RECEIVED

Nov 22 2021

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions
Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case 2018-001246

The State, ...Petitioner-Respondent,

v.

Charles Dent,.....Respondent-Petitioner.

CORSS-PETITION FOR WRIT OF CERTIORARI

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

Attorney for Respondent-Petitioner Charles Dent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional

Rules

CERTIFICATION OF COUNSEL

By written order dated October 18, 2021 (A. 980-81), the Court of Appeals denied Charles Dent's cross-petition for rehearing (A. 961-67).

QUESTIONS PRESENTED

Question I

Did the trial judge err by not directing a verdict of acquittal on Indictment No. 2014-GS-07-01673 when the State failed to present any evidence that "fellatio on the Defendant by J.M." occurred during the time frame of the indictment?

Question II

Did the trial Judge err by not limiting the definition of sexual battery to "fellatio" when "fellatio on the Defendant by J.M." was the only sexual battery alleged in the indictment?

Question III

Did the trial judge err by not excluding the testimony of Tessa Trask when this testimony was based on her own theories and the record does not contain any evidence that her theories are reliable?

Question IV

Did the trial judge err by allowing the prosecution to introduce State's Exhibits 1, 3, 4, 6, 11, 13, and 15 when the prosecution could not establish the chain of custody, the witness could not authenticate those images, the images were not relevant to guilt, and the prejudicial effect of those images and J.M.'s testimony about those images substantially outweighed any probative value?

Question V

Did the trial judge err by overruling Charles Dent's objections during the State's opening and the direct examination of John Camelo, thereby allowing Mr. Camelo to offer opinions about whether J.M. was a victim sexual abuse based on his training, education, and experience?

Question VI

Did the trial judge err by denying Charles Dent his Sixth Amendment right to confront and cross-examine John Camelo about the real reasons why he ended the relationship with Lori Michelle Mayo?

Question VII

Did the trial judge err by not quashing the two indictments for disseminating obscene material to a minor twelve years of age or younger because the State did not follow the procedures set forth in S.C. Code §§ 16-15-305 and 435, which require the Solicitor's Office to apply for the arrest warrants?

Question VIII

Did the trial judge err by not suppressing State's Exhibits 1, 3, 4, 6, 11, 13, and 15 because the State did not follow the procedures set forth in S.C. Code §§ 16-15-305 and 435, which require the Solicitor's Office to apply for the search warrant and arrest warrants?

Question IX

Did the trail judge err by not directing the verdict on the two indictments for disseminating obscene material to a minor twelve years of age or younger because the State did not satisfy the requirements of the statute?

Question X

Should this Court grant Charles Dent a new trial based on the cumulative error doctrine?

STATEMENT OF CASE

A detailed Statement of the Case appears in Charles Dent's Return to the State's Petition for a writ of *Certiorari*, at 1-4, filed contemporaneously with the Cross-Petition for a Writ of *Certiorari*. Mr. Dent's Return, at 5-18, also contains a detailed Statement of Fact.

ARGUMENT

Question I

Did the trial judge err by not directing a verdict of acquittal on Indictment No. 2014-GS-07-01673 when the State failed to present any evidence that "fellatio on the Defendant by J.M." occurred during the time frame of the indictment?

In the Court of Appeals, Mr. Dent argued the trial court erred when it failed to direct a verdict of acquittal on Indictment No. 2014-GS-07-01673 when the State failed to present

any evidence that "fellatio on the Defendant by J.M." occurred during the time frame of the indictment. Brief of Appellant, at 41-43; Reply Brief of Appellant, at 1-3. The Court of Appeals summarily disposed of this issue:

> Because this finding is dispositive, we decline to address Dent's remaining issues on appeal. *See State v. Hepburn*, 406 S.C. 416, 428 n. 14, 753 S.E.2d 402, 408 n. 14 (2013) (declining to review remaining issues when its determination of a prior issue was dispositive of the appeal).

State v. Dent, 434 S.C. 357, ___, fn. 3, 863 S.E.2d 478, 481, fn. 3 (Ct. App. 2021).

In his Petition for Rehearing (A. at 961-67), Mr. Dent argued it was error for the court below to decline to decide this issue. In *Hepburn,* this Court reversed a conviction for homicide by child abuse and "direct[ed] a verdict of acquittal." 406 S.C. at 442, 753 S.E.2d at 416. Because of the directed verdict, the remaining issues alleging error during the trial became moot. Stated another way, the directed verdict was dispositive of the entire case. If this Court agrees with Mr. Dent "and enters a directed verdict, then double jeopardy will bar the State from prosecuting Mr. Dent a second time for first-degree criminal sexual conduct with a minor. U.S. Const. Am. V; S.C. Const. Art. I, § 12. Given the variance between the indictment and the evidence presented at trial, not deciding this issue would give the State a "free pass" by allowing them to seek an amended indictment from the grand jury. Petition for Rehearing, A. 961-67.

