STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAMUEL JOLLY,

APPELLANT

APPELLATE CASE NO. 2018-000259

FINAL BRIEF OF APPELLANT

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2.

Did the trial judge abuse his discretion by refusing to exclude evidence of prior bad acts pursuant to Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), where the state, by procuring vague and overbroad indictments, was permitted to admit unlimited evidence of alleged sexual misconduct committed by Appellant over a thirteen month period without meeting any of the exceptions contained within Rule 404(b), SCRE, or proving the alleged conduct by clear and convincing evidence?

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4.

Did the trial judge abuse his discretion by refusing to exclude expert testimony from Dr. Elizabeth Baker in violation of Appellant's constitutional rights under the Confrontation Clause and pursuant to Rule 705, SCRE, where the underlying facts, data, and evidence relied upon by the witness had been lost or destroyed, thereby preventing Appellant from effectively cross-examining the witness and retaining his own expert to challenge the witness's opinion testimony concerning her physical examination of the minor child?

STATEMENT OF THE CASE

A Dorchester County Grand Jury indicted Appellant on February 10, 2013 for first degree criminal sexual conduct with a minor and, on February 3, 2014, for lewd act upon a child. R. 309-312. His case was called to trial on February 12, 2018 before the Honorable Edgar W. Dickson, and a jury. R. 1. Assistant Solicitors Ryan Templeton and Michael Spears represented the state, and Michelle Williams and John Kornegay represented Appellant. R. 1. On February 14, 2018, the jury found Appellant guilty as indicted. R. 293, ll. 10-18. He was sentenced to thirty years for first degree criminal sexual conduct with a minor and fifteen years concurrent for lewd act. R. 304, ll. 2-12.

This appeal follows.

STATEMENT OF THE FACTS

On August 22, 1997, the Department of Social Services (DSS) began an investigation after Minor told her physical education teacher that Appellant, her stepfather, had sexually assaulted her. R. 126, ll. 12-21; R. 152, ll. 2-14. Yvonnia Brown, a social worker employed by DSS, accompanied by two law enforcement officers with the Dorchester County Sheriff's Office, interviewed Minor at her home on that date.[1] R. 152, ll. 5-22. Minor disclosed allegations of sexual abuse. R. 126, ll. 17-21; R. 157, ll. 13-15. Three days later, on August 25, 1997, Brown returned to the residence and interviewed Appellant. R. 157, l. 19 – 158, l. 10. When questioned, Appellant allegedly admitted to tickling Minor, pulling down her pants, touching her breasts, and exposing himself to her. R. 158, ll. 11-24. When asked whether he had digitally penetrated Minor, Appellant allegedly told Brown he did not recall. R. 158, l. 25 – 159, l. 5. Brown ultimately turned the investigation over to law enforcement. R. 160, ll. 15-18.

On September 5, 1997, Minor attended a forensic interview at the Lowcountry Children's Center. R. 127, l. 14 – 128, l. 4; R. 211, ll. 4-17; R. 215, ll. 11-14. On that same day, Minor underwent a physical examination by Dr. Elizabeth Baker, who at the time was employed by the Children's Medical Assessment Center. R. 204, l. 3 – 205, l. 6; R. 211, ll. 18-21. Dr. Baker, who was never qualified as an expert, testified over Appellant's objection that Minor's "hymen -- which is a little piece of skin that surrounds the entrance to the vagina . . . had an interruption at 6:30." R. 206, ll. 3-5. She later clarified that an "interruption" meant the skin was not "continuous and smooth across." R. 207, ll. 3-7. This was the only physical evidence of alleged sexual abuse presented by the state.

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[1] Yvonnia Brown was known as Yvonnia Elmore at the time of the investigation. R. 161, ll. 13-15.

A warrant was issued for Appellant's arrest on October 9, 1997. R. 213, ll. 2-13. However, it was not served on Appellant until January 30, 2013. R. 213, ll. 17-19. Due to the significant passage of time, almost all of the documentation and records related to the investigation were either lost or destroyed, including the videotape of Minor's forensic interview, the Department of Social Service's file, photographs and a videotape taken by Dr. Baker during her physical examination of Minor, Dr. Baker's detailed report containing her findings, and most of law enforcement's file. See R. 35, l. 19 – 39, l. 12.

Minor, who was thirty-one years old at the time of trial, explained during her testimony that Appellant and her mother married at some point during 1996 when she was nine years old. During that same year, the family moved from North Charleston to a home in Dorchester County. R. 114, l. 15 – 115, l. 11. Minor alleged that after the family moved to Dorchester, Appellant began sexually abusing her. Specifically, she claimed Appellant fondled her breasts after she complained of pain and tenderness caused by puberty. R. 116, l. 11 – 117, l. 5. She further alleged Appellant would show her cartoon pornography on a computer in the garage. During these encounters, Minor was sitting on Appellant's lap and he would allegedly "stick his hands down in [her] panties" and touch her vagina. R. 117, l. 6 – 118, l. 10.

On another occasion, Minor claimed Appellant pulled down her "panties," touched her vagina, and explained to her why she was "growing pubic hair there." R. 119, l. 18 – 120, l. 6. She claimed she saw Appellant naked every day. On one occasion while Appellant and Minor were laying in bed, Appellant allegedly handed her a stuff animal "and asked [her] to rub his penis with the stuffed animal to arouse him." She supposedly complied. R. 122, l. 16 – 123, l. 14. Minor described several other incidents involving improper touching. R. 121, l. 20 – 122, l. 15; R. 124, l. 5 – 125, l. 12.

This alleged conduct eventually progressed to a single incident of alleged digital penetration. Minor claimed she remembered Appellant getting on top of her while they were laying in her parents' bed and inserting his middle finger into her vagina. R. 120, l. 18 – 121, l. 19.

Minor first disclosed the alleged abuse to her mother. When "that did really go anywhere," she told her grandmother about the abuse. However, nothing "came out of telling" her grandmother either. Minor eventually told her "gym teacher," who told the guidance counselor, who in turn contacted DSS, which led to law enforcement's investigation. R. 125, l. 23 – 126, l. 21.

Appellant testified in his own defense. He denied sexually abusing Minor. R. 240, ll. 8-13. Appellant asserted that these allegations surfaced after he spanked Minor. When he admitted to the social worker that he had pulled down Minor's pants, he was referencing the spanking. He assumed that is what the social worker was talking about. R. 234, l. 19 – 235, l. 9. Appellant also admitted to tickling Minor when they "used to play and have fun" together. R. 235, ll. 10-18. As far as touching Minor's vagina, Appellant told the social worker in 1997 that he did not remember because he may have inadvertently touched her during a bath or while helping her dress. As far as improperly touching her "on purpose," Appellant vehemently denied ever doing so. R. 235, l. 19 – 236, l. 3.

The jury ultimately found Appellant guilty as indicted. He was sentenced to thirty years for first degree criminal sexual conduct with a minor and fifteen years for lewd act.

