STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Allendale County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BOBBY JONES, SR.,

APPELLANT

APPELLATE CASE NO. 2018-001345

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant was indicted by the Allendale County Grand Jury for criminal sexual conduct with a minor in the second degree. R 542-543. Appellant's jury trial was held before the Honorable Brooks P. Goldsmith from July 9, 2018 through July 12, 2018. R. 1. Appellant was represented by Glenn Walters and Michael Culler, and the state was represented by Rebekah Luttrell and Leigh Staggs. R. 2.

The jury found Appellant guilty as charged and Judge Goldsmith sentenced him to twelve years imprisonment.

This appeal follows.

STATEMENT OF FACTS

Appellant was a local bishop and the step-father of the alleged female victim ("Minor") in this case. Appellant was married to Minor's mother and the three of them lived together at the time of the allegations which gave rise to this case. Minor was fourteen years old at the time of the allegations in this case. R. 333, ll. 16 – 25.

As will be seen infra, the controversy in this case began when a substitute teacher overheard Minor talking to another student. On March 4, 2013, Minor was interviewed at her school by an "administrative team" which included the school principal, the school guidance counselor, the school nurse, and a substitute teacher. R. 210, ll. 12 – 23. Minor told them that she and Appellant "did it." R. 211, l. 7. Minor was asked to elaborate and she wrote out two statements alleging that she and Appellant had sex. R. 211, ll. 7 – 20; R. p. 537-538 (State's Ex. 1 and 2).

Again, the allegations came to light initially when Minor's substitute teacher, Carolyn Chess ("Chess"), overheard Minor talking about the allegations with another student. R. 195, ll. 2 – 13. At trial, Chess recalled: "[Minor] was talking about it to some other kids. And I said, [Minor], discuss whatever you have to discuss with your mom. Don't discuss that in here, I said, because [Appellant] is my family and I don't want to hear it."[1] R. 195, ll. 8 – 13. Chess stated that later that day Minor told her "it really happened." R. 195, l. 25 – 196, l. 11. The following day Chess told the school guidance counselor, Pamala Kinard ("Kinard"), "what [Minor] said." R. 197, ll. 10 – 15. Chess claimed that Minor handed her a piece of paper that said "he did that…he stick [sic] it in." R. 198, 8 – 11.

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[1] Chess said she was related to Appellant "by [her] grandma." R. 200, ll. 13 – 16.

Chess threw the piece of paper away because she did not believe Appellant would have done what Minor claimed. R. 198, ll. 16 – 20. Chess testified that Minor maintained she had told her mom about the incident and her mom did not believe her. R. 200, ll. 2 – 9.

Chess took Minor to the school guidance counselor, Kinard, so that the allegations could be reported to her. R. 186, ll. 1 – 10. Kinard testified at trial that Minor told her she and Appellant had sex. R. 187, ll. 14 – 15. She further testified that she reported the allegations made by Minor to "those above [her]." R. 186, ll. 7 – 9.

Sheriff Tom Carter, the Sheriff of Allendale County, was called to the school and informed of the allegations against Appellant. R. 312, l. 21 – 313, l. 5. Sheriff Carter was shown Minor's first statement and then he spoke directly to her. R. 313, ll. 10 – 20; R. p. 537 (State's Ex. 1). Sheriff Carter told Minor that she needed to write a more detailed statement and then she proceeded to write a second statement which was ultimately introduced at trial. R. 314, ll. 20 – 21; R. p. 538-539 (State's Ex. 2).

Sheriff Carter reported the allegations to DSS and they sent one of their caseworkers, Mary Carter ("Mary"), to the school.[2] R. 315, ll. 9 – 17. At that point a "collective" decision was made not to allow Minor to return home with Appellant even though he was normally the person who picked her up from school to take her home. R. 316, ll. 16 – 25. They also agreed that Sheriff Carter would be the one to inform Appellant of the situation when he arrived at the school to pick Minor up because Sheriff Carter personally knew Appellant. R. 317, ll. 3 – 8.

When Appellant showed up to the school that day to pick Minor up, Sheriff Carter took him into one of the offices in the school and informed him of the allegations that Minor made. R. 318, ll. 4 – 10. The Sheriff asked Appellant if he and Minor had been arguing and then the

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[2] Mary Carter is of no relation to Sheriff Carter. R. 315, ll. 18 – 19.

Sheriff recalled that: "that's when he proceeded to tell me...me and my wife was discussing about sex and boys with [Minor] because we discovered that she was using a magic marker, putting it in her vagina...and that we decided to get her...a vibrator and I taught her how to have sex..." R. 319, ll. 16 – 25.

Mary testified that when she arrived at the school on March 4, 2013 she interviewed Minor. R. 332, ll. 6 – 9. Mary claimed that Minor disclosed to her that she and Appellant had sex and also that Appellant showed her how to use a vibrator by putting the vibrator inside her vagina. R. 334, ll. 6 – 14. Mary also interviewed Appellant when he arrived at the school and after Sheriff Carter had spoken with him. R. 335, l. 24 – 336, l. 6. She claimed that Appellant told her that he "showed [Minor] how to use [the vibrator]." R. 336, ll. 9 – 10.

