THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Court of Appeals Appellate Case No. 2018-001684

The State,..... Respondent,

v.

Michael Cliff Eubanks, ... Appellant.

Petition for Certification Pursuant to Rule 204(b), SCACR

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Appellant Michael Cliff Eubanks

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional

Rules

INTRODUCTION

Pursuant to Rule 204(b), SCACR, Michael Cliff Eubanks respectfully petitions this Court for an order certifying this case for review by this Court. The lead issue in Mr. Eubanks' direct appeal is

> *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.[1]

Brief of Appellant at 1 (footnote added). Alternatively, this Court could hold that *Simmons* and the *Kromah* line of cases already limit the evidence admissible pursuant to the *Schumpert* line of cases, in which case the trial court judge erred by not limiting the opinion evidence admitted through the State's expert during Mr. Eubank's trial.

This Court's intervention is needed because our Court of Appeals "lacks the authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court." *State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611,

---

[1] The *Kromah* line of cases includes but is not necessarily limited to *Briggs v. State*, 421 S.C. 316, 806 S.E.2d 713 (2017); *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015); *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011); *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989). *See also Chappell v. State*, No. 2016-000283, 2019 WL 7341490 (S.C. Ct. App. Dec. 31, 2019); *State v. Makins*, 428 S.C. 440, 835 S.E.2d 532 (Ct. App. 2019); *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012); *South Carolina Dept. of Social Services v. Lisa C.*, 380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2008); *State v. Dempsey*, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000). *And see Mangal v. Warden, Perry Corr. Inst.*, No. CV 6:18-106-RBH-KFM, 2019 WL 7461668, at *1 (D.S.C. Dec. 18, 2019), *report and recommendation adopted*, No. 6:18-CV-00106-RBH, 2020 WL 42859 (D.S.C. Jan. 3, 2020).

618 (Ct. App. 2012), *affirmed as modified on other ground by State v. Cheeks*, 408 S.C. 198, 758 S.E.2d 715 (2014); *see also* S.C. Const. Art. V, § 9.

STATEMENT OF THE CASE

On May 16, 2017, J.L. alleged her stepfather, Michael Cliff Eubanks,[2] 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[3] 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).

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.

---

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

[3] The arrest warrant incorrectly invokes the term "sexual battery." S.C. Code Ann. § 16-3-651(h); *see also State v. Elliott*, 346 S.C. 603, 552 S.E.2d 727 (2001) ("'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.") *overruled on other ground by State v. Gentry*, 610 S.E.2d 494, 501, 363 S.C. 93, 106 (2005).

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—only four days before trial—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.[4] 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.

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.

---

[4] 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.

Mr. Eubanks appealed to the Court of Appeals, raising the following issues in his Brief of Appellant:

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.

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.

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?

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.

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.

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.[5]

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.

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.

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.

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.

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.

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

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.

On January 16, 2020, Mr. Eubanks served his Final Brief of Appellant and Final Brief of Appellant. This petition follows.

---

[5] Citing *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007), the State argues "that dehumanizing an appellant in permissible so long as it is based on the record." Brief of Respondent at 30.

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, Cliff 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 gettogethers 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[6] 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 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.

---

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

- 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.[7] R. 594-606.

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.

---

[7] 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.

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.[8] 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 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

[8] 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.

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, R. 808.

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, R. 809.

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,[9] 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,[10] providing "assessments and therapy with children that have been abused."[11] 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.

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

---

[9] 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.

[10] S.C. Code Ann. § 63-11-310.

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

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.[12] R. 308-312.

[12] 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

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"[13] 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?
>
> 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.

---

wound, without opining whether the injury was unlawfully inflicted or the result of self-defense. R. 320-21.

[13] 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.

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 about "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).[14]

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."[15] R. 388. Later she testified disclosure can be tentative, "which is where most children's disclosures fall, where they share some pieces of information but not all of it." She does not "expect a child to report every single detail of

---

[14] 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.

[15] The State questions the accuracy of the transcript regarding this testimony:

> Contrary to [Mr. Eubanks'] assertion, it clearly appears Ms. Galloway-Williams misspoke or ***the transcript was inaccurate*** when she testified "So we refer to disclosure as a process, meaning that we would expect that a child or an adult is going to tell every single detail or every single even that they've experienced related to child abuse at one time."

Brief of Respondent, at 9 (fn. 2) (emphasis added). The State, however, has not challenged the transcript. *See* Mr. Eubank's Issue XIII asking the Court to "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."

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"[16] and "step-dad having fun with daughter." J.L told Ms. Bennett that she told her mother about the YouTube searches.[17] Her mother never investigated these allegations. R. 248-53.

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

---

[16] 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.

[17] 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.

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.[18]

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 knew it

[18] 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.

was up there."[19] 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.[20] 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.

---

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

[20] 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, citing Rule 404(b), SCRE and 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."[21] *See* Rule 403, SCRE. The trial judge allowed the prosecution to introduce the evidence because Mr. Eubanks had denied the intent to commit third-degree criminal sexual conduct with a minor

[21] The transcript reflects defense counsel cited to Rule 404.3. R. 658, line 21. Please see the concerns raised by Question XII, *infra*. The corrected transcript shows counsel cited Rule 404(b), SCRE. R. 807.

