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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM PICKENS COUNTY
Court of General Sessions
Perry H. Gravely, Circuit Court Judge

Court of Appeals Case No.: 2017-001867

The State,. . . . . Respondent,

v.

Joseph Campbell Williams, II,. . . . . Petitioner.

PETITION FOR WRIT OF CERTIORARI

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PETITION

Pursuant to Rule 242, SCACR, the Petitioner moves this Court for a writ of certiorari to review the decision of the Court of Appeals in this case.

The Petitioner was convicted of the offense of criminal sexual conduct with a minor in the first degree and criminal sexual conduct with a minor in the second degree. Petitioner received a combined sentence of forty years. On appeal the Petitioner argued that the trial court committed error by excluding evidence offered to prove a pattern of prior false accusations made by the prosecutrix against other individuals. The excluded evidence was offered for two reasons. First, it bore directly on the credibility of the prosecutrix. Second, it was essential to understanding the Petitioner's testimony as to why he never allowed the prosecutrix to be alone with him. Exclusion of the evidence prevented the Petitioner from effectively cross-examining the prosecutrix. It also limited the Petitioner's ability to present a full defense by preventing him from fully explaining the reason he intentionally avoided being alone with the prosecutrix.

Statement of the Issues

1. Did the court commit reversible error in limiting evidence of prior false accusations by complainant against persons other than the defendant?
2. Did the court commit reversible error in excluding evidence of prior false accusations so as prove the Petitioner's state of mind and thereby explaining his actions?

Statement of the Case

This was a delayed reporting case. The Petitioner, mother and prosecutrix resided together from the time the prosecutrix was four to five years old. R. p. 88-89. The prosecutrix had a

history of physically fighting with her mother. R. p. 443. When the prosecutrix was 17 she got wo angry with her mother that she posted on Facebook "world war 3 is about to begin and everybody gonna wish they never f***ed with me ! that aint a threat, that's a promise!". 154, l. 2-12. Just hours after posting the promise to do something cataclysmic the prosecutrix made a complaint to the Sheriff's Office alleging that the Petitioner had sexually abused her when she was six or seven years old. R. p. 63; 108.

The prosecutrix had been in mental health treatment since 2003. R. p. 201-237. The defense presented evidence from mental health records so show that the prosecutrix had consistently denied any sexual abuse. R. p. 149-153; 206-216; 226-227. As an essential part of the defense the Petitioner sought to establish a prior pattern of false sexual abuse allegations by the prosecutrix. R. p. 40. The false accusations were apparently one of the reasons that the prosecutrix was referred for mental health treatment. R. p. 74-76. The state objected repeatedly to the defense's attempts to establish the history of false allegations arguing that such testimony should be excluded under the rape shield statute. R.p. 77. The defense was clear in its intent to elicit evidence of the false allegations rather than any actual sexual behavior. R. p. 74-76. The court sustained the State's objection and excluded evidence of the prior false allegations. R. p. 77-83.

During the State's case-in-chief the prosecution offered expert testimony of Angie Farmer who was one of the prosecutrix's mental health providers. R. p. 201-206. Farmer had the prosecutrix's mental health records to refer to during her testimony. R. p. 206-208. The solicitor elicited testimony from Farmer about the prosecutrix's mental/behavioral health treatment. R. p. 208. Farmer testified that the prosecutrix made a false report of abuse by her mom. R. p. 215-216.

Farmer went on to also identify in the records where the prosecutrix also made allegations of sexual abuse against two people other than the defendant. R. p. 215-216. Unlike the abuse claim involving the victim's mother, Farmer did not volunteer that the two allegations of sexual abuse made against other people were also false.[1] On cross-examination the defense attempted to elicit testimony from Farmer that the two prior allegations of sexual assault were also found to be false. This time the state objected on the grounds of hearsay. R. p. 229. The court sustained the objection without stating a basis. R. p. 229.