ARGUMENT

1.

The trial judge erred by refusing to quash the indictments for first degree criminal sexual conduct with a minor and lewd act upon a child as vague and overbroad when the indictments, which covered over a year period, failed to state the offense with sufficient certainty and particularity to enable Appellant to know what he was called upon to answer and whether he could plead an acquittal, particularly given the surrounding circumstances, namely that the alleged conduct occurred over twenty years before trial and almost all of the documentation and records related to the investigation, including the videotape of the forensic interview, were lost or destroyed.

Motion and Ruling

Citing to State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015) and State v. Tumbleston, 376 S.C. 90, 654 S.E.2d 849 (Ct. App. 2007), Appellant moved pretrial to quash both indictments. Defense counsel emphasized the standard articulated in Baker and argued the span of time alleged in each indictment, August 1, 1996 to August 22, 1997, was "insufficient to give Mr. Jolly [Appellant] and the defense the ability to sufficiently address the accusations brought by the state," particularly given the circumstances of the case where the conduct was alleged to have occurred over twenty years ago. R. 3, l. 10 – 5, l. 9.

When confronted by the trial judge with our Supreme Court's holding in State v. Wade, 306 S.C. 79, 409 S.E.2d 780 (1991), in which the Court held the two year time period alleged in the indictment was not unconstitutionally vague or overbroad, defense counsel easily distinguished this case based on the unusual surrounding circumstances. Specifically, counsel again emphasized that "the prosecution of this case is over 20 years after the allegations." R. 5,

ll. 13-22. As a result, he explained that almost all of the documentation and records related to the investigation, which existed at the time the charges were brought, have been lost or destroyed. R. 5, l. 23 – 6, l. 6. Counsel argued that under Baker, the trial court must consider these surrounding circumstances. R. 6, ll. 2-6.

Specific to the lewd act indictment, counsel argued the indictment should be quashed because it failed to identify or describe any specific conduct or incidents of alleged misconduct thereby preventing Appellant from effectively combating the charge against him. Counsel maintained, "Essentially, in the lewd-act indictment, the state has repeated the statute with names thrown in. They have not given any detail as to a specific time/date, any details as to what occurred. And I don't believe that is sufficient under the case law." R. 7, l. 23 – 8, l. 7. Under Baker, counsel argued the indictment "must state the allegations of this particular incident." He concluded the lewd act indictment failed to comply with this requirement because it merely contained "the language of the statute with the name Samuel Jolly [Appellant] and [Minor] put in." R. 8, l. 11 – 9, l. 8.

The solicitor argued that "as far as the lewd act is concerned" merely "putting the time frame, along with a victim, along with the basic requirements [elements] of . . . that particular charge" is sufficient to put the defendant on notice of what he is called upon to answer. R. 9, ll. 17-22. He concluded that based on the indictments "along with all the discovery that's been put forward in this case, he's able to determine these are basically sexual touchings, along with the ultimate act, . . . which is the digital penetration." R. 9, l. 22 – 10, l. 2.

In response, defense counsel explained that in the limited discovery Appellant received there are numerous allegations of "different incidents" and the defense does not "know which of these incidents the state is pursuing as a lewd act." He argued, "And with all these different

accusations that potentially the state could be pursuing under this charge, having just the statute listed in the indictment does not provide the defense with sufficient notice to effectively answer those charges." R. 10, ll. 10-24. When the judge inquired, counsel asserted there were eleven separate allegations that could constitute lewd act contained in the lead investigator's notes from his observation of Minor's forensic interview and eighteen separate allegations in the notes from the forensic interviewer about the same interview. Counsel concluded that the general lewd act indictment "doesn't give us, as the defense, a direction or a target to know, okay, this is what we need to answer." R. 10, l. 25 – 11, l. 20.

Expanding on this argument at a later point during Appellant's motion in limine to exclude evidence of prior bad acts, which is argued *infra*, defense counsel asserted:

> **[T]he Court [trial judge] has talked about the realm of the indictment being what happened in Dorchester County. And I've been through the evidence that's been provided to me with a fine-tooth comb. And the reality for me – and maybe/maybe not for the state – is I don't know what those are.**
>
> The very first thing the handwritten notes from the therapist [forensic interviewer] at the LCC [Lowcountry Children's Center] is there is a difficulty with recall of dates from the victim. **So she [Minor] is inconsistent with where things happened and when they happened.** She tells one person that the first thing that happened is that Samuel Jolly [Appellant] showed his privates to her by lifting the sheet while they were in bed.
>
> She tells Detective Marshall – he writes in his notes that these problems have been happening since she was 2 years old. **So here I am, trying to read these notes, because the LCC video [videotape of the forensic interview] is gone, and trying to figure out, with some sort of specificity, some sort of ballpark figure, what are the dates that these allegations happened and where did they happen. I don't know.**
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> She goes on to tell the therapist that the first incident – she tells the therapist, however, that the first incident was in the computer home [room] of the – where the family lived before the marriage, where Samuel Jolly put his hands down her shorts. **I don't know where that is. I don't know when that is. I don't know if they're going to try to bring that in.**
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> So that was one of the reasons why I kept saying, What is the lewd act? If you want to tell me that the lewd act is the rubbing the teddy bear on genitalia and

> this and that and this, then I think we're getting somewhere. Because I don't – I can't tell from – and **part of the problem is that we've [the state has] lost the evidence.**
>
> And so **I can't piece together what the allegations are and what is going to become a prior bad act**. And that's one of the reasons I brought it pretrial, is because I don't want to be standing up like, you know, a jack-in-the-box every time she says something to say, "Objection. I think this is *Lyle*."
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> So – and that – and that was one of the reasons I wanted to get it cleared up before court and – and try to figure out – and – and also, we have to – if we're going to amend the indictment, we obviously have to do it before . . . the jury is sworn. So I just wanted to say that. I don't know. And **I don't know that the state knows when certain incidences happened and where they happened. Because the record that we have is not accurate.**

R. 27, l. 21 – 29, l. 17 (emphasis added).

The judge ultimately refused to quash the indictments. He ruled, "I'm not going to dismiss any of them based on the indictment." R. 14, l. 23 – 15, l. 2.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." State v. Baker, 411 S.C. 583, 588, 769 S.E.2d, 863 (2015) (quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)) (internal quotation marks omitted). It is "bound by the trial court's factual findings unless they are clearly erroneous." Id. (quoting Wilson, 345 S.C. at 6, 545 S.E.2d at 829) (internal quotation marks omitted).

Discussion

The trial judge erred by refusing to quash the indictments for first degree criminal sexual conduct with a minor and lewd act upon a child as vague and overbroad when the indictments, which covered over a year period, failed to state the offense with sufficient certainty and particularity to enable Appellant to know what he was called upon to answer and whether he could plead an acquittal, particularly given the surrounding circumstances, namely that the

alleged conduct occurred over twenty years before trial and almost all of the documentation and records related to the investigation, including the videotape of the forensic interview, were lost or destroyed.