On March 13, 2013, a physical examination was performed on Minor by Nurse Practitioner Kristin Dalton ("Dalton"). R. 390, ll. 22 – 25. Dalton directly asked Minor to tell her "about the vibrator." R. 392, ll. 20 – 21. She stated that Minor told her that her mother and Appellant had purchased the vibrator for her. R. 392, ll. 21 – 23. Dalton asked if the vibrator had been inside or outside of her vagina and Minor stated that it was inside her vagina. R. 392, 23 – 24. When Dalton asked who put the vibrator inside her vagina, Minor responded that she put the vibrator in herself. R. 392, l. 25. Minor also told Dalton that she had never had sex. R. 393, ll. 3 – 5.

Dalton completed her physical exam of Minor which was completely normal. R. 394, ll. 6 – 9. After the physical exam Dalton again asked Minor who put the vibrator inside of her vagina and Dalton claimed that Minor then maintained that she and Appellant both put the vibrator inside of her vagina. R. 394, ll. 1 – 5.

On March 26, 2013, Minor was interviewed by SLED Agent Richard Johnson ("Johnson") at her school. R. 222, ll. 15 – 20. Johnson asked Minor a series of questions about the allegations she made against Appellant. R. 223, ll. 9 – 10. According to Johnson, Minor asked to write her own statement instead of answering his questions. R. 223, ll. 10 – 14. Johnson acquiesced in this procedure and she proceeded to handwrite a statement in which she stated that Appellant did not use a vibrator on her and that she only used it on herself. R. p. 540-541 (State's Ex. 3). However, later in the same statement she wrote that Appellant did use the vibrator on her and that they "did it." R. p. 540-541 (State's Ex. 3).

Minor testified during the state's case in chief and also in the defense's case in chief. R. 127 – 171; R. 404 – 430. She testified that she only wrote the statements alleging that Appellant used a vibrator on her and had sex with her because she was pressured and intimidated. R. 159, ll. 2 – 4. Minor stated that she "would have wrote anything to get away from them," referring to the "administrative team" that interviewed her at school on March 4, 2013. R. 159, ll. 4 – 5. Minor testified that Appellant "did not show [her] how to use a vibrator." R. 164, ll. 10 – 14. She also testified that Appellant never touched her inappropriately or abused her at all. R. 164, l. 25 – 165, l. 4.

When the defense called Minor to the stand in their case in chief she again stated that Appellant never touched her with a vibrator or had sex with her or did anything improper with her. R. 411, l. 7 – 412, l. 9. She told the jury that she was using highlighters to satisfy her sexual desires and she told Appellant about that because he was a counselor and frequently helped young people with their problems. R. 405, ll. 4 – 8. She stated that as a result, she, her mom and Appellant all had a "conversation" about this and decided that she should have a vibrator. R. 405, ll. 9 – 10.

Minor wanted to have a boyfriend and be sexually active, but her parents would not allow it. R. 405, l. 25 – 406, l. 17. Minor told her friend N.S. that her parents bought her a vibrator and that she should get her parents to buy her one too. R. 410, ll. 12 – 17. After Minor told N.S. about her parents buying her a vibrator is when the untrue rumors started around the school. R. 411, ll. 4 – 6. Minor stated that after the rumors started she began lying about what happened because she resented her parents for the restrictions they put on her. R. 412, ll. 13 – 23.

Appellant also testified in his own defense. R. 431 – 457. Appellant adamantly denied ever touching Minor in any sexually improper way. R. 431, ll. 15 – 18. Appellant said that when Minor confided in him about her sexual desires he got her mother involved in the conversation because he felt that it was important for her mother to know what was going on. R. 437, l. 12 – 438, l. 2. Appellant acknowledged that he did not want Minor dating boys or having sex out of fear that she might get a sexually transmitted disease or become pregnant. R. 438, ll. 12 – 17.

Appellant, Minor and her mom all had a "conversation" as a family and decided that they would buy a vibrator for Minor to help her satisfy her sexual urges. R. 439, ll. 6 – 14. Minor's mother was not willing to go to the store and purchase a vibrator so Appellant reluctantly agreed that he would go purchase one. R. 439, ll. 13 – 18. After the vibrator was purchased, Appellant recalled: "Minor came in the den and got it. And of course, we know what people do with vibrators. She was doing the same thing with magic markers and stuff, so we didn't have to instruct her as to what to do. I mean, we was not showing her what to do, that's ridiculous." R. 439, l. 25 – 440, l. 5.

Appellant told the jury that he never told Sheriff Carter or Mary from DSS that he used a vibrator on Minor. R. 452, l. 24 – 453, l. 18.

ARGUMENT

1.

The Court erred in granting the state's motion to quash the jury after it alleged Appellant used a peremptory strike in violation of *Batson v. Kentucky* because he struck a juror who identified her profession as being a "housewife" which was a facially race neutral reason and where the state was not required to show pretext by providing evidence that Appellant had seated another similarly situated juror.

Standard of Review

"'In criminal cases, the appellate court sits to review errors of law only.'" State v. Inman, 409 S.C. 19, 25, 760 S.E.2d 105, 108 (2014) (quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). "A court is bound by the trial court's factual findings unless they are clearly erroneous." Id. (internal quotation omitted). "On review, this Court is limited to determining whether the trial court abused its discretion." State v. Edwards, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009).