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.[22] 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 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

---

[22] 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.

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."[23] 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).

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.

---

[23] 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.

> 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.

ARGUMENT

***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.**

Relying on *Schumpert*,[24] 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 relied on *Schumpert* to admit opinion testimony even though the diagnosis was largely based on the statements of J.L. that bolstered her credibility as the

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

complaining witness. Any discussion about overruling *Schumpert* should begin with *State v. Hudnall*,[25] 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 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*, this 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. This 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 application of *Schumpert* in *Morgan*. Morgan challenged the admissibility of two

[25] 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 overruling (or limiting) the *Schumpert* line of cases in order to exclude opinion testimony, based on hearsay, bolstering the credibility of a complaining witness.

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 furthered 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. This Court later overruled *Morgan*—at least in part—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," this Court steadfastly maintains 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. 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). *See also 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*, this 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*, this 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, this Court acknowledged it is proper to allow and expert to "testify to the behavioral characteristics of sex abuse victims." *Id.* (citing *Schumpert*; *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)). This 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 (hereinafter "*Anderson-Brown* procedure"). The *Anderson-Brown* procedure allowing a "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.[26]

In *State v. Simmons*, this Court held the "hearsay testimony [of a medical doctor] ventured far beyond the parameters of Rule 803(4), SCRE,[27] 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). This 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. This Court noted, "If this tactic were permitted, the legitimate use of the Rule 803(4), SCRE, medical diagnosis and treatment exception would

---

[26] 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 *Barrett* 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.

[27] 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."

be undermined and the general approach of Rule 801(d)(1)(D), SCRE,[28] 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 so holding, this Court reaffirmed its long standing precedent enforcing the limitation contained in Rule 803(4), SCRE limiting the admissibility of "[s]tatements made for purposes of medical diagnosis or treatment" to those statements that are "reasonably pertinent to diagnosis or treatment." *See Simmons*, 423 S.C. at 563-64, 816 S.E.2d at 572-73 (2018) (citing *State v. Camele*, 293 S.C. 302, 360 S.E.2d 307 (1987), *State v. Brown*, 286 S.C. 445, 334 S.E.2d 816 (1985), and *State v. Burroughs*, 328 S.C. 489, 492 S.E.2d 408, (Ct. App. 1997)). As seen above, the limitations on the admissibility of statements made for the purpose of medical diagnosis or treatment was a consideration for this Court in *Hudnall.*

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 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

[28] 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."

J.L. counseling services though Beyond Abuse, the statutorily mandated Children's Advocacy Center in the Eighth Judicial Circuit.[29] 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. State's Exhibit No. 10, R. 810-13. 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, the *Schumpert* line of cases should be overruled (or limited) to the extent that the holdings in these cases 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 statements of the complaining witness. Alternatively, this Court could hold that *Simmons* and the *Kromah* line of cases already limit the evidence admissible pursuant to the *Schumpert* line of cases, in which case the trial court judge erred by not limiting the opinion evidence admitted through the State's expert during Mr. Eubank's trial.

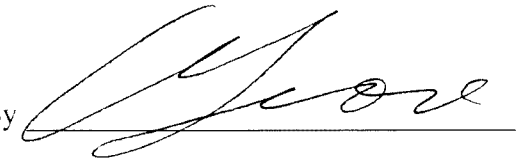
---

[29] S.C. Code Ann. § 63-11-310.

CONCLUSION

For the forgoing reasons, this Court should grant the petition and consider the issue. As the Court of Appeals observed in *Morgan*, "the *Schumpert* court never truly confronted the bolstering issue." 326 S.C. at 511, 485 S.E.2d at 117. The bench and bar would benefit from this Court clarifying *Schumpert* in relation to *Simmons* and the *Kromah* line of cases.

Respectfully submitted,

By 

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Michael Cliff Eubanks

January 27, 2020
Greenwood, South Carolina

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

The State,..... Respondent,

v.

Michael Cliff Eubanks, ... Appellant.

Certificate of Service

I certify that I have served this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed to:

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

William M. Blitch, Jr., Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
E-mail: charles@groselawfirm.com

January 27, 2020
Greenwood, South Carolina

The Grose Law Firm, LLC

404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: charles@groselawfirm.com
Web: GroseLawFirm.com

January 27, 2020

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: *State of South Carolina v. Michael Cliff Eubanks*
Court of Appeals Appellate Case No. 2018-001684

Dear Mr. Shearouse:

Enclosed please find the original and six copies of Mr. Eubanks' Petition for Certification Pursuant to Rule 204(b), SCACR, along with a certificate of service.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

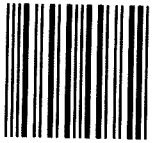
Yours very truly,

E. Charles Grose, Jr.

cc: The Honorable Jenny Abbott Kitchings
Mr. Cliff Eubanks
William M. Blitch, Jr., Esquire

The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646

1000



29211

U.S. POSTAGE PAID
FCM LG ENV
GREENWOOD, SC
29646
JAN 27, 20
AMOUNT

$2.20

R2305K137645-04

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
P.O. 11629
Columbia, SC 29211