"An indictment is a critical document in criminal defense preparation that is grounded in constitutional and statutory principles." State v. Baker, 411 S.C. 583, 588, 769 S.E.2d 860, 863 (2015) (citing S.C. Const. art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed . . .") and S.C. Code Ann. § 17-19-10 (2014) ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury . . .")).

As our Supreme Court explained in State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005):

> The indictment is the charge of the state against the defendant, **the pleading by which he is informed of the fact, and *the nature and scope* of the accusation**. When that indictment is presented, that accusation made, that pleading filed, the accused has two courses of procedure open to him. *He may question the propriety of the accusation, the manner in which it has been presented,* the source from which it proceeds, and have these matters promptly and properly determined; or, waiving them, he may put in issue the truth of the accusation, and demand the judgment of his peers on the merits of the charge. If he omits the former, and chooses the latter, he ought not, when defeated on the latter,—when found guilty of the crime charged,—to be permitted to go back to the former, and inquire as to the manner and means by which the charge was presented.

Id. at 102, 610 S.E.2d at 499-500 (internal citations omitted) (emphasis added).

If a defendant raises a timely challenge to the sufficiency of an indictment, the reviewing court must determine "whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be

charged." Id. at 102-103, 610 S.E.2d at 500. "In determining whether an indictment meets the sufficiency standard, the trial court must look at the indictment with a practical eye *in view of all the surrounding circumstances*." State v. Tumbleston, 376 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct. App. 2007) (emphasis added). In doing so, "one is to look at the 'surrounding circumstances' that existed pre-trial, in order to determine whether a given defendant has been 'prejudiced,' i.e., taken by surprise and hence unable to combat the charges against him." Baker, 411 S.C. at 589, 769 S.E.2d at 864 (quoting State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991)).

Gentry, "the seminal case in analyzing the sufficiency of an indictment," sets forth two requirements that are relevant and dispositive in the instant case. Baker, 411 S.C. 589, 769 S.E.2d at 864. The first being a defendant's right to question the propriety of the accusation and the manner in which it has been presented, which Appellant has done. The second is the Court's determination as to whether the offense is stated with sufficient certainty and particularity to enable the defendant to know what he is called upon to answer and whether he may plead an acquittal.

Examining the indictments in view of all the surrounding circumstances, there was no way for Appellant to know whether he could plead an acquittal given the vast time period covered by the indictments, and the vagueness of the lewd act indictment, which merely contained the elements of the offense and identified Minor as the complainant.

Both indictments covered a thirteen month period, which occurred more than twenty years before trial. This expansive time period, which would never pass constitutional muster in any other class of criminal case, rendered the indictments vague and overbroad because it lacked specificity as to when the alleged acts occurred. As our Supreme Court exclaimed in Baker: "Although we recognize the difficulty the prosecution faces in identifying exact dates in child

sexual abuse cases, the class of criminal case should not translate into an exception that operates to circumvent constitutional and statutory principles." Baker, 411 S.C. at 592, 769 S.E.2d at 865. Having to defend against events that allegedly occurred over a continuous thirteen month period prevented Appellant from effectively combating the charges against him.

To complicate matters further, due to the passage of time, almost all of the documentation and records related to the investigation were either lost or destroyed. Perhaps most significant was the loss of the videotape of Minor's forensic interview, which prevented Appellant from knowing what Minor alleged occurred and when Minor alleged it occurred. Moreover, the materials available, specifically Detective Marshall's notes from his observation of the forensic interview and the notes from the forensic interviewer herself, contained an extensive number of allegations that could constitute a lewd act. This undoubtedly prevented Appellant from determining what alleged conduct the state intended to prosecute and from preparing any sort of meaningful defense.

As our Supreme Court exclaimed in Baker, "It is axiomatic that an indictment must include more than the elements of the charged offense." Baker, 411 S.C. at 592, 769 S.E.2d at 865. However, that is exactly what the lewd act indictment encompassed: the elements contained in the statute and Minor's identity as the complainant. It failed to allege any specific conduct the state intended to prosecute as a lewd act. Again, this prevented Appellant from knowing what he was called upon to answer and whether he could plead an acquittal.

Because the indictments were unconstitutionally overbroad and vague, which significantly limited Appellant's ability to combat the charges against him, this Court should hold the trial judge erred by refusing to quash the indictments, reverse Appellant's convictions and sentence, and remand for a new trial.

2.

The trial judge abused his discretion by refusing to exclude evidence of prior bad acts pursuant to Rule 404(b), SCRE, and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), where the state, by procuring vague and overbroad indictments, was permitted to admit unlimited evidence of alleged sexual misconduct committed by Appellant over a thirteen month period without meeting any of the exceptions contained within Rule 404(b), SCRE, or proving the alleged conduct by clear and convincing evidence.

Motion and Ruling

Appellant moved pretrial to exclude evidence any prior bad acts pursuant to Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Defense counsel asserted that one of the reasons Appellant needed the indictments to be specific and particular is because the defense anticipated the state would "bring up an entire year of bad acts." R. 15, ll. 6-24. Counsel argued the state likely would present evidence that "not only did he [Appellant] have a sexual touching – and that's the lewd act – but he [also showed] pornographic material. He had sexual play with a teddy bear." R. 15, 21-24. She argued "by making this general indictment," the state "opened the door to all this prior bad act material that [the defense] can't keep out. And [all] they're [going] to do with it is show propensity: 'Oh, well, he showed her pornographic material.'" R. 18, ll. 7-18. Moreover, counsel asserted that by having a vague and overbroad indictment, the state would be permitted to introduce prior bad acts without satisfying the requirements of Rule 404(b), SCRE, and Lyle, specifically meeting one of the exceptions, such as common scheme or plan and identity, and proving the existence of the prior bad acts by clear and convincing evidence. R. 18, ll. 19-25.

In support of her argument, counsel cited to State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997), where our Supreme Court held prior accusations of child abuse, specifically allegations that Pierce had inflicted a "split lip and a swollen eye" on the child, were not admissible in Pierce's trial for homicide by child abuse because there was no clear and convincing proof that Pierce inflicted the injuries. R. 22, l. 11 – 24, l. 20; See Pierce, 326 S.C. at 178, 485 S.E.2d at 914. The Court further held that Pierce's "rough treatment" of the child in which she "jerked [the child] off the counter by his arm and put him in his stroller" was not admissible because the prior act was "not of such a close similarity to homicide by child abuse so as to overrule its prejudicial effect," which is required under the common scheme or plan exception of Rule 404(b) and Lyle. Pierce, 326 S.C. at 178, 485 S.E.2d at 914.

The solicitor argued that all of the sexual abuse allegations that occurred in Dorchester County were covered by the indictments and therefore not prior bad acts. He claimed only the misconduct that allegedly occurred in Charleston County before the family moved to Dorchester were prior bad acts because such conduct was not covered by the indictment. R. 24, l. 25 –26, l. 3.