The defense later attempted to offer testimony of the prior false allegations through the Petitioner's brother. When the brother attempted to testify that victim "had a troubled past and had already made false accusations..." the state objected. R. p. 297. The court again sustained without explanation. R. p. 297. Then the defense attempted to elicit testimony from the Petitioner's brother pertaining to the Petitioner efforts to never be alone with the prosecutrix (presumably due to her prior false allegations against other men): "did your brother, what was he telling you about his relationship with..." R. p. 298. The state objected and the court again sustained as hearsay finding that the Petitioner was not a party to the case. R. p. 298.

When the Petitioner took the stand he testified that he would never be alone with the prosecutrix over the whole time he was married to the prosecutrix's mother. R. p. 303. When the Petitioner attempted to explain why, the state objected and cut him off:

> Q. Tell the jury why you would never leave yourself alone with this girl?
> A. Because she'd made accusations against --.

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[1]Presumably, based on the court's earlier ruling, Farmer had been instructed not to disclose the details (falsity) of the victim's allegations of prior sexual abuse by persons other than the defendant.

R. p. 303.

At that point the jury was sent out and argument ensued. The defense argued that the testimony was not offered for truth of the matter asserted. R. p. 303. Specifically the defense argued that the testimony proved the Petitioner's motive and intent as to why he wouldn't be alone with the prosecutrix. R. p. 303. The state maintained that the testimony violated the rape shield statute. 304-308.

The defense requested to proffer the Applicant's testimony. R. p. 303-307. When the defense attempted to proffer the Petitioner's testimony the court immediately cut the Petitioner off:

The Court:	I'll let you proffer.
Defense counsel:	Mr. Williams, I am going to ask you some question on a proffer. Did you ever leave yourself alone with [the prosecutrix]?
Defendant:	No, sir, I did not.
Defense counsel:	Because I was fearful of her because of past --
The Court:	Again, he can say "I was fearful of being accused of anything' but I don't think that he can say because of her previous allegations.

R. p. 307, l. 6-18.

After successfully preventing the testimony explaining that the Petitioner didn't want to be alone with the prosecutrix because she had made prior false allegations of sexual abuse against other people, the solicitor went on to argue to the jury how she didn't believe the defense witnesses. R. p. 351. That the defense witness testimony was absurd to her [the prosecutor]. R. p. 351. The solicitor went on to say "How crazy is this?..... went to such great lengths... just to make

sure that her daughters never had a chance to be alone with him. This is preposterous." R. p. 362. The solicitor went on attacking the defense testimony that the Petitioner avoided ever being alone with the prosecutrix: “How crazy is this? How illogical is this, that they want you to believe that they went to great lengths, to avoid sleep, just to make sure that her daughters never had a chance to be alone with him? This is preposterous.” R. p. 362, l. 18-23. Throughout closing argument the state continued to take an unfair advantage of having blocked the Petitioner’s ability to explain the basis for his avoidance of ever being alone with the prosecutrix:

> Now, Mr. Dover said that the defendant would have been a fool to have put himself in that position. The defendant testified that 20 from the beginning he said that he wasn’t left alone with them. By putting -- by saying, you know, that he would have been a fool to have put himself in that position, that’s like a slap in the face to all the other step-dads out there. That is saying that no step-dad should ever be alone with a step-child because that’s an inherent risk. That is saying that when moms and dads get married that have prior children, that the family shouldn’t be blended. That you should try to have a good relationship. That you should push your child away. No. That makes no sense. And it makes no sense that mom would have gone to great lengths to keep the kids away from him like that.

R. p. 386, l. 17-397, l. 10.

Discussion of the Law

In a prosecution for criminal sexual conduct or assault with intent to commit criminal sexual conduct, the admissibility of evidence of the victim's sexual conduct is controlled by S.C. Code Ann. 16-3-659.1 (1985). Unlike the federal rule which contains the standards and procedures governing the admissibility of such evidence, this rule merely references the statute. Note to Rule 412. Rule 412, SCRE, provides: “In prosecutions for criminal sexual conduct or assault with intent to commit criminal sexual conduct, the admissibility of evidence concerning the victim's sexual conduct is subject to the limitations contained in S.C. Code Ann. 16-3-659.1

(1985)." South Carolina's Rape Shield statute provides in pertinent part: "Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656;..." S.C. Code Ann. § 16-3-659.1. The testimony that the court excluded was not evidence of the victim's sexual conduct, but rather evidence of the prosecutrix's prior false allegations. The former is barred by Rule 412, the latter is not.