The Merits

After the State rested, Mr. Dent moved for a directed verdict. He noted the State relied on the two Hopeful Horizon videotaped interviews. The July 15, 2014 interview did not contain any evidence of fellatio. In the July 28, 2014 interview, the only evidence of fellatio was that it occurred in the first townhouse. Counsel argued, "So with regards to the indictment that ends in 01673, our position is that there's not been any testimony of

criminal sexual conduct with a minor in the first degree happening in the second location. And so we move to dismiss that indictment for that reasons." R. 589-90.

The State responded with three arguments. First, it argued "indictments are notice documents"[1] that merely put an accused on notice of the charges, meaning the State merely has to prove a sexual battery as defined by the statute. The State argued it could rely on a statement in the second interview alleging cunnilingus. Second, the State argued J.M.'s second videotaped interview established fellatio at the first house, and J.M.'s trial testimony established fellatio at the second house. Third, the State argued it should be allowed to argue there was some "confusion" about where the sexual abuse occurred because of J.M.'s age, the close proximity of the two townhouses, and the allegations of a common offender. R. 590-91.

Counsel for Mr. Dent reminded, "I don't recall the testimony in the trial about both houses" being the location of fellatio. Counsel reminded the trial judge he read the indictments in opening statements and "thought it was very important for the jurors to have the indictments [during deliberations] in this case so that they would know exactly what the charges were." In the indictments, the State identified "fellatio on the Defendant by J.M." as the sexual battery it intended to prove at trial. "That's the element they picked." Counsel argued, even though some "prosecutors treat the Grand Jury like a rubber stamp," there is "the State Constitutional right to have a presentment to the Grand Jury." Any argument by the State "about another sexual battery [] would be a variance from the

[1] *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). Counsel for Mr. Dent argued, [T]here's that *Gentry* case out there that talks about indictments being a notice document. But they could write that down on a cocktail napkin and give it to us and it would give us notice." And, "But there is still something to the State Constitutional right to have a presentment to the Grand Jury." R. 592.

indictment." *See Bailey v. State*, 392 S.C. 422, 709 S.E.2d 671 (2011) (supplemental jury instructions impermissibly enlarged indictment by instructing jury that it could convict defendant of a crime not alleged in indictment). Counsel argued, as a notice document, the indictment "puts us on notice that they were going to prove fellatio." Counsel concluded, "with regards to the second house," there is not "any proof that's been presented for that to go to the jury." R. 591-93. The trial judge denied the motion. R. 613. Mr. Dent renewed his directed verdict motions at the close of all evidence. R. 683-85.

This Court held in *Hepburn*:

> In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict. During trial, [w]hen ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. The trial court should grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty, as [s]uspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.
>
> On appeal, [w]hen reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the state. If the state has presented any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must affirm the trial court's decision to submit the case to the jury.

406 S.C. at 429, 753 S.E.2d at 408-09 (internal citations and quotations omitted); *and see State v. Cherry,* 361 S.C. 588, 606 S.E.2d 475 (2004); *State v. Gaster,* 349 S.C. 545, 564 S.E.2d 87 (2002); *State v. Mitchell,* 341 S.C. 406, 535 S.E.2d 126 (2000); *State v. Burdette,* 335 S.C. 34, 515 S.E.2d 525 (1999); *see also* Rule 19(a), SCRCrimP.

When arguing the directed verdict motion, both parties agreed J.M.'s July 15, 2014 interview did not contain any evidence of a sexual battery, let alone fellatio. The parties also agreed J.M.'s July 28, 2014 interview alleged fellatio occurring only at the first

townhouse. The jurors acquitted Mr. Dent on the indictment that corresponded to the timeframe J.M. lived in the first townhouse.

When denying the directed verdict motion, the trial judge might have been influenced by the prosecution's argument that J.M. testified in during the trial that Mr. Dent made her perform fellatio at the second townhouse. A review of the trial record, however, reveals this argument to be a misstatement of the evidence. The following is the only trial testimony by J.M. about fellatio:

Q. Okay. Did he ever make you touch his penis?

A. He didn't make me touch. He made me lick his private parts.

Q. Can you tell me about that?

A. It's hard to explain. I'm sorry.

Q. That's okay. When you say he made you, what does the that mean?

A. It means he told me to.

Q. Okay. Once or more than once?

A. Once.

R. 377.

Thus, the only allegation of fellatio is that it occurred at the first townhouse, and the jurors acquitted of this charge.[2] This Court, therefore, should grant the writ, consider the issue.

[2] As argued in more detail in Question II below, allowing the State to rely on a sexual battery other than fellatio would be an impermissible variance from the indictment. *See Sate v. Bailey,* 392 S.C. 422, 709 S.E.2d 671 (2011).

Question II

Did the trial Judge err by not limiting the definition of sexual battery to "fellatio" when "fellatio on the Defendant by J.M." was the only sexual battery alleged in the indictment.