In reply, as discussed above, defense counsel asserted:

> **[T]he Court [trial judge] has talked about the realm of the indictment being what happened in Dorchester County. And I've been through the evidence that's been provided to me with a fine-tooth comb. And the reality for me – and maybe/maybe not for the state – is I don't know what those are.**
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> The very first thing the handwritten notes from the therapist [forensic interviewer] at the LCC [Lowcountry Children's Center] is there is a difficulty with recall of dates from the victim. **So she [Minor] is inconsistent with where things happened and when they happened.** She tells one person that the first thing that happened is that Samuel Jolly [Appellant] showed his privates to her by lifting the sheet while they were in bed.
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these notes, because the LCC video [videotape of the forensic interview] is gone, and trying to figure out, with some sort of specificity, some sort of ballpark figure, what are the dates that these allegations happened and where did they happen. I don't know.

She goes on to tell the therapist that the first incident – she tells the therapist, however, that the first incident was in the computer home [room] of the – where the family lived before the marriage, where Samuel Jolly put his hands down her shorts. **I don't know where that is. I don't know when that is. I don't know if they're going to try to bring that in.**

So that was one of the reasons why I kept saying, What is the lewd act? If you want to tell me that the lewd act is the rubbing the teddy bear on genitalia and this and that and this, then I think we're getting somewhere. Because I don't – I can't tell from – and **part of the problem is that we've [the state has] lost the evidence.**

And so **I can't piece together what the allegations are and what is going to become a prior bad act**. And that's one of the reasons I brought it pretrial, is because I don't want to be standing up like, you know, a jack-in-the-box every time she says something to say, "Objection. I think this is *Lyle*."

So – and that – and that was one of the reasons I wanted to get it cleared up before court and – and try to figure out – and – and also, we have to – if we're going to amend the indictment, we obviously have to do it before . . . the jury is sworn. So I just wanted to say that. I don't know. And **I don't know that the state knows when certain incidences happened and where they happened. Because the record that we have is not accurate.**

R. 27, l. 21 – 29, l. 17 (emphasis added).

Before ruling, the trial judge expressed his concern. He told the solicitor that "when's going to be an issue." R. 29, ll. 18-21. The judge later asserted, "I'm concerned . . . if my ruling is that she [Minor] can testify as to the lewd acts that occurred on August 1, 1996 to August 22, 1997, *we got to be pretty sure of what those acts are*. She can't come in here and start saying, 'Well, you know, when I was 2,' because I'm assuming at 2 was before this." R. 31, ll. 13-20 (emphasis added).

The solicitor claimed, in preparation for trial, that Minor was able to articulate to the solicitor which "events occurred in that house in Dorchester County." R. 32, ll. 12-25. When

the trial judge asked whether the defense was "aware of which events" Minor alleged occurred in Dorchester County, defense counsel asserted, "No . . . *I have no clue*." R. 33, ll. 3-13 (emphasis added). Counsel later exclaimed, "I assume she's going to be saying things that I am completely unprepared for." R. 34, ll. 4-5.

The solicitor ultimately agreed the state would not present any evidence of the allegations that occurred in Charleston County, which would clearly fall outside of the indictments and constitute prior bad acts. He concluded, "The state . . . only intend[s] to go into the allegations that occurred in Dorchester County during the time listed in the indictment." R. 22, ll. 17-23.

Appellant continued to object. Noting that her motion to quash the indictments as vague and overbroad and her motion to exclude evidence of prior bad acts were intertwined, defense counsel argued, "I think there needs to be an incident date and an incident and then all the other acts [would constitute prior bad acts]. If they [the state] wanted to indict [Appellant] for all the other acts I think they probably should have indicted it. Otherwise, there is a reason why we have Lyle so we don't do things like this. So I would object to everything." R. 23, ll. 4-19.

The trial judge ultimately ruled Minor "can testify to any of the lewd acts that occurred from August 1st of 1996 . . . [t]o August 22nd of 1997," which is the period covered in the indictment. R. 23, l. 20 – 24, l. 5.

Standard of Review

"In criminal cases, the appellate court sits solely to review errors of law." State v. Cope, 405 S.C. 317, 334, 748 S.E.2d 194, 203 (2013) (citing State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). "The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." Cope, 405 S.C. at 334-335, 748 S.E.2d at 203 (quoting State v. Clasby, 385 S.C. 148, 154, 682

S.E.2d 892, 895 (2009)) (internal quotation marks omitted). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." Id. (citing State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008)).

Discussion

The trial judge abused his discretion by refusing to exclude evidence of prior bad acts pursuant to Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), where the state, by procuring vague and overbroad indictments, was permitted to admit unlimited evidence of alleged sexual misconduct committed by Appellant over a thirteen month period without meeting any of the exceptions contained within Rule 404(b), SCRE, or proving the alleged conduct by clear and convincing evidence.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013) (citing Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 415-416, 118 S.E. 803, 807 (1923)) (internal quotation marks omitted). "However, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Cope, 405 S.C. at 337, 748 S.E.2d at 204 (citing Rule 404(b), SCRE) (internal quotation marks omitted). "As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE." Cope, 405 S.C. at 337, 748 S.E.2d at 204 (citing State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009)). "If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within an exception in Rule 404(b)." Id.

"When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act

evidence to determine whether there is a close degree of similarity." State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277-278 (2009) (citing State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993)). "When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." Id. at 433, 683 S.E.2d at 278.

"If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." Cope, 405 S.C. at 337, 748 S.E.2d at 204 (citing State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008)) (internal quotation marks omitted). "Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." Cope, 405 S.C. at 337-338, 748 S.E.2d at 204-205 (citing Clasby, 385 S.C. at 155, 682 S.E.2d at 896).

Here, compounding his error in refusing to quash the indictments as unconstitutionally vague and overbroad, the trial judge abused his discretion by permitting the state to admit unlimited evidence of alleged sexual misconduct committed by Appellant over a thirteen month period without meeting any of the exceptions contained within Rule 404(b), or proving the alleged conduct by clear and convincing evidence. By failing to narrow the scope of the indictment by identifying specific incidents of alleged misconduct and the corresponding dates, the state easily circumvented the requirements of Rule 404(b). See Baker, 411 S.C. at 592, 769 S.E.2d at 865 ("Although we recognize the difficulty the prosecution faces in identifying exact dates in child sexual abuse cases, the class of criminal case should not translate into an exception that operates to circumvent constitutional and statutory principles."). Specifically, the state was erroneously allowed to introduce alleged sexual misconduct that occurred over a vast thirteen month period without satisfying the common scheme or plan exception articulated in Rule

404(b) or proving the alleged acts by clear and convincing evidence, neither of which it could have done if required. This allowed the state to liberally introduce propensity evidence that was extremely prejudicial to Appellant.

Under the standard announced in Wallace, the state could not satisfy the requirements of the common scheme and plan exception because any similarities between the various acts alleged by the state were greatly outweighed by the dissimilarities. See Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277-278. The acts alleged by Minor were separate and distinct. Moreover, the state could not prove the alleged conduct by clear and convincing evidence since the acts were mere accusations levied by Minor.