Rule 412 is designed only to preclude evidence of a complaining witness's prior sexual conduct. Evidence of prior false accusations of rape made by a complaining witness does not constitute "prior sexual conduct" for rape shield purposes. In presenting such evidence, a defendant is not probing the complaining witness's sexual history. Rather, a defendant seeks to prove for impeachment purposes that the complaining witness has previously made false accusations of rape. Viewed in this light, such evidence is more properly understood as verbal conduct, not sexual conduct. To the extent a defendant offers evidence of prior false accusations of rape to impeach the credibility of the witness, its admission does not run afoul of the Rape Shield Rule. *See* State v. Walton, 715 N.E.2d 824, 826–27 (Ind. 1999).

Other jurisdictions are reasonably consistent in allowing evidence of prior false accusations for impeachment purposes.[2] Maine, Maryland, Missouri, New Mexico, Ohio, Tennessee, Vermont, and Wisconsin follow the federal rule and allow cross-examination concerning a prior false accusation that is probative of the witness's character for truthfulness, but do not allow the use of extrinsic evidence to contradict the witness's answer or to prove the

[2]The following state-by-state analysis was made by the Supreme Court of New Jersey in State v. Guenther, 181 N.J. 129 (2004). Although somewhat dated, it remains relevant.

character trait. *See, e.g.*, State v. Almurshidy, 732 A.2d 280, 287 n. 4 (Me.1999); State v. Cox, 298 Md. 173, 468 A.2d 319, 323–24 (1983); State v. Raines, 118 S.W.3d 205, 211–14 (Mo.Ct.App.2003); State v. Scott, 113 N.M. 525, 828 P.2d 958, 962–63 (Ct.App.1984); State v. Boggs, 63 Ohio St.3d 418, 588 N.E.2d 813, 816–17 (1992); State v. Wyrick, 62 S.W.3d 751, 780–82 (Tenn.Crim.App.2001); State v. Leggett, 164 Vt. 599, 664 A.2d 271, 272 (1995); State v. Olson, 179 Wis.2d 715, 508 N.W.2d 616, 619–20 (Ct.App.1993), *reh'g denied*, 515 N.W.2d 715 (Wis.1994).

Alaska, Arizona, Arkansas, Idaho, New Hampshire, and Nevada also have evidence rules similar to the federal rule, but have relaxed those rules in sexual crime cases to allow the admission of extrinsic evidence of an accuser's prior false sexual crime allegation. See, e.g., Morgan v. State, 54 P.3d 332, 336 (Alaska Ct.App.2002); State v. Hutchinson, 141 Ariz. 583, 688 P.2d 209, 212–13 (Ct.App.1984) (*interpreting* State ex rel Pope v. Superior Court, 113 Ariz. 22, 545 P.2d 946, 953 (1976)); West v. State, 290 Ark. 329, 719 S.W.2d 684, 686–87 (1986), *reh'g denied*, 290 Ark. 329, 722 S.W.2d 284 (1987); State v. Schwartzmiller, 107 Idaho 89, 685 P.2d 830, 833 (1984); State v. Gordon, 146 N.H. 258, 770 A.2d 702, 704–05 (2001); Miller v. State, 105 Nev. 497, 779 P.2d 87, 89–90 (1989).