"In the typical appeal from the granting or denial of a Batson motion, the appellate courts give deference to the findings of the trial court and apply a clearly erroneous standard." State v. Cochran, 369 S.C. 308, 312, 631 S.E.2d 294, 297 (Ct. App. 2006). "This standard of review, however, is premised on the trial court following the mandated procedure for a Batson hearing." Id. "Here, where the assignment of error is the failure to follow the Batson hearing procedure, we must answer a question of law. When a question of law is presented, our standard of review is plenary." Id.

Relevant Facts

The first jury selection process at Appellant's trial resulted in a jury consisting of twelve black jurors, six of which were male and six of which were female. R. 31 – 40. Appellant is a black male. The state used five peremptory strikes. R. 32, l. 25 – 33, l. 5; R. 33, l. 20 – 34, l. 1; R. 34, ll. 12 – 16; R. 35, ll. 1 – 5; R. 38, ll. 9 – 13. All five of the state's strikes were of black jurors, four of which were female and one of which was a male. Id. Appellant used only five of his peremptory challenges. R. 36, ll. 3 – 9; R. 36, ll. 17 – 23; R. 36, l. 24 – 69, l. 11; R. 37, l. 20 – 70, l. 1; R. 38, ll. 2 – 8. All five of Appellant's strikes were female, two of which were black and three of which were white. Id.

Two alternate jurors were selected, both of whom were black females. R. 40, ll. 2 – 22. Appellant struck one black female alternate and the state struck one black female alternate. R. 39, ll. 8 – 14; R. 39, ll. 15 – 19.

After the jury was selected the state made a Batson[3] challenge stating: "the Defense exercised six [including the alternate] of their strikes. Of those six, five were female, three of those were white ladies and they were the only Caucasian jurors called to be put on the jury." R. 41, l. 22 – 42, l. 2.

Defense Counsel responded by going through each one of his strikes and giving his reason for each. Beginning with Juror No. 39 who was a white female, Defense Counsel stated "that young lady was employed at the Hampton school district, but she also stood up and stated that her sister had reported some type of sexual abuse." R. 42, ll. 5 – 10.

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[3] Batson v. Kentucky, 476 U.S. 79 (1986).

Appellant's second strike was Juror No. 166 who was a black female. Defense Counsel stated that he struck her because she "knew someone that served on the grand jury that indicted [Appellant]." R. 42, l. 25 – 43, l. 4.

Appellant's third strike was Juror No. 98 who was another black female. Defense Counsel stated that the reason for the strike was "[o]f course, that was the person that was employed in Allendale County school systems as a teacher." R. 43, ll. 8 – 12.

Appellant's fourth strike was Juror No. 113 who was a white female. Defense Counsel stated that he struck Juror No. 113 because she was a nurse at Allendale County Hospital and that they were planning to strike all nurses. R. 43, l. 13 – 44, l. 2.

Appellant's fifth strike was Juror No. 158 who was a white female. Defense Counsel struck this juror because she identified herself as a "housewife" which was an occupation that Appellant did not want represented on the jury pool. Defense Counsel also pointed out that the only other juror called who identified themselves as a "housewife" was struck during the selection of the alternate jurors. R. 44, ll. 4 – 10.

Defense Counsel summarized his strikes by stating:

> [T]hose would be the race neutral issues with regard to the selection. It was based upon employment in this particular case, associated with someone that reported wrongdoing, and, of course…we have the teacher at Allendale, nurse at the hospital and a nurse will be testifying, just like we eliminate any police officer. And, of course, the last juror was associated with someone.

R. 44, l. 23 – 45, l. 8. The Court responded that it did not understand the rationale of striking the "housewife." R. 45, ll. 9 – 11. Defense Counsel stated that the defense's position was to strike all "housewives" and that both of the jurors who identified as such were struck. R. 45, ll. 12 – 20. Counsel argued that they look to the professions that people hold and in this particular case

they struck several jurors based on their professions including a nurse and a teacher as well. R. 45, ll. 21 – 23.

The state replied:

> I still fail to understand…how striking all housewives is relevant to this…there's a wide variety of different caregivers and women that stay home and choose to work or don't choose to work or some are unemployed or what their nature is. I just don't believe that that's a sufficient race neutral explanation for striking that lady.

R. 46, ll. 7 – 16.

Defense Counsel proceeded to explain his view of a "housewife":

> A housewife's approach for a case such as this is totally different from someone who's sitting at home as a caretaker or someone who's sitting at home because they're unemployed…A house wife employees [employs] a system of management and skills that keep a home running properly…It's not simply someone sitting around that is a caretaker. And of course, their approach to life and view of issues is totally different from someone else that's home that's unemployed or someone that's a caretaker…A housewife is someone who's employed, *who manages the household, who manages the budget, sees to the affairs of the family itself and may even end up being the leader of the family.*

R. 47, l. 2 – 48, l. 10 (emphasis added). Defense Counsel argued that this was a race neutral reason for the strike and therefore satisfied that requirement from Batson. Counsel argued: "[T]he skill set requirement of being a housewife, we do not believe would be in the best interest of our case. This is someone who makes decisive decisions, manages money, manages a household. Maybe that's someone we don't want on our jury." R. 49, ll. 15 – 20. Defense Counsel stated that he did not strike the juror based on her race but rather the skill set she has in being a "housewife." R. 49, l. 21 – 50, l. 2.