Accordingly, the trial judge abused his discretion by permitting the state to introduce evidence of prior bad acts without satisfying one of the exceptions of Rule 404(b) or proving the alleged conduct by clear and convincing evidence. Respectfully, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

3.

The trial judge abused his discretion by permitting a medical doctor to give opinion testimony, specifically that Minor allegedly had an interruption of the hymen, which required special knowledge, skill, experience, and training, without qualifying the witness as an expert in violation of Rules 701 and 702, SCRE.

Motion and Ruling

Appellant moved pretrial to exclude expert testimony from Dr. Elizabeth Baker, who physically examined Minor in September 1997, pursuant to Rule 705, SCRE, and the Confrontation Clause because the underlying facts, data, and evidence Baker relied on in reaching her conclusion were either lost or destroyed, which prevented the defense from effectively cross-examining the doctor and retaining its own expert to challenge Baker's opinion that Minor allegedly suffered an interruption of the hymen.

Before proffering Dr. Baker's testimony, the assistant solicitor admitted, "*I do think that she still needs to be qualified as an expert* in order to get into what - - her report. The 'annular transection at 6:30,' *I don't think a layman would have come up with that phrase*." R. 174, ll. 3-7 (emphasis added). Defense counsel likewise asserted, "[T]he fact that she [Baker] makes an opinion that there is an annular tear with transection at 6:30 *is an expert opinion*." R. 175, ll. 9-11 (emphasis added).

Even the trial judge initially agreed that Dr. Baker's opinion that Minor's hymen had a transection was an expert opinion:

> Mr. Spears [Assistant Solicitor]: The crux of our questioning here - - the point is going to be did she [Dr. Baker] see a tear on the hymen, however she phrases that . . . I'm not going to ask her to opine as to how it might have happened. I'm just - - *as a doctor*, did she see this during her examination? And that's it.
>
> Ms. Williams [Defense Counsel]: That's an opinion by a doctor.

The Court: *It is an opinion by a doctor.*

R. 176, ll. 2-12 (emphasis added).

The state ultimately proffered Dr. Baker's testimony. Baker testified *in camera* about her educational background and experience. She earned a Bachelor of Science degree in biology from the University of South Carolina in 1982 and a medical degree from the University of South Carolina School of Medicine in 1986. She then completed a one year rotating internship at Greenville Memorial Hospital. After her internship, she did a two year pediatric residency at Richland Memorial Hospital. R. 179, ll. 5-16.

In 1997, Baker was employed by the Children's Medical Assessment Center where she performed forensic medical examinations for children where there were allegations of physical or sexual abuse. After obtaining some background information, Baker would perform a general examination and then conduct a detailed examination of the child's skin, oral cavity, and genital and anal areas. R. 180, ll. 7-22. During these examinations, Dr. Baker would take photographs and video to support her findings. She would later record her visual findings in a written report. R. 180, l. 13 – 181, l. 11.

Dr. Baker testified that she examined Minor in 1997. R. 181, ll. 12-14. During her examination of Minor, she took photographs and a video to document and support her findings. R. 184, l. 19 – 185, l. 5. She admitted she would have relied on the photographs, and possibly the video, when completing the written report of her findings. R. 186, ll. 16-21. However, she said she would have formulated her opinion before completing the physical examination. Baker asserted, "[T]he photographs were typically used to make sure that it was documented appropriately in case somebody wanted a second opinion." R. 187, ll. 9-20.

Dr. Baker also obtained basic background information from Minor's mother. She said the information from the mother was primarily for "timing" purposes because if the alleged event had occurred with seventy two hours of the exam, she "would have done a collection kit." R. 189, l. 21 – 190, l. 12. Baker claimed she did not rely on any other sources of information, including the videotape of Minor's forensic interview. R. 183, l. 21 – 184, l. 1.

In addition to completing and submitting the condensed report required by the State Law Enforcement Division (SLED), Dr. Baker developed and completed "a much more detailed report" containing her findings. This more detailed report was destroyed "a long time ago." Consequently, Dr. Baker, who admitted she had no independent recollection of the examination or her findings, relied solely on the report required by SLED, which was still available, to testify during Appellant's trial. R. 184, l. 10 – 185, l. 16; R. 188, l. 10 – 189, l. 15.

After Dr. Baker's *in camera* testimony, the following colloquy occurred between defense counsel and the trial judge:

> Mr. Kornegay: I would just point Your Honor to the second argument, Rule 705, South Carolina Rules of Evidence . . . In discussing this rule - - so the reason Rule 705 exists is because of Rule 703 that allows experts to give expert opinion testimony.
>
> The Court: If . . . she gives an opinion.
>
> Mr. Kornegay: Correct.
>
> The Court: Okay. And *your argument is that her visual inspection, what she sees, is an opinion.*
>
> Mr. Kornegay: Well, Your Honor, I - - *I think there's evidence of that by the fact that she gathers evidence and information to allow other people to examine that and they may come to a different diagnosis.*
>
> The Court: I understand that argument.
>
> Mr. Kornegay: So I - - so she testified that she took video as well as photographs during this examination for the purpose of preserving her examination so that

people could come behind her, such as any experts hired by the Defense, and either confirm or deny her diagnosis.

The Court: Right. Now, . . . we're not talking about a diagnosis. We're talking about just her visualization of what she saw.

Mr. Kornegay: Sure. Her determination - -

The Court: *She's not making an opinion as to what caused it.*

Mr. Kornegay: Right. *Not - - not as to causation - - but that it is annular with transection at 6:30.*

The Court: Right.

Mr. Kornegay: Right. I'm only . . . referring to that . . . phrase - - in this argument. She did not testify as to the diagnostic of blunt force trauma, and - - and I understand that. So my argument is focusing on that annular with transection at 6:30. However, Judge, I still think it implicates Rule 705. The fact that we do not have those photographs, we do not have that video. She said she was not sure if a longer report was taken after that examination because of the time line and when that longer report was developed.

The Court: Right

Mr. Kornegay: In quoting the advisory committee notes to Rule 705, the Tenth Circuit wrote that (as read): "Advanced knowledge through pre-trial discovery of an expert witness basis for his opinion is essential for effective cross-examination." And I would argue that not having the video, not having the photographs, not being able to consult another witness and have them look over that discovery should prevent Dr. - - Dr. Baker from testifying to that annular with transection at 6:30.