Massachusetts and Oregon, which like New Jersey follow the common law rule, have recognized a limited exception to allow cross-examination of an accuser who has made a prior false sexual crime allegation when the case involves a similar crime, but disallow extrinsic evidence. *See, e.g.*, Commonwealth v. Bohannon, 376 Mass. 90, 378 N.E.2d 987, 991 (1978); State v. Driver, 192 Or.App. 395, 86 P.3d 53, 55–58 (2004). Kansas, Georgia, Indiana, Louisiana, and Virginia, which also follow the common law rule prohibiting specific conduct

evidence relating to character, have suggested that the defendant's right to confrontation in a sexual crime case allows cross-examination of the accuser-witness and the admission of extrinsic evidence to prove the witness's prior false sexual crime accusation. *See, e.g.*, State v. Barber, *supra*, 766 P.2d at 1290 (Kan.); Smith v. State, 259 Ga. 135, 377 S.E.2d 158, 160, *cert. denied*, 493 U.S. 825, 110 S.Ct. 88, 107 L.Ed.2d 53 (1989); Little v. State, 413 N.E.2d 639, 643–44 (Ind.Ct.App.1980); State v. Smith, 743 So.2d 199, 202 (La.1999); Clinebell v. Commonwealth, 235 Va. 319, 368 S.E.2d 263, 266 (1988).

Texas has embraced a case-by-case analysis to determine whether a defendant's right to confrontation requires relaxation of the bar on specific conduct evidence in all cases in which an accuser has made a prior false criminal allegation—not just sexual crime cases. *See* Lopez v. State, 18 S.W.3d 220, 225 (Tex.Crim.App.2000) (declining "to create a per se exception to the Rule 608(b) for sexual offenses" because "[i]t makes no sense to say that certain factors will always be present in a case involving a sexual offense").

Some Federal Courts of Appeals that have addressed the use of a prior false accusation to undermine the credibility of an accuser-witness have determined that restrictions on the admissibility of extrinsic evidence do not violate the Sixth Amendment right to confrontation. *See, e.g.*, Boggs v. Collins, 226 F.3d 728, 736–40 (6th Cir.2000), *cert. denied*, 532 U.S. 913, 121 S.Ct. 1245, 149 L.Ed.2d 152 (2001); Hogan v. Hanks, 97 F.3d 189, 191 (7th Cir.1996), *cert. denied*, 520 U.S. 1171, 117 S.Ct. 1439, 137 L.Ed.2d 546 (1997); United States v. Bartlett, 856 F.2d 1071, 1088–89 (8th Cir.1988).

Several jurisdictions have recognized that prior false accusations of sexual crimes by the accuser may be admissible for reasons unrelated to impeachment of general credibility—to prove

the accuser's habit, state of mind, motive, or common scheme. *See, e.g.*, Peeples v. State, 681 So.2d 236, 237–39 (Ala.1995) (habit); People v. Hurlburt, 166 Cal.App.2d 334, 333 P.2d 82, 87 (1958) (state of mind); State v. Anderson, 211 Mont. 272, 686 P.2d 193, 199, 201 (1984) (state of mind, motive, and bias). In the present case, given multiple prior false allegations, combined with other evidence in the victim's mental health records of a pattern of lying, the evidence could fall within the realm of habit, intent, or common scheme.

In determining that prior false allegations are admissible under Rule 412, other court's have considered and resolved any conflict with Rule 608. Rule 608 provides in part:

> (b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Rule 608 (b), SCRE.

In considering the apparent conflict other court's have held that "evidentiary constraints must sometimes yield to a defendant's right of cross-examination." Clinebell v. Commonwealth, 235 Va. 319, 368 S.E.2d 263, 266 (1988); *see also* Mengon v. State, 505 N.E.2d 788, 792 (Ind.1987) (holding that a party's right to cross-examination should not be unduly limited by the court). A defendant's Sixth Amendment right of confrontation requires that the defendant be afforded an opportunity to conduct effective cross-examination of State witnesses in order to test their believability. Davis v. Alaska, 415 U.S. 308, 315–18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Timberlake v. State, 690 N.E.2d 243, 255 (Ind.1997), *cert. denied*, 525 U.S. 1073, 119 S.Ct. 808, 142 L.Ed.2d 668 (1999). "The right to cross-examine, as well as other forms of