The state responded by arguing that Appellant was making a generalization about an entire group of people which was an insufficient reason for using a strike. R. 51, ll. 5 – 9. The

state argued: "[T]hey're generalizing this term household. They're applying it, first of all, housewives – they're applying it specifically to women, but there's no mention made of potentially men that might have the same occupation." R. 51, ll. 10 – 15.

Defense Counsel immediately responded that a man or a woman can serve in the capacity as a "housewife" and that "the same decisions are required in order to manage a household." R. 52, ll. 10 – 13. Counsel further pointed out that the term "housewife" was given by the potential juror herself, i.e. the potential juror identified herself as a "housewife" as being her profession. R. 52, ll. 13 – 19. "Housewife" was how the potential juror described herself. R. 52, ll. 20 – 25. Counsel reiterated that the term "housewife" defines an occupation and a specific job that a person does. R. 53, ll. 16 – 19.

The Court ruled for the state and granted its motion to quash the jury. R. 55, l. 18 – 56, l. 12.

The following day the parties selected a second jury. R. 58 – 68. The second jury consisted of nine black jurors and three white jurors; seven female jurors and five male jurors. R. 58 – 68. The state used three peremptory strikes, all of which were black females. R. 63, l. 25 – 96, l. 4; R. 65, ll. 3 – 7; R. 66, ll. 12 – 16. Appellant only used two peremptory strikes, one of which was a black female and the other of which was a white female. R. 63, ll. 11 – 17; R. 66, ll. 5 – 11. Juror No. 158, the juror who was struck the day before by Appellant based on her stated occupation as being a "housewife," was seated on the second jury. R. 64, l. 21 – 65, l. 2.

Two alternate jurors were selected, both of whom were black females. R. 67, l. 18 – 68, l. 11. Appellant struck one alternate who was a white female and the state did not use any strikes on alternates. R. 67, ll. 9 – 16. Neither party made a motion with regards to the selection of the second jury. R. 68, ll. 12 – 17.

Discussion

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits a party from using a peremptory strike on the basis of a prospective jurors' race. Batson v. Kentucky, 476 U.S. 79 (1986). This principle applies to the state as well as to a defendant in a criminal case. Georgia v. McCollum, 505 U.S. 42 (1992). It is immaterial whether the defendant and the prospective juror are the same or a different race. Powers v. Ohio, 499 U.S. 400 (1991).

When a party challenges an opponent's use of its peremptory strikes in violation of Batson v. Kentucky, the trial judge must hold a hearing to determine whether the jury should be quashed. State v. Giles, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014). At the hearing, the party challenging the use of the peremptory strike must first make a prima facie showing that the strike was based on race. Id. Once the challenging party has made a prima facie showing that the strike was based on race then the proponent of the strike is required to present a race neutral reason for the strike. Id. The race neutral reason "need not be persuasive, or even plausible, but it must be clear and reasonably specific such that the opponent of the challenge has a full and fair opportunity to demonstrate pretext..." Id. at 21 – 22, 754 S.E.2d at 265.

If the proponent of the strike is able to give a race neutral reason, then the trial judge must move to the third step which requires the challenging party to show that the race neutral reason given by the proponent is merely a pretext. Id. Generally speaking, pretext will be established by the challenging party showing that the proponent of the strike did not strike similarly situated members of the jury panel who were of a different race. Payton v. Kearse, 329 S.C. 51, 55, 495 S.E.2d 205, 208 (1998). The burden of proving a violation of Batson always rests with the party that is challenging the strike. Giles, 407 S.C. at 18, 754 S.E.2d at 263.

In this case, the state moved to quash the jury based on Appellant's use of his peremptory strikes arguing: "the Defense exercised six [including the alternate] of their strikes. Of those six, five were female, three of those were white ladies and they were the only Caucasian jurors called to be put on the jury." R. 41, l. 22 – 42, l. 2. Appellant immediately went through each of his strikes detailing race neutral reasons for each one. R. 42, ll. 5 – 10; R. 42, l. 25 – 43, l. 4; R. 43, ll. 8 – 12; R. 43, l. 13 – 44, l. 2; R. 44, ll. 4 – 10.

After Defense Counsel gave his explanation for each strike, the state focused solely on one strike – the juror who identified herself as a "housewife." R. 45, ll. 9 – 11; R. 46, ll. 7 – 16. Appellant gave an exhaustive explanation as to why he wanted to strike all "housewives" on the jury because of the skill set that they possess in managing a household and being a decisive leader. R. 47, l. 2 – 48, l. 10; R. 49, ll. 15 – 50, l. 2.

When the Court asked for a response by the state, the assistant solicitor simply stated that she did not understand how striking all "housewives" was relevant to the case. R. 46, ll. 7 – 16. The state never presented any evidence to show that Defense Counsel's given reason for striking a juror who identified herself as a "housewife" was a pretext. In fact, Defense Counsel specifically pointed out that the only other juror who identified herself as a "housewife," who was a black female, was struck during the selection of the alternates. R. 45, ll. 12 – 20.