R. 192, l. 21 – 195, l. 5 (emphasis added).

The assistant solicitor claimed in reply that Dr. Baker testified *in camera* "in her capacity as a doctor" and "did not opine as an expert to anything." He maintained Baker testified "as a lay witness what she specifically saw herself during this examination." R. 195, ll. 12-16. Notably this argument was in direct conflict with the solicitor's earlier admission that, "*I do think that she still needs to be qualified as an expert* in order to get

into what - - her report. The 'annular transection at 6:30,' *I don't think a layman would have come up with that phrase.*" R. 174, ll. 3-7

The solicitor then asserted:

> What's been referenced by the Defense here is in regards to rebutting expert testimony. *We're not trying to elicit expert testimony, we're not trying to get her to say that she thinks that this interference [transection] came from anywhere. We're simply asking her what she saw on this date.*
>
> Now, the fact that she was a doctor means that she was the person doing this exam, and obviously, I would ask her . . . her history, how she became a doctor, and things like that; but . . . *I'm not planning on qualifying her as an expert to get her opinion on how this interference came from. I'm just asking her what she saw at this specific time.*

R. 195, l. 17 – 196, l. 3 (emphasis added).

Defense counsel was adamant that the state could not call Dr. Baker to testify as a lay witness. Citing to Rule 701, SCRE, counsel argued that Dr. Baker's "special knowledge, skill, experience, and training" were "essential to her coming to this diagnosis" that Minor had a transection of the hymen. R. 196, ll. 5-22. He later asserted that without "the same knowledge as Dr. Baker, I don't believe any of us would know what we were looking at, how to diagnose it. She testified that she used a colposcope. I don't know what that is. *I just don't believe that - - for purposes of this testimony - - that she would be a lay witness.*" R. 197, ll. 14-22 (emphasis added).

Acknowledging the difference between expert testimony and lay testimony, the trial judge asserted "an expert is . . . allowed to testify as to opinion" but a "lay witness may only testify as to matters within [her] personal knowledge." R. 199, l. 25 – 200, l. 4. He concluded, "In this case, the doctor's testifying as to her personal knowledge of having performed a physical and visual examination of the victim; and in the physical examination, the doctor reports

findings. *These are not opinions, but observations* ***based on education and experience***; and I feel like the doctor is available for cross-examination to ensure reliability and credibility of the examination." R. 200, ll. 5-12 (emphasis added).

The judge later continued, "The purpose behind qualifying someone as an expert is to allow the expert to offer an opinion. In this case, ***the doctor is not allowed to offer an opinion in any matter*** *and now allowed to offer an opinion as to causation. However, to report on the physical examination of the minor, it does require the* ***expertise*** *of a doctor* to report on the physical findings that she made, and I am going to allow her testify just as she did." R. 200, ll. 16-23 (emphasis added).

Testimony Before the Jury

Dr. Baker reviewed her educational background and experience before the jury. R. 204, ll. 5-15. She then explained that, in September 1997, she was employed at the Children's Medical Assessment Center, where she performed forensic medical examinations for children when there were allegations or concerns of physical or sexual abuse. R. 204, ll. 3-21. During these examinations, Baker would obtain background information from the child and from other sources, perform a general physical examination, and then conduct a detailed examination of the child's skin and oral, genital, and anal areas. R. 204, l. 22 – 205, l. 3.

In 1997, Dr. Baker physically examined Minor. She testified that Minor's general examination was "normal" and that there were "no skin findings . . . documented." R. 205, ll. 4-13. As far as her detailed examination of Minor's genital and anal area, Baker opined:

> The larger outer lips, the labia majora and labia minora, the smaller inner lips, the vulva were all normal . . . Her posterior fourchette, which is where the lips come down towards the bottom, were normal. Her - - the area between her genital area and her anal area was normal and her anus was normal.

> **Her hymen - - which is a little piece of skin that surrounds the entrance to the vagina, it had an interruption at 6:30** which was towards the back.

R. 205, l. 21 – 206, l. 5 (emphasis added).

Baker later drew a diagram of her findings for the jury to help the jurors better understand her findings. R. 206, l. 6 – 207, l. 7. She later clarified that an "interruption" meant the skin was not "continuous and smooth across." R. 207, ll. 3-7. In accordance with the judge's ruling, Baker did not testify as to what may have caused the interruption.

Dr. Baker admitted on cross-examination that she had no independent recollection of her examination of Minor and was relying solely on records provided to her by the state to testify as to her findings. R. 208, ll. 16-19. She further explained that during her examination, she would have taken photographs and a videotape to support her findings and to allow other doctors or medical professionals to examine the evidence and formulate their own opinion and conclusions. However, these photographs and videotape "were destroyed a long time ago." R. 207, l. 25 – 209, l. 3.

Standard of Review

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" State v. Westmoreland, 421 S.C. 410, 418-419, 807 S.E.2d 701, 706 (Ct. App. 2017) (quoting State v. Commander, 396 S.C. 254, 262-263, 721 S.E.2d 413, 417 (2011)); See State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."

Westmoreland, 421 S.C. at 419, 807 S.E.2d at 706 (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).

Discussion

The trial judge abused his discretion by permitting Dr. Baker to give opinion testimony, specifically that Minor allegedly had an interruption of the hymen, without qualifying her as an expert since such testimony indisputably required special knowledge, skill, experience, and training.

The admission of expert testimony is governed by Rule 702, SCRE, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge. Stated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions." Id. at 445-446, 699 S.E.2d at 175 (citing Rule 703, SCRE). "On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." Id. at

446, 699 S.E.2d at 175 (citing Rules 602 and 701, SCRE). "For these reasons, expert testimony receives additional scrutiny relative to other evidentiary decisions." Id.

In Watson, our Supreme Court specified the following three prong test for expert testimony:

> [I]n executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.

Id. (internal citations omitted).

"Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability. Thus, only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate." Id. at 446-447, 699 S.E.2d at 175.

Rule 701, SCRE, states, "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) *do not require special knowledge, skill, experience or training*." (emphasis added).

It was a manifest abuse of discretion for the trial judge to admit Dr. Baker's opinion, based on her physical examination, that Minor had a transection of the hymen without qualifying Baker as expert since this opinion without a doubt required special knowledge, skill, experience, and training. See Rule 701(c), SCRE. The judge acknowledged Dr. Baker's findings were "observations *based on education and experience*" and that "to report on the physical examination of the minor, it does require the *expertise* of a doctor," yet he permitted Baker to testify as to her findings without qualifying her as an expert. R. 200, ll. 5-23 (emphasis added). This was clearly error in violation of Rule 701, SCRE.

The trial judge's error in permitting Dr. Baker to testify as to her opinion that Minor had a transection on her hymen without qualifying her as an expert was highly prejudicial to Appellant since Baker's testimony was the only physical evidence of sexual abuse presented by the state.

Respectfully, this Court should hold the trial judge abused his discretion by permitting Dr. Baker to testify as to her opinion, which required special knowledge, skill, experience, and training, without qualifying her as an expert, reverse Appellant's convictions and sentence, and remand for a new trial.

4.

The trial judge abused his discretion by refusing to exclude expert testimony from Dr. Elizabeth Baker in violation of Appellant's constitutional rights under the Confrontation Clause and pursuant to Rule 705, SCRE, where the underlying facts, data, and evidence relied upon by the witness had been lost or destroyed, thereby preventing Appellant from effectively cross-examining the witness and retaining his own expert to challenge the witness' opinion testimony concerning her physical examination of the minor child.

