

applicable in rural communities. As stated above, the finding of fact that "the empaneling of an impartial jury was accomplished in this case" is not supported by the record without the trial judge convening a hearing to determine the Mr. Bailey's connection to Ms. Newsome and Investigator Hunnicutt.

Fourth, the trial judge acknowledged the court disregarded existing case law requiring the court to convene the hearing requested by Mr. Eubanks, citing *McCoy v. State*, 401 S.C. 363, 371, 737 S.E.2d 623, 628 (2013) ("evaluating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing"). R. 6. *And see, e.g., Remmer v. U.S.*, 350 U.S. 377 (1956); *Remmer v. U.S.*, 347 U.S. 227 (1954); *State v. Bryant*, 354 S.C. 390, 581 S.E.2d 157 (2003). Additionally, the trial judge's suggestion counsel for Mr. Eubanks might have "sandbagged" the pre-trial investigations into the backgrounds of potential jurors is not supported by the record. *Blackwell, supra.*

Fifth, the order denying Mr. Eubanks' motion for a new trial states, "[B]ased on the colloquy with Juror Bailey, the Court was fully satisfied with his ability to remain impartial in these proceedings." R. 6. This finding of fact, however, overlooks the fact that the trial judge's colloquy with Mr. Bailey occurred immediately after opening statements, when the trial judge was under the impression Mr. Bailey had "limited contact with the victim's family" involving a "prior one-time business transaction with a member of the victim's family [that] was extremely limited in scope," and before counsel for Mr. Eubanks discovered Mr. Bailey's connection to Ms. Newsome and Investigator Hunnicutt. Convening a hearing was still necessary. *McCoy.*

Finally, the trial judge erred by not applying the proper standard for a juror misconduct claim, which is

> Provided a claim is timely raised, a new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges.

McCoy, 401 S.C. at 371, 737 S.E.2d ar 627. Although citing *McCoy*, the order denying Mr. Eubanks motion for a new trial ignored this standard.

In his motion for a new trial, Mr. Eubanks made a timely request for the trial court to convene a hearing regarding Mr. Bailey's connections to Ms. Newsome and Investigator Hunnicutt. As the trial judge acknowledged, *McCoy* and similar cases required the trial court to convene that hearing. This Court, therefore, should remand this case to the Circuit Court to convene a hearing to determine whether Mr. Bailey intentionally concealed his connections to Ms. Newsome and Investigator Hunnicutt. Either one of these connections supports Mr. Eubanks exercising one of his peremptory challenges and, depending on the facts developed at the hearng, might support excluding Mr. Bailey for cause.

Question XI

The trial judge erred by declining to charge second degree-assault and battery as a lesser-included offense of third-degree criminal sexual conduct with a minor.

> The law to be charged is determined by the evidence presented at trial. A trial judge must charge a lesser included offense if there is any evidence from which the jury could infer the defendant committed the lesser rather than the greater offense.

State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004) (internal citations omitted) (holding appellant was entitled to lesser included jury instruction in criminal sexual

conduct case). "The test for determining if a crime is a lesser included offense is whether the greater of the two offenses includes all the elements of the lesser offense." *State v. McFadden*, 342 S.C. 629, 632, 539 S.E.2d 387, 389 (2000), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

Counsel for Cliff Eubanks requested the trial judge instruct the jurors second-degree assault and battery as a lesser included offense of third-degree criminal sexual conduct with a minor. The trial judge initially pointed to "an unpublished opinion in the advance sheets this week that addressed that very question and said that on a charge of this nature A&B second would not constitute a lesser included offense." Defense counsel countered, "The criminal sexual conduct third degree just requires touching with intent to satisfy lust. Assault and battery second degree requires the touching with no [element of] intent to satisfy lust." R. 688-90; *see also* Court's Exhibit No. 1 (emails between Court and counsel regarding requests to charge), R. 817-20.

The trial judge ultimately denied the request for three reasons. First, the court below saw the jurors' decision, regarding Mr. Eubanks' statement in State's Exhibit No. 2, as a binary choice between conduct initiated by Mr. Eubanks that would be third-degree criminal sexual conduct with a minor or conduct initiated by J.L. that would not be an assault and battery or "an unlawful touching." Second, the trial judge noted our General Assembly did not expressly make second-degree a lesser included offense of third-degree criminal sexual conduct with a minor as a way "to offer additional protections to minors." Third, second-degree criminal sexual conduct with a minor has "different elements" than second-degree assault and battery. R. 692-93, 696-98.