Defense Counsel argued to the judge that the reason for striking the juror was not because of her race but rather because of her occupation as being the manager of a household. R. 49, l. 21 – 50, l. 2. The assistant solicitor then proceeded to turn its argument from racial discrimination into a "gender discrimination" generalization argument that Defense Counsel was somehow making an improper generalization about females. R. 51, ll. 10 – 15. Counsel immediately and correctly responded that a man or woman can have the occupation of

"housewife" in that either gender can be a stay at home parent who manages the affairs of the family. R. 52, ll. 10 – 13. Counsel further argued that he did not come up with the term "housewife" but rather both of the prospective jurors who were struck on this basis had identified themselves as "housewife" when asked about their occupation. R. 52, ll. 13 – 19.

The term "housewife" was racially neutral on its face and therefore the Court should have turned to the state and required them to show pretext. The Court, however, never required the state to make such a showing. It was error for the Court to not require the state to make a showing that Appellant's given reason for his peremptory strike was a pretext. State v. Cochran, 369 S.C. 308, 312, 631 S.E.2d 294, 297 (Ct. App. 2006).

Even though it was improper for the Court to leave the burden on Appellant to show that he did not engage in racial discrimination, Appellant nonetheless affirmatively presented evidence to the Court that the given reason was not a pretext because no other similarly situated potential jurors were seated of a different race or gender. In fact, the only other juror who self-identified as a house wife was a black woman who was also struck during the selection of the alternates. Appellant articulated a race and gender-neutral reason for his strike of Juror 158 that was clear and reasonably specific such that the burden should have been shifted to the state. The trial court's failure to follow the proper Batson procedure as outlined in Giles was error.

Furthermore, in State v. Williams, 379 S.C. 399, 665 S.E.2d 228 (Ct. App. 2008), the Court of Appeals found that the defendant's use of a peremptory challenge on a juror whose spouse was unemployed was a sufficiently race neutral reason. Williams, 379 S.C. at 402-403, 665 S.E.2d at 230. In so holding, the Court said "employment, or lack of it, is a well-understood and recognized consideration in the exercise of peremptory challenges." Id. See also State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999) (finding prosecutor's strike of black juror who was

unemployed was race neutral); State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999) (finding defendant's strike of juror based on his place of employment was race neutral); State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) (holding that defendant's strike of a juror based on her employment as a court reporter was race neutral).

The Supreme Court in State v. Short, 333 S.C. 473, 511 S.E.2d 358 (1999) held that no showing of actual prejudice was required to find reversible error for the denial of the right to exercise peremptory strikes. Short, 333 S.C. at 477, 511 S.E.2d at 360. Nonetheless, Juror No. 158 was seated on the second jury which convicted Appellant. R. 64, l. 21 – 65, l. 2. Appellant had initially struck Juror No. 158 based on her stated occupation of being a "housewife." As articulated above, this was a proper exercise of Appellant's peremptory strike. The Court erroneously granted the state's Batson motion and therefore Appellant was prevented from properly using his peremptory strike on this juror. Williams, 379 S.C. 399, 402, 665 S.E.2d 228, 230 (Ct. App. 2008) (stating that when a juror who was properly struck by a defendant was subsequently seated on a jury after the trial court's erroneous granting of a Batson motion, prejudice is presumed because there is no way to determine whether defendant's right to an impartial jury was violated).

Here, the trial judge erred in granting the state's motion to quash based on a violation of Batson v. Kentucky and Appellant was prejudiced because he was prevented from using his peremptory strike on Juror No. 158, the housewife, and she was improperly seated on the jury that convicted him. Appellant's conviction and sentence should be reversed and remanded for a new trial. See State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999); State v. Short, 333 S.C. 473, 511 S.E.2d 358 (1999).

2.

The Court erred in qualifying Sitha Patel as an expert in the field of "child sexual abuse dynamics" because her training was limited to a one-week class at the Child First Law Center and a three-day class at MUSC, and because she admitted that she could not determine an error rate for her field and that her only quality control procedures were to follow the Child First protocol.

Standard of Review

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting Douglas, 369 S.C. at 429–30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct.App.2001)). To show prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing Means, 348 S.C. at 166, 558 S.E.2d at 924).

Relevant Facts

During Appellant's trial the Court held an in camera hearing where the state called Sitha Patel ("Patel"), a self-described therapist and forensic interviewer. R. 249, l. 3 – 250, l. 1. Patel testified that she worked for an organization called Hopeful Horizons interviewing children from ages three to seventeen with allegations of abuse. R. 250, ll. 8 – 12. She also testified that she provided therapy to children who had been victims of abuse. R. 250, ll. 13 – 20.

Patel received a master's degree in social work after receiving an undergraduate degree in marketing management, with a minor in international business. R. 251, ll. 11 – 17. As part of Patel's graduate program she testified: "I worked in a residential program for children who self-injure. I worked in a psychiatric private hospital working with alcohol and addictions, alcoholism and other forms of addictions..." R. 251, ll. 21 – 25.