confrontation, 'ensure [sic] that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo–American criminal proceedings.' " Tague v. Richards, 3 F.3d 1133, 1138 (7th Cir.1993) (*quoting* Maryland v. Craig, 497 U.S. 836, 846, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990)). Accordingly, the majority of jurisdictions that have considered the have held that the evidentiary rule preventing evidence of specific acts of untruthfulness must yield to the defendant's Sixth Amendment right of confrontation and right to present a full defense.[3] Finding both the reasoning and weight of this authority persuasive, we hold that evidence of prior false accusations of rape is admissible to attack the credibility of the accusing witness, notwithstanding the general exclusionary edict of Rule 608(b). *See* State v. Walton, 715 N.E.2d 824, 827 (Ind. 1999).

As a matter of first impression this Court held that prior allegations by the victim against persons other than the defendant may be probative on the issue of credibility . State v. Boiter, 396 S.E.2d 364, 302 S.C. 381 (S.C., 1990). There the Court noted that "other jurisdictions have held that such evidence is admissible only if the court makes a threshold determination that the prior accusation was false. *See* Clinebell v. Com., 235 Va. 319, 368 S.E.2d 263 (1988); Woods v. State, 657 P.2d 180 (Okl.1983), Commonwealth v. Bohannon, 376 Mass. 90, 95, 378 N.E.2d 987, 991 (1978). Other Courts have also considered remoteness of the prior accusation. *See* State v. LeCair, *supra*." *See* State v. Boiter, 396 S.E.2d 364, 302 S.C. 381 (S.C., 1990). Although apparently holding that the trial court must make some threshold determination that the prior

[3] *E.g.*, Clinebell, 368 S.E.2d at 265–66; Commonwealth v. Bohannon, 376 Mass. 90, 378 N.E.2d 987, 990–91 (1978); West v. State, 290 Ark. 329, 719 S.W.2d 684, 687 (1986); State v. Anderson, 211 Mont. 272, 686 P.2d 193, 198–201 (1984); Miller v. State, 105 Nev. 497, 779 P.2d 87, 89 (1989); Smith v. State, 259 Ga. 135, 377 S.E.2d 158, 160, *cert. denied*, 493 U.S. 825, 110 S.Ct. 88, 107 L.Ed.2d 53 (1989).

accusation was false to allow such evidence, the Boiter Court did not articulate an applicable standard of proof when doing so.

The standard of proof applied in similar cases varies among jurisdictions. Some jurisdictions require that the prior accusation be shown to be "demonstrably false." *See, e.g.*, Little, *supra*, 413 N.E.2d at 643 (Ind.Ct.App.); State v. Sieler, 397 N.W.2d 89, 92 (S.D.1986); Berry v. Commonwealth, 84 S.W.3d 82, 91 (Ky.Ct.App.2001). Others have articulated varying standards of proof for determining whether the witness made the accusation and whether it was false: clear and convincing evidence, Gordon, *supra*, 770 A.2d at 704, 705 (N.H.); preponderance of the evidence, Morgan v. State, 54 P.3d 332, 339 (Alaska Ct.App.2002); or "a reasonable probability of falsity," Smith, *supra*, 377 S.E.2d at 160(Ga.); Barber, *supra*, 766 P.2d at 1290 (Kan.Ct.App.); Clinebell, *supra*, **323 368 S.E.2d at 266 (Va.). *See also* Smith, *supra*, 743 So.2d at 203 (La.) (stating judge must determine "whether reasonable jurors could find, based on the evidence presented by defendant, that the victim had made prior false accusations").

Although not setting a clear standard of proof, this Court in Boiter held that in deciding admissibility of evidence of a victim's prior accusation, the trial judge should first determine whether such accusation was false. If the prior allegation was false, the next consideration becomes remoteness in time. Finally, the trial court shall consider the factual similarity between prior and present allegations to determine relevancy.