Although not identifying the case, the trial judge apparently relied on *State v. Hernandez*, decided during Mr. Eubank's trial, which found "that had the Legislature intended for assault and battery in the first and second degrees to be lesser-included offenses of CSCM, it could have so provided." No. 2016-000612, 2018 WL 4690997, at *3 (S.C. Ct. App. Aug. 1, 2018).[32] Both *Hernandez* and the trial judge overlooked the evolution of the statutory second-degree assault and battery offense. Initially, S.C. Code § 16-3-600(D)(1)(b) (2010) required the nonconsensual touching of the private parts involve an adult, by providing:

> A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and the act involves the nonconsensual touching of the private parts of an *adult*, either under or above clothing.

(emphasis added). The next year, our General Assembly amended S.C. Code § 16-3-600(D)(1)(b) (2010),[33] removing the requirement that the nonconsensual touching of the private parts involve an *adult* by providing:

> A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and the act involves the nonconsensual touching of the private parts of a *person*, either under or above clothing.

(emphasis added). The General Assembly, thus, intended for second degree-assault and battery to apply to nonconsensual touching of the private parts of a child, contrary to the trial judge's belief.

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[32] As an unpublished opinion, *Hernandez* is not precedent and was not binding on the trial court. Rule 268(d), SCACR.

[33] The 2015 amendment to S.C. Code § 16-3-600 changed the definition of "moderate bodily injury" but did not otherwise alter the elements of second-degree assault and battery.

Third-degree criminal sexual conduct with a minor requires proof of (1) the age of the accused, (2) the age of the child, (3) a lewd or lascivious touching (or attempt of the body parts of the child, and (3) "the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child." S.C. Code Ann. § 16-3-655. Second-degree assault and battery deletes the elements of age of the accused, age of the child, and "the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child." Thus, second-degree assault and battery satisfies the elements test. *McFadden.*

Because reasonable jurors could have concluded that Mr. Eubanks unlawfully touched J.L. without "the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child," the trial judge erred by not instructing second-degree assault and battery. *White*, *supra.* This Court should order a new trial.

Question XII

This Court should reverse Cliff Eubanks' convictions and sentences and order a new trial based on the cumulative error doctrine.

The cumulative error doctrine "provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial." *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). *And see State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000), *reversed on other grounds by State v. Blurton,* 352 S.C. 203, 573 S.E.2d 802 (2002) (cumulative error of solicitor's improper argument and improperly excluded evidence warranted reversal). In *Blurton*:

> The prosecutor accused Blurton of a recent fabrication, an accusation which could not have been seriously made if the trial court had properly admitted the taped telephone conversations between Blurton and

> Mayfield. In that regard, the closing arguments served to exacerbate the error in excluding evidence critical to Blurton's defense.

342 S.C. at 512-13, 537 S.E.2d at 298. In *Blurton,* the Solicitor's improper closing argument was directly linked to the erroneously excluded evidence.

Here, several of the questions presented in this appeal are directly linked to each other. First, testimony about the container of pornography, questioning about legal internet searches, requiring Mr. Eubanks to demonstrate "twerking," and the Deputy Solicitor's inflammatory closing argument, all of which were improper character attacks, combined to deny Cliff Eubanks a fair trial. Second, the cumulative effect of Tony Bailey's multiple non-disclosures of information relevant to his selection as a juror require a new trial. Third, the cumulative effect of the trial judge's failure to provide Mr. Eubanks sufficient time to have the iPhone 5 examined and to delay the conclusion of the trial for a few days denied Mr. Eubanks his Constitutional right to present a complete defense. This Court should order a new trial.

Question XIII

This Court should clarify the procedure to be followed when the court reporter assigned to record a trial accepts employment with one of the parties that participated in that trial prior to completing the trial transcript.

South Carolina Court Administration assigned Tara Scott to be the court reporter for Judge Addy during the term of General Sessions Court for Laurens County during which the Eighth Circuit Solicitor's Office prosecuted Cliff Eubanks (week of July 30, 2019 – August 3, 2018).[34] On August 13, 2018, Mr. Eubanks moved for a new trial. On

[34] Found at https://www.sccourts.org/calendar/dspTermsCRCir.cfm (last viewed June 22, 2019).

August 17, 2018, while the new trial motion was still pending, Mr. Eubank's trial counsel requested the court reporter produce the trial transcript.

On September 4, 2018, a representative of the Eighth Circuit Solicitor's Office approached Ms. Scott, inquiring whether she would be interested in a position in that office as a victims' advocate. On September 21, 2018, Ms. Scott met with Solicitor Stumbo, who formally offered her the position as a victims' advocate, which she immediately accepted. Also on September 21, 2018, Ms. Scott submitted her resignation to Court Administration. October 26, 2018 was Ms. Scott's last date of employment with Court Administration. October 29, 2019 was Ms. Scott's first date of employment as a victims' advocate for the Eighth Circuit Solicitor's Office.