Patel was a certified forensic interviewer and had been "trained with evidence-based models, trauma focused cognitive behavioral therapy and child/family traumatic stress intervention." R. 252, ll. 10 – 13. Patel testified that she had counseled one hundred and fifty people, ninety percent of whom were children, and also that she had conducted over four hundred and fifty forensic interviews of children. R. 253, ll. 2 – 11. Patel said she attended continuing education courses but did not give a specific number and she presented at seven such courses. R. 253, l. 17 – 254, l. 19.

Patel had been qualified as an expert only one time and it was in Family Court in Beaufort County. R. 255, ll. 3 – 9. The state then moved to have Patel qualified as an expert in the field of "child sexual abuse dynamics." R. 256, ll. 3 – 5.

On voir dire, Defense Counsel asked about Patel's peer review process and she stated:

> It's a peer review for the State of South Carolina, three times a year, and once a year, it's for the region. And we basically come

> together and we review journal articles and we share forensic interviews to ensure that we're, you know, following the protocol.

R. 256, ll. 18 – 23. Counsel asked if there was a way to determine an error rate and Patel admitted: "No. It's not a scientific research. There's no error rate involved." R. 257, ll. 1 – 2. Patel also had never published anything in her supposed field of expertise. R. 257, ll. 6 – 8. When Defense Counsel asked Patel about her "quality control procedures" she initially replied: "What do you mean by that?" R. 257, ll. 9 – 12. After Counsel explained the question further, Patel responded that "we have a protocol that we follow that's recommended by the State of South Carolina, which is Child First protocol…" R. 257, ll. 17 – 19.

When Defense Counsel inquired further into Patel's training she revealed that the "trauma-focused therapy" training she received from the Medical University of South Carolina was merely a three-day training followed by fifteen conference calls "to ensure that we're following protocol." R. 258, ll. 3 – 25. Based on this training alone, she received a certificate to be a "trauma-focused cognitive behavioral therapist." R. 259, ll. 3 – 4.

Defense Counsel also revealed through voir dire that Patel's certification to be a forensic interviewer came from a one-week class at the Child First Law Center in Columbia, S.C., at the end of which she conducted only a single "mock forensic interview." R. 259, l. 5 – 260, l. 2. When Counsel asked her how the mock interview was reviewed she stated "[t]here wasn't anything to review…it was a mock interview, meaning that we were practicing our skills that we learned throughout that week with an acting person…" R. 260, ll. 6 – 14.

Patel testified during voir dire that Hopeful Horizons, the agency she works for, is a member of the professional organization "NA double CP – N double ACP," but she could not

identify what that acronym stood for.[4] R. 260, l. 16 – 261, l. 24. She did, however, claim that this organization is "basically an organization that provides resources and different types of trainings that you have access to." R. 262, ll. 1 – 3.

Defense Counsel objected to Patel being qualified as an expert in child sexual abuse. R. 262, ll. 13 – 17. Counsel argued that there is no reliability in the field evidenced by her testimony that there was no way to determine an error rate. R. 262, ll. 18 – 21. Counsel further argued that she was not adequately qualified in this field by pointing out the fact that she only had a three-day class followed by conference calls and also that she was certified as a forensic interviewer after taking only a one-week class in forensic interviewing. R. 263, ll. 14 – 22.

The state responded by citing to State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018), State v. Barrett, 416 S.C. 124, 785 S.E.2d 387 (S.C. App. 2016), and State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (S.C. App. 2015). The state argued: "The court in South Carolina has made it very clear that this area of expertise is well settled. An expert in behavioral characteristics of sex abuse victims and this particular field of expertise would fall under the nonscientific expert." R. 265, ll. 16 – 22.

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[4] It is somewhat unclear from the record what the actual acronym is that Ms. Patel is referring to. She first said "NA double CP," then said "N double ACP." R. 260, l. 25 – 261, l. 1. She then again referred to it as "NAACP." R. 261, ll. 17 – 21. To undersigned counsel's knowledge, the NAACP, which stands for the National Association for the Advancement of Colored People, is an organization that has nothing to do with child sexual abuse. See https://www.naacp.org/about-us/. Also, to undersigned counsel's knowledge the NACCP, which stands for the National Association of Child Care Professionals, has now been renamed to the Association for Early Learning Leaders. See https://www.earlylearningleaders.org. According to its website, the mission and goal of this organization is "to strengthen the knowledge, skills, and abilities of directors, owners, emerging leaders and other early learning professionals to ensure quality programs for young children." See https://www.earlylearningleaders.org/page/About_ELL. Nothing on the organization's website appears to suggest that it has anything to do with child sexual abuse.

The state argued that Patel was qualified because she had "conducted over 450 forensic interviews using an established protocol and procedure" and that "[s]he has counseled over 150 individuals, 90 percent of whom are child victims." R. 266, ll. 2 – 5. The state also said that Patel had a master's degree "in this field"[5] and that she was "certified by the State of South Carolina" which made her qualified to testify as to the behavioral characteristics of child sexual abuse.

Appellant responded by citing to State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015) and State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) and argued that the state did not meet its burden in showing reliability by failing to show an error rate. R. 267, l. 18 – 268, l. 2.

The Court ruled for the state that Patel was qualified as an expert. R. 268, ll. 3 – 9. The Court stated: "The next step, of course, is to determine whether her testimony will be admitted. Let's have a proffer on that." R. 268, ll. 9 – 12.