Motion and Ruling

Appellant moved pretrial to exclude expert testimony from Dr. Elizabeth Baker, who physically examined Minor in September 1997, pursuant to Rule 705, SCRE, and the Confrontation Clause because the underlying facts, data, and evidence Baker relied on in reaching her conclusion were either lost or destroyed, which prevented the defense from effectively cross-examining the doctor and retaining its own expert to challenge Baker's opinion that Minor allegedly had an interruption or transection of the hymen. Appellant filed a written memorandum in support of his motion, which was marked as Court's Exhibit No. 3. R. 305.

In response to Appellant's motion, the state proffered Dr. Baker's testimony. Baker testified *in camera* about her educational background and experience. She earned a Bachelor of Science degree in biology from the University of South Carolina in 1982 and a medical degree from the University of South Carolina School of Medicine in 1986. She then completed a one year rotating internship at Greenville Memorial Hospital. After her internship, she did a two year pediatric residency at Richland Memorial Hospital. R. 179, ll. 5-16.

In 1997, Baker was employed by the Children's Medical Assessment Center where she performed forensic medical examinations for children where there were allegations of physical

or sexual abuse. After obtaining some background information, Baker would perform a general examination and then conduct a detailed examination of the child's skin, oral cavity, and genital and anal areas. R. 180, ll. 7-22. During these examinations, Dr. Baker would take photographs and video to support her findings. She would later record her visual findings in a written report. R. 180, l. 13 – 181, l. 11.

Dr. Baker testified that she examined Minor in 1997. R. 181, ll. 12-14. During her examination of Minor, she took photographs and a video to document and support her findings. R. 184, l. 19 – 185, l. 5. She admitted she would have relied on the photographs, and possibly the video, when completing the written report of her findings. R. 186, ll. 16-21. However, she would have formulated her opinion before completing the physical examination. Baker asserted, "[T]he photographs were typically used to make sure that it was documented appropriately in case somebody wanted a second opinion." R. 187, ll. 9-20.

Dr. Baker also obtained basic background information from Minor's mother. She maintained that the information from the mother was primarily for "timing" purposes because if the alleged event had occurred with seventy two hours of the exam, she "would have done a collection kit." R. 189, l. 21 – 190, l. 12. Baker claimed she did not rely on any other sources of information, including the videotape of Minor's forensic interview.

In addition to completing and submitting the condensed report required by the State Law Enforcement Division (SLED), Dr. Baker developed and completed "a much more detailed report" containing her findings. This more detailed report was destroyed "a long time ago." Consequently, Dr. Baker, who admitted she had no independent recollection of the examination or her findings, relied solely on the report required by SLED, which was still available, to testify during Appellant's trial. R. 184, l. 10 – 185, l. 16; R. 188, l. 10 – 189, l. 15.

After Dr. Baker's *in camera* testimony, the following colloquy occurred between defense counsel and the trial judge:

> Mr. Kornegay: I would just point Your Honor to the second argument, Rule 705, South Carolina Rules of Evidence . . . In discussing this rule - - so the reason Rule 705 exists is because of Rule 703 that allows experts to give expert opinion testimony.
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> The Court: If . . . she gives an opinion.
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> Mr. Kornegay: Correct.
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> The Court: Okay. And your argument is that her visual inspection, what she sees, is an opinion.
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> Mr. Kornegay: Well, Your Honor, I - - I think there's evidence of that by the fact that she gathers evidence and information to allow other people to examine that and they may come to a different diagnosis.
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> The Court: I understand that argument.
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> Mr. Kornegay: So I - - *so she testified that she took video as well as photographs during this examination for the purpose of preserving her examination so that people could come behind her, such as any experts hired by the Defense, and either confirm or deny her diagnosis.*
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> The Court: Right. Now, right now she's not make - - we're not talking about a diagnosis. We're talking about just her visualization of what she saw.
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> Mr. Kornegay: Sure. Her determination - -
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> The Court: She's not making an opinion as to what caused it.
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> Mr. Kornegay: Right. Not - - not as to causation - - but that it is annular with transection at 6:30.
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> The Court: Right.
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> Mr. Kornegay: Right. I'm only . . . referring to that . . . phrase - - in this argument. She did not testify as to the diagnostic of blunt force trauma, and - - and I understand that. So my argument is focusing on that annular with transection at 6:30. However, Judge, *I still think it implicates Rule 705. The fact that we do not have those photographs, we do not have that video.* She said she was not sure if a longer report was taken after that examination because of the time line and when that longer report was developed.

The Court: Right

Mr. Kornegay: In quoting the advisory committee notes to Rule 705, the Tenth Circuit wrote that (as read): "*Advanced knowledge through pre-trial discovery of an expert witness basis for his opinion is essential for effective cross-examination.*" *And I would argue that not having the video, not having the photographs, not being able to consult another witness and have them look over that discovery should prevent Dr. - - Dr. Baker from testifying to that annular with transection at 6:30.*

R. 192, l. 21 – 195, l. 5 (emphasis added).

The assistant solicitor claimed in reply that Dr. Baker testified *in camera* "in her capacity as a doctor" and "did not opine as an expert to anything." He maintained Baker testified "as a lay witness what she specifically saw herself during this examination." R. 195, ll. 12-16. He then asserted:

> What's been referenced by the Defense here is in regards to rebutting expert testimony. We're not trying to elicit expert testimony, we're not trying to get her to say that she thinks that this interference [transection] came from anywhere. We're simply asking her what she saw on this date.
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> Now, the fact that she was a doctor means that she was the person doing this exam, and obviously, I would ask her . . . her history, how she became a doctor, and things like that; but . . . I'm not planning on qualifying her as an expert to get her opinion on how this interference came from. I'm just asking her what she saw at this specific time.

R. 195, l. 17 – 196, l. 3.

Acknowledging the difference between expert testimony and lay testimony, the trial judge asserted "an expert is . . . allowed to testify as to opinion" but a "lay witness may only testify as to matters within [her] personal knowledge." R. 199, l. 25 – 200, l. 4. He concluded, "In this case, the doctor's testifying as to her personal knowledge of having performed a physical and visual examination of the victim; and in the physical examination, the doctor reports findings. These are not opinions, but observations based on education and experience; and I feel

like the doctor is available for cross-examination to ensure reliability and credibility of the examination." R. 200, ll. 5-12 (emphasis added).

The judge later continued, "The purpose behind qualifying someone as an expert is to allow the expert to offer an opinion. In this case, the doctor is not allowed to offer an opinion in any matter and now allowed to offer an opinion as to causation. However, to report on the physical examination of the minor, it does require the expertise of a doctor to report on the physical findings that she made, and I am going to allow her testify just as she did." R. 200, ll. 16-23 (emphasis added).