On October 27, 2018, Ms. Scott requested an extension to November 17, 2018 to complete the transcript. The extension request represented that 400 of 900 pages of the transcript had been completed at that point. Based on information provided by Court Administration in response to a Freedom of Information Act request, "The extension was not granted at the time it was submitted due to the extension request procedure not being followed." Ms. Scott delivered the transcript on November 26, 2018.

Mr. Eubanks challenged the transcript. Court Administration conducted an independent review of the transcript, reporting to this Court, on February 7, 2019, the correction of unspecified "proofreading errors that included word misspellings and grammar, punctuation, and typographical errors." Ms. Scott delivered the corrected transcript on February 18, 2019.

Published policy requires court reporters to return records to Court Administration upon separation:

> When a court reporter's employment with the Department ends, all primary and back-up recordings, trial notes, and log sheets must be properly labeled, dated, and transmitted in person to Court Administration in Columbia, South Carolina, no later than the last day of employment.

Section X (Return of Records and Equipment), Court Reporter Manual, at p. 13, as approved August 16, 2011, amended March 1, 2017, and updated May 1, 2018.[35] October 26, 2018 was Ms. Scott's last date of employment with Court Administration. When Ms. Scott requested an extension on October 27, 2018, she reported approximately one-half of Mr. Eubanks' transcript had been completed. If Court Administration had followed its published policy, then Ms. Scott would have returned her records and tapes to Court Administration before the transcript was complete, meaning production of the transcript could have been turned over to a disinterested court reporter.

Once Ms. Scott acquired an interest in employment with the Eighth Circuit Solicitor's Office, she should have disclosed that conflict of interest and recused herself from working on any cases involving her future employer.[36] Guidance from this court is necessary to avoid similar situations from occurring in the future.[37] As seen in footnotes

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[35] Found at https://www.sccourts.org/courtreporter/CourtReporterManual.pdf (last viewed December 18, 2018).

[36] Very arguably, Ms. Scott should have recused herself from proceedings involving the Eighth Circuit Solicitor's Office beginning as early as September 4, 2018 when that office began recruiting her for the Victims' Advocate position. That the Solicitor's Office did not advertise the position strongly suggests Ms. Scott was the only candidate for the position at that time. Certainly, by September 18, 2018, Ms. Scott was actively pursuing the Victims' Advocate position. According to the Judicial Department website, Ms. Scott was the court reporter for General Sessions Court in the Eighth Judicial Circuit on September 4-7, 12-14, 17-21, 2018 and October 1-5, 8-12, 2018.

[37] Mr. Eubanks acknowledges this issue likely will be moot in this case, depending on the outcome of his second challenge to the transcript. "If, however, an issue raised is capable of repetition but generally will evade review, the Court can address the issue." *Nelson v. Ozmint*, 390 S.C. 432, 434, 702 S.E.2d 369, 370 (2010).

17 and 29, *supra*, even after Court Administration reviewed this transcript, errors remain that are directly relevant to the questions presented in this appeal.

CONCLUSION

For the foregoing reasons, this Court should reverse Cliff Eubanks' convictions and sentences and remand this case for a new trial. In the alternative, this Court should remand this case for a hearing to determine whether juror Tony Bailey had undisclosed relationships with Investigator Jared Hunnicutt and Darlene Newsome.

Additionally, this Court should provide guidance about the procedure to be followed when the court reporter assigned to record a trial accepts employment with one of the parties that participated in that trial prior to completing the trial transcript.

Respectfully Submitted,

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Issues arising from a court reporter leaving the employment of Court Administration has the potential of generating multiple issues in the future. The failure of this court reporter to return her records to Court Administration became a consideration in at least one other case. In *State v. Charles Tillman,* Appellate Case No. 2018-000495, as evidence by a petition dated March 26, 2019, the Attorney General's Office had difficulty obtaining a transcript from this same court reporter, which could have been avoided if the procedures set forth in the Court Reporter Manual had been followed.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2018-001684

RECEIVED
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SC Court of Appeals

The State,.. Respondent,

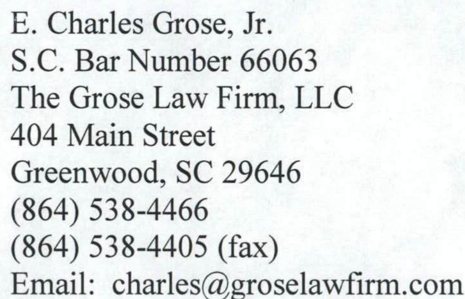
v.

Michael Cliff Eubanks, ... Appellant.

Rule 211, SCACR Certification

This Final Brief of Appellant complies with Rule 211(b), SCACR.

Respectfully Submitted,



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