In her proffered testimony, Patel testified extensively as to what she claimed the "broad range of signs and symptoms" that children who are victims of sexual abuse might exhibit. R. 268, ll. 19 – 20. She specifically claimed that age can be a factor in how signs of sexual trauma in children might manifest and also about how the relationship of the victim and perpetrator of sexual violence may affect the manifestation of signs and symptoms in children. R. 269, l. 3 – 270, l. 18.

Patel testified about the "grooming process" that sexual predators sometimes engage in with the victim and also other family members of the victim. R. 270, l. 19 – 272, l. 7. She spoke about differences in the grooming of a young child versus a teenager. R. 272, ll. 8 – 24. She also testified about what she referred to as the "disclosure process," which begins with the

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[5] According to the record, Ms. Patel's Master's degree is in social work, not child sexual abuse dynamics which is the field in which the state offered her as an expert. R. 307, ll. 11 – 17.

"denial stage" and then moves into the "tentative stage," the "active disclosure stage" and then the "recantation stage." R. 274, l. 19 – 275, l. 19.

The Court ruled that Patel's proffered testimony would be admissible because its probative value outweighed its prejudicial effect. R. 277, l. 25 – 278, l. 9.

Jury In

The state called Patel in its case in chief and after going through her background and training again moved to qualify her as an expert in "dynamics of child sexual abuse." R. 295, ll. 8 – 10. Appellant renewed his objection at that time and the Court granted the state's motion to qualify Patel as an expert. R. 295, ll. 11 – 14.

Patel then testified before the jury extensively to the "big range of signs" that children victims of sexual assault might exhibit. R. 295, l. 22 – 296, l. 23. She also testified that she had never met the alleged victim in this case, her mother, or Appellant. R. 296, l. 24 – 297, l. 13. She again testified about the affect that a victim's age might have on their signs and symptoms and also the relationship of the victim and perpetrator might have on their signs and symptoms. R. 297, l. 14 – 298, l. 7. She spoke extensively about the "grooming process" again and also the "disclosure process" including recantation. R. 298, l. 8 – 302, l. 25. In regard to recantation, Patel testified:

> [W]e see it across all ages. With young children and adolescents, we see that. And there's lots of reasons for recantation. Some of the reasons for recantation are that no one will believe them, they didn't have the support from – especially, if there's a nonoffending caregiver, they didn't get the support from them or their life has been completely changed. So, now, they're not living in the home and things are just completely different, they're scared. They want things to go back to normal. They want the abuse to stop, but they want things to be back to normal as far as the family dynamics. There's also – there's so many reasons for recanting. They can – there's lots of reasons.

R. 302, ll. 11 – 25.

The state also elicited testimony from Patel about reasons that a non-offending caregiver might fail to protect a child victim from sexual abuse. R. 303, ll. 1 – 23. She then testified in detail about how a child is more likely to recant when the offender is someone who is a family member or close with the family. R. 303, l. 24 – 304, l. 10.

On cross examination, Patel acknowledged that her master's degree was in social work and did not have anything to do with interviewing alleged victims. R. 307, ll. 11 – 17. She also admitted that she only had a one-week class to get her certification and that she was not personally a member of any professional organization. R. 305, ll. 6 – 22.

Discussion

Child abuse assessment experts are non-scientific experts and therefore the admissibility of their testimony should be reviewed under State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). State v. Chavis, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015).

Under White, "[n]on-scientific expert testimony must satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter." White, 382 S.C. at 273, 676 S.E.2d at 688. In White, the state specifically argued that "reliability need not be shown for the admission of non-scientific expert testimony" and the Supreme Court specifically rejected that argument. Id. at 272-273, 676 S.E.2d at 687-688. The White Court held:

> [T]he trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or non-scientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact.

White, at 274, 676 S.E.2d at 689.

In this case, the state sought to qualify Sitha Patel as an expert in the field of "child sexual abuse dynamics." Patel's qualifications in this field were insufficient to warrant her being qualified as an expert. Her master's degree was in social work. Her undergraduate degree was in marketing management with a minor in international business. R. 251, ll. 11 – 17. None of these degrees had anything to do with child sexual abuse.

After completing her master's degree, she stated that she worked in a residential program which also apparently had nothing to do with child sexual abuse. She testified that her work was done at a psychiatric hospital where she dealt with children who "self-injure" and had drug and alcohol addition problems. R. 251, ll. 21 – 25. Children who "self-injure" would not appear to fall under the category of a victim of child sexual abuse who would have been injured by another person.

Patel's only training in the field for which the state offered her as an expert was a three-day class at MUSC followed up with fifteen telephone calls to insure that she was "following protocol," and a week-long class at the Child First Law Center which culminated in conducting a single mock interview. She had never published anything in her supposed field of expertise and she was not personally a member of any professional organizations. R. 257, ll. 6 – 8; R. 260, l. 16 – 261, l. 24. When she testified that the agency she worked for, Hopeful Horizons, was a member of a professional organization she referred to the NAACP or the NACCP demonstrating her apparent lack of knowledge of the name of the organization of which Hopeful Horizons was a member. R. 260, l. 16 – 261, l. 24.