The defense in this case was clearly attempting to lay a proper foundation for the admissibility of the prior false statements. When the defense attempted to proffer the evidence it was cut short by the court. In every attempt the trial court summarily cut the defense off without allowing an opportunity to present evidence relevant to a Boiter analysis. Given the testimony at

issue, it was incumbent upon the trial court to conduct a proper Boiter analysis, which it failed to do.

Despite some testimony about the prior sexual allegations against other people was admitted, evidence of their falsity was excluded. Although the trial court repeatedly cut off the defense, a review of the questions that the defense was attempting to ask, the arguments of counsel, as well as other testimony that was admitted, facts relating to the investigation and falsity of the prior accusations appear to have been recorded in the mental/behavioral health records of the prosecutrix. The record is sufficient to show that the allegations were false, or at least sufficient enough to require the trial court to conduct a hearing to properly address and determine the issue under the factors set forth in Boiter.

There is nothing in the record that would suggest that the trial court considered, much less conducted, a proper analysis under Boiter. The record shows that the court simply refused to allow the defendant an opportunity to meet his burden to establish admissibility under Boiter. Accordingly, the trial court's ruling constitutes an error of law and is not entitled to any deference. Failing to allow the defense an opportunity to present evidence to carry the burden as to admissibility constitutes an abuse of discretion on the part of the trial judge.

Prejudice

This case turned entirely on the believability of the prosecutrix. As a result, the defense of the case rested heavily on her effective cross-examination. In limiting the defense cross-examination the court violated the Petitioner's rights under the Confrontation Clause. "A violation of the defendant's Sixth Amendment right to confront the witness is not per se reversible error" if the "error was harmless beyond a reasonable doubt." State v. Mizzell, 349 S.C. 326, 333, 563

S.E.2d 315, 318 (2002) (*quoting* State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994)) (*internal quotations omitted*). This Court must determine whether the error was harmless beyond a reasonable doubt. Graham, 314 S.C. at 385, 444 S.E.2d at 527. No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990); State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985); State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct.App.2004). Whether an error is harmless depends on the particular facts of each case and upon a host of factors, including:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case.

Mizzell, 349 S.C. at 333, 563 S.E.2d at 318–19 (*quoting* Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

"Harmless beyond a reasonable doubt" means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt. Mizzell, 349 S.C. at 334, 563 S.E.2d at 319; Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). "In determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict." Mizzell, 349 S.C. at 334, 563 S.E.2d at 319 (internal quotations omitted). The Mizzell Court concluded the trial court committed reversible error:

> Considering the Van Arsdall factors, we note much of Steele's testimony was either cumulative or corroborated by other witnesses....
> ...Critically, however, Steele was the only witness to testify as an eyewitness to [defendants'] burglary of the home. The lack of physical evidence placing [defendants] at the scene enhanced the importance of Steele's testimony. As in

> [State v.] Brown, [303 S.C. 169, 399 S.E.2d 593 (1991),] the co-conspirator witness is the only link placing [defendants] at the scene of the crime.... ....Because Steele was the only witness to directly link [defendants] to the burglary, we cannot say the trial court's error was harmless beyond a reasonable doubt. Accordingly, we find the trial court committed prejudicial error in limiting [defendants'] cross-examination into Steele's possible sentence.

State v. Mizzell, 349 S.C. 326, 334–35, 563 S.E.2d 315, 319–20 (2002). Here, the only evidence against the Petitioner was the testimony of the prosecutrix. Limiting the Petitioner's effective cross-examination can not be harmless.

Prejudice is further evident where several witnesses, including the Petitioner, testified that the allegations could not be true because the Petitioner intentionally avoided ever being alone with the prosecutrix. The state objected every time a witness, including the Petitioner, attempted to explain the reason underlying the Petitioner's fear of being alone with the prosecutrix. Then after having kept out any explanation behind the witnesses' testimony that the defendant would never be alone with the prosecutrix, the state made the defense's lack of explanation the object of ridicule in closing argument. The conviction of the Petitioner should therefore be reversed.