Because the trial judge concluded Baker did not need to be qualified as an expert to testify about her opinion that Minor had a transection to the hymen, he did not specifically address Appellant's argument that her expert testimony should be excluded pursuant to Rule 705, SCRE.

Testimony Before the Jury

Dr. Baker reviewed her educational background and experience before the jury. R. 204, ll. 5-15. She then explained that, in September 1997, she was employed at the Children's Medical Assessment Center, where she performed forensic medical examinations for children when there were allegations or concerns of physical or sexual abuse. R. 204, ll. 3-21. During these examinations, Baker would obtain background information from the child and from other sources, perform a general physical examination, and then conduct a detailed examination of the child's skin and oral, genital, and anal areas. R. 204, l. 22 – 205, l. 3.

In 1997, Dr. Baker physically examined Minor. She testified that Minor's general examination was "normal" and that there were "no skin findings . . . documented." R. 205, ll. 4-13. As far as her detailed examination of Minor's genital and anal area, Baker opined:

> The larger outer lips, the labia majora and labia minora, the smaller inner lips, the vulva were all normal . . . Her posterior fourchette, which is where the lips come down towards the bottom, were normal. Her - - the area between her genital area and her anal area was normal and her anus was normal.
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> **Her hymen - - which is a little piece of skin that surrounds the entrance to the vagina, it had an interruption at 6:30** which was towards the back.

R. 205, l. 21 – 206, l. 5 (emphasis added).

Baker later drew a diagram of her findings for the jury to help the jurors better understand her findings. R. 206, l. 6 – 207, l. 7. She later clarified that an "interruption" meant the skin was not "continuous and smooth across." R. 207, ll. 3-7. In accordance with the judge's ruling, Baker did not testify as to what may have caused the interruption.

Dr. Baker admitted on cross-examination that she had no independent recollection of her examination of Minor and was relying solely on records provided to her by the state to testify as to her findings. R. 208, ll. 16-19. She further explained that during her examination, she would have taken photographs and a videotape to support her findings and to allow other doctors or medical professionals to examine the evidence and formulate their own opinion and conclusions. However, these photographs and videotape "were destroyed a long time ago." R. 207, l. 25 – 209, l. 3.

Standard of Review

"The admission of evidence is within the trial judge's discretion and will not be disturbed on appeal absent abuse of that discretion." State v. Slocumb, 336 S.C. 619, 626-627, 521 S.E.2d 507, 511 (Ct. App. 1999) (citing State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 (1995)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Westmoreland, 421 S.C. at 419, 807 S.E.2d at 706 (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).

Discussion

The trial judge abused his discretion by refusing to exclude expert testimony from Dr. Baker in violation of Appellant's constitutional rights under the Confrontation Clause and pursuant to Rule 705, SCRE, where the underlying facts, data, and evidence relied upon by the witness had been lost or destroyed thereby preventing Appellant from effectively cross-examining Baker and retaining his own expert to challenge Baker's opinion concerning her physical examination of Minor, namely that she had an interruption on her hymen.

The admission of expert testimony is governed by Rule 702, SCRE, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge. Stated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions." Id. at 445-446, 699 S.E.2d at 175 (citing Rule 703, SCRE). "On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." Id. at

446, 699 S.E.2d at 175 (citing Rules 602 and 701, SCRE). "For these reasons, expert testimony receives additional scrutiny relative to other evidentiary decisions." Id.

In Watson, our Supreme Court specified the following three prong test for expert testimony:

> [I]n executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.

Id. (internal citations omitted).

"Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability. Thus, only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate." Id. at 446-447, 699 S.E.2d at 175.

The Confrontation Clause

The Confrontation Clause of the Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Our state constitution likewise protects an accused's right to confront the witnesses against him. See S.C. Const. art. I, § 14 ("Any person charged with an offense shall enjoy the right . . . to be confronted with the witnesses against him."). "This right

to confront and cross-examine witnesses 'is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial.'" State v. Stokes, 381 S.C. 390, 399, 673 S.E.2d 434, 438 (2009) (quoting State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987)). [T]he decisions of [the United States Supreme] Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases." Pointer v. Texas, 380 U.S. 400, 404 (1965).

Essential to this right is having access to the evidence relied upon to reach conclusions and opinions concerning a defendant's guilt or innocence. Without access to the underlying facts, data, and evidence relied upon by an expert, the accused is unable to effectively confront and challenge the witness' opinion and ultimately the charges against him.

Here, because the documents and records related to the investigation were either lost or destroyed, Appellant was never afforded the opportunity to examine or investigate evidence Dr. Baker relied upon in reaching her opinion that Minor had an interruption on her hymen. Specifically, the photographs and video Dr. Baker took during her physical examination of Minor and her detailed report containing her findings and conclusions were lost or destroyed. This evidence was unavailable for Appellant to investigate or examine and its destruction prevented Appellant from retaining his own expert to challenge Dr. Baker's findings. Presenting an expert witness whose opinion was based upon facts, data, and evidence unavailable to the defense violated Appellant's right to confront and cross-examine the witnesses against him. Consequently, the trial judge abused his discretion by admitting Dr. Baker's expert testimony over Appellant's objection.

Rule 705, SCRE

Rule 705, SCRE states, "The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. **The expert may in any event be required to disclose the underlying facts and data on cross-examination**." (emphasis added).

This Court has recognized that "Rule 705 is the cross-examiner's sword." State v. Slocumb, 336 S.C. 619, 631, 521 S.E.2d 507, 513 (Ct. App. 1999) (quoting United States v. A & S Council Oil Co., 947 F.2d 1128, 1135 (4th Cir.1991). As stated in the Advisory Committee Note to Rule 705, "advance knowledge through pretrial discovery of an expert witness's basis for his opinion is essential for effective cross-examination." Smith v. Ford Motor Co., 626 F.2d 784, 793 (10th Cir. 1980) (internal citation omitted).

In this case, the information Dr. Baker relied upon in reaching her opinion that Minor had an interruption or transection of the hymen was lost or destroyed and therefore unavailable to the defense. This prevented Appellant from effectively exploring any facts or assumptions Baker may have had at the time she developed her opinion. It further made any challenge to her expert opinion through cross-examination impossible and prevented Appellant from retaining his own expert to challenge Dr. Baker's findings. Consequently, the trial judge abused his discretion by allowing Dr. Baker to testify as to her expert opinion in violation of Rule 705, SCRE.

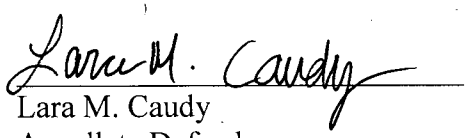
Dr. Baker's testimony was highly prejudicial to Appellant because it was the only physical evidence presented by the state that Minor had been sexually abused, particularly where Appellant testified in his own defense and vehemently denied improperly touching Minor.

Respectfully, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully Submitted,



Lara M. Caudy
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ATTORNEY FOR APPELLANT

This 9th day of October, 2018.

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."

October 9, 2018

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