Although Patel testified that she had attended continuing education courses regarding child sexual trauma, the record was devoid of information about the number of such courses she

had attended or the time and place of these courses. Further, she claimed to have given presentations at only seven continuing education courses.

Patel's training and experience, or lack thereof, as supported by the record are wholly insufficient to support the trial judge's conclusion that she was qualified as an expert in child sexual abuse dynamics. None of her formal education in undergraduate or graduate school had anything to do with child sexual abuse. After graduation she received a mere eight days of training on the subject and, amazingly, received a "certification" as a forensic interviewer. Having completed only a one-week class at the Child First Law Center, she conducted a single mock interview which apparently was not graded or even reviewed in any way.

The state did not present sufficient evidence to demonstrate that Patel was qualified as an expert. On the contrary, the record supports the opposite conclusion that she was not qualified as an expert in child sexual abuse. Because she was not qualified as an expert in the field of child sexual abuse dynamics the Court erred in admitting her as an expert over Appellant's objection.

In addition to objecting to Patel based on her qualifications, Appellant also objected to her testimony on reliability grounds citing State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015) and State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009).

In Chavis, the defendant argued that the state failed to present sufficient evidence to demonstrate the reliability of two witnesses they offered as experts in child abuse assessment. Chavis, 412 S.C. at 107, 771 S.E.2d at 339. The Court agreed as to one of the witnesses and did not reach the issue on the second witness. Id. In finding that the trial court erred in qualifying the witness as an expert the Court stated:

> We agree with Appellant that although Mrs. Elliott was sufficiently trained in RATAC protocol, and that she used RATAC protocol during her interviews, there is simply no evidence that her conclusions or impressions taken from these interviews were

> accurate. During cross examination, when asked if there was any way to discern what her error rate was, she responded "no." Her only peer review involved one other interviewer reviewing her work to ensure she was using RATAC protocol. When asked what her quality control procedures were, she responded "I use RATAC protocol every time in the interview room."

Id. at 108, 771 S.E.2d at 339.

This case is nearly identical to Chavis. When Appellant asked Patel if there was a way to determine an error rate, she said: "No. It's not a scientific research. There's no error rate involved." R. 257, ll. 1 – 2. When Appellant asked her about her "quality control procedures" she initially replied: "What do you mean by that?" R. 257, ll. 9 – 12. After Appellant explained the question further, she responded that "we have a protocol that we follow that's recommended by the State of South Carolina, which is Child First protocol..." R. 257, ll. 17 – 19. Finally, when Appellant asked Patel about her peer review process she indicated that "they" came together a few times a year to review each other's cases to make sure that they were following the protocol. R. 256, ll. 18 – 23.

As in Chavis, here, the state failed to show that Patel was reliable as required by State v. White. Patel acknowledged that she could not discern an error rate, that her peer review process was nothing more than ensuring that she was following the Child First protocol, and she even seemed confused initially when asked about her quality control procedures. When pressed, all she could say about her quality control is that she follows the Child Frist protocol.

As the Supreme Court stated in Chavis: "[E]vidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies." Chavis at 108, 771 S.E.2d at 339. There is no evidence in the record here that demonstrates that Patel was

able to draw reliable results from the procedures that she followed and therefore the reliability requirement of SCRE 702 and State v. White was not met.

Appellant was prejudiced by Patel's testimony because she testified extensively in a way that mirrored Minor's behavior under the aura of having been qualified as an "expert." As the Supreme Court stated in State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013): "[A]lthough an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts."

The significance of Patel's testimony cannot be overstated, especially in light of Minor's recantation on the witness stand. Minor specifically testified that Appellant did not touch her in any sexually improper way. R. 411, l. 7 – 412, l. 9. The state then used Patel to discredit Minor's recantation by going through the supposed reasons that children recant allegations of abuse.

Patel testified that some minors recant because a nonoffending caregiver may not have believed the minor or given the minor the support they needed. Of course, in this case there was specific testimony that Minor previously claimed that her mother did not believe her when she made the allegation against Appellant. R. 200, ll. 2 – 9. There was further testimony that Minor's life was drastically changed after the allegations because she and her mother were forced to live separately from Appellant. R. 166, ll. 3 – 25. Again, Patel testified about this exact factual scenario being a factor in why a minor might recant. Patel also testified that:

> [I]f the offender is close to the family or is a family member, that makes it more likely that the child is going to recant because they don't want to see that person go to jail or they don't want that person to – you know, they don't want another family member to be upset because now this person is going to get in trouble. They don't want to break up the home.

R. 304, ll. 2 – 9. Taken as a whole, Patel's testimony prejudiced Appellant by improperly bolstering Minor's prior statements and improperly attempting to discredit her recantation on the witness stand.

Appellant's conviction and sentence should be reversed because the state failed to show that Patel was qualified in the field of child sexual abuse dynamics and it also failed to show that she was reliable as required in South Carolina. Furthermore, such error was not harmless. Therefore, the trial judge erred in qualifying Patel as an expert over Appellant's objection. State v. Chavis, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015); State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009).

CONCLUSION

By reason of the foregoing argument, Appellant's conviction should be reversed, and this case remanded to the Allendale County Court of General Sessions for a new trial.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of November, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 4, 2019

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