In its analysis the Court of Appeals further misperceived the prior allegations' probative value. In Boiter the court held that prior allegations by the victim against persons other than the defendant may be probative on the issue of credibility . State v. Boiter, 396 S.E.2d 364, 302 S.C. 381 (S.C., 1990). Boiter only dealt with one prior allegation that was remote in time. In applying Boiter the Court of Appeals misperceived the nature of the evidence at issue in the Petitioner's case. Unlike cases involving a single remote prior allegation, the present case involves a series of prior allegations made against multiple individuals. By virtue of the increased number of allegations made against different people the probative nature of evidence is far greater than seen

in Bointer. Especially when combined with the prosecutrix's documented history of lying.

Under Boiter the prior accusations were relevant and highly probative. Accusations against multiple people around the same time as the events alleged against the Petitioner could reasonably be expected to have an effect on the jury. Where this case turned on the credibility of the prosecutrix it presents precisely the situation where the Confrontation Clause "tips the scales" in favor of permitting cross-examination. State v. Boiter, 302 S.C. 381, 383, 396 S.E.2d 364, 365 (1990). Because the prior allegations bore directly on the issue of the prosecutrix's credibility they were highly probative to the point of being essential to the defense of the case. Denial of the Petitioner's right to cross-examine and introduce evidence related to the prior allegations was therefore error.

Prejudice

The decision of the Court of Appeals found that the introduction of similar evidence such that it removed the prejudice of excluding evidence relating to the other allegations. This overlooks the fact that it was the pattern of false allegations against multiple people that makes the evidence so important. While evidence of a single prior false accusation may raise doubt in the jury's mind as to the credibility of the prosecutrix, a pattern of such allegations around the same time raises that potential exponentially. This is especially important here where the case turned entirely on the believability of the prosecutrix. As a result the defense of the case rested heavily, if not entirely, on effective cross-examination. In limiting the defense cross-examination the trial court violated the Petitioner's rights under the Confrontation Clause. "A violation of the defendant's Sixth Amendment right to confront the witness is not *per se* reversible error" if the "error was harmless beyond a reasonable doubt." State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d

315, 318 (2002) (*quoting* State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994)) (*internal quotations omitted*). This Court must determine whether the error was harmless beyond a reasonable doubt. Graham, 314 S.C. at 385, 444 S.E.2d at 527. No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990); State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985); State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct.App.2004). Whether an error is harmless depends on the particular facts of each case and upon a host of factors, including:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case.

Mizzell, 349 S.C. at 333, 563 S.E.2d at 318–19 (*quoting* Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

"Harmless beyond a reasonable doubt" means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt. Mizzell, 349 S.C. at 334, 563 S.E.2d at 319; Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). "In determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict." Mizzell, 349 S.C. at 334, 563 S.E.2d at 319 (internal quotations omitted). The Mizzell Court concluded the trial court committed reversible error:

> Considering the Van Arsdall factors, we note much of Steele's testimony was either cumulative or corroborated by other witnesses....
> ...Critically, however, Steele was the only witness to testify as an eyewitness to [defendants'] burglary of the home. The lack of physical evidence placing [defendants] at the scene enhanced the importance of Steele's testimony. As in

> [State v.] Brown, [303 S.C. 169, 399 S.E.2d 593 (1991),] the co-conspirator witness is the only link placing [defendants] at the scene of the crime.... ....Because Steele was the only witness to directly link [defendants] to the burglary, we cannot say the trial court's error was harmless beyond a reasonable doubt. Accordingly, we find the trial court committed prejudicial error in limiting [defendants'] cross-examination into Steele's possible sentence.

State v. Mizzell, 349 S.C. 326, 334–35, 563 S.E.2d 315, 319–20 (2002). Here, the State's case rested squarely on the credibility of the prosecutrix. Attacking credibility was the essence of the defense strategy. Limiting the Petitioner's ability to impeach the prosecutrix can not be harmless.

CONCLUSION

Based on the foregoing the Court should grant a the petition, order full briefing, and reverse the decision of the Court of Appeals.

Respectfully submitted,

s/J. Falkner Wilkes
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September 21, 2020.