Mr. Dent asked the Court of Appeals to hold the trial court "err[ed] by not limiting the definition of sexual battery to 'fellatio' when 'fellatio on the Defendant by J.M.' was the only sexual battery alleged in the indictment." Brief of Appellant, at 43-44; Reply Brief of Appellant, at 3-5. Although the State defends the trial judge's ruling on appeal, the State tacitly admits the error by acknowledging it was required to prove fellatio in order to survive Mr. Dent's directed verdict motion. *See, e.g.,* Brief of Respondent, at 8-11. As this Court recently reminded:

> The primary purpose of an indictment is threefold: to put the defendant on notice of the elements of the offense; to allow him to decide whether to plead guilty or stand trial; and to enable the trial court to know what judgment to pronounce following a conviction.

State v. Lewis, 434 S.C. 158, ___, 863 S.E.2d 1, 8 (2021) (citing *Evans v. State*, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005)). As will be discussed below, Mr. Dent relied on the indictment when he proceeded to trial and outlined his defense to the jurors in his opening statement.

In footnote 3 of its opinion, the court below declined to decide this issue. Here, Mr. Dent relied on the indictment's limitation to a single sexual battery. As seen above, Mr. Dent is concerned the failure to decide this issue will give the State a "free pass" to seek an amended indictment. If the State does not seek an amended indictment, then this issue likely will be repeated during a new trial.

The Merits

During his opening statement, Mr. Dent informed the jurors it "is important to know exactly what's in the indictments" that the State has to prove beyond a reasonable doubt. The two criminal sexual conduct indictments are divided by time from when J.M. "lived in one apartment and moved into another apartment." The indictments allege Mr. Dent made J.M. "perform oral sex" at "those two different locations."[3] R. 250-51.

During the charge conference, Mr. Dent requested, when "defining sexual battery," the trial court "limit it to fellatio." The State objected to that request. The trial judge ruled the Court would instruct the entire definition contained in S.C. Code Ann. § 16-3-651(h).[4] R. 693-706.

In *Bailey*, this Court held:

> In South Carolina, [i]t is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. A material variance between charge and proof entitles the defendant to a directed verdict; such a variance is not material if it is not an element of the offense.
>
> [W]hile a conviction may be sustained under an indictment which is defective because it omits essential elements of the offense, such is not true when the indictment facially charges a complete offense and the State presents evidence which convicts under a different theory than that alleged. A conviction under the latter circumstance violates principles of due process . . . because the State has failed to prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant was charged.

---

[3] Later on, during opening statements, Mr. Dent repeated the indictments alleged Mr. Dent Made J.M. perform oral sex on him at the two locations, which is what the State represents it will prove. R. 255.

[4] S.C. Code Ann. § 16-3-651(h) provides, "'Sexual battery' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes."

392 S.C. at 433-34, 709 S.E.2d at 677 (internal citations and quotations omitted); *and see State v. Gunn,* 313 S.C. 124, 437 S.E.2d 75 (1993) and *State v. Cody,* 180 S.C. 417, 186 S.E. 165 (1936); *see also Thomason v. State,* 892 S.W.2d 8, 11 (Tex.Crim.App.1994).

As seen, Indictment No. 2014-GS-07-01673 alleged Mr. Dent committed first-degree criminal sexual conduct with a minor, "between August 2013 and April 2014," alleging a single sexual battery, "to wit: fellatio on defendant by J.M." R. 31-32. The trial judge allowed the prosecution to argue for the jurors to convict Mr. Dent for first-degree criminal sexual conduct with a minor for a sexual battery other than fellatio. The trial judge also instructed the jurors they could convict Mr. Dent of first-degree criminal sexual conduct with a minor for a sexual battery other than fellatio. This argument and jury instruction resulted in a variance in the indictment. This Court should grant the writ and consider the question.

Question III

Did the trial judge err by not excluding the testimony of Tessa Trask's when this testimony was based on her own theories and the record does not contain any evidence that her theories are reliable?

Mr. Dent asked the Court of Appeals to "exclude[e] the testimony of Tessa Trask's when this testimony was based on her own theories and the record does not contain any evidence that her theories are reliable." Brief of Appellant, at 44-46; Reply Brief of Appellant, at 5-8. In footnote 3 of its opinion, the court below declined to decide this issue. Mr. Dent's petition for rehearing asked the Court of Appeals to address this issue because it is capable of repetition at a re-trial.

The Merits

In his pretrial brief and during the hearing, Mr. Dent specifically requested the trial judge require the prosecution to proffer Ms. Trask's complete testimony for the trial judge to determine the reliability pursuant to *Watson v. Ford Motor Company*, 389 S.C. 434, 699 S.E.2d 169 (2010) (summarizing three-part procedure for qualifying expert witnesses) and *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015) (state failed to show individual reliability of witness sufficient to allow her to testify as child abuse assessment expert). The trial judge declined that request and ruled Ms. Trask could be qualified as an expert in behavioral characteristic of child victims of sexual abuse." R. 47-58, 183-91.

Before the jurors, the trial judge qualified Ms. Trask as an expert in the behavioral characteristics of child victims of sexual abuse, subject to the pre-trial objections. Ms. Trask never met J.M. or read the case file; however, she did watch some of pre-trial proceedings. Ms. Trask testified, "I developed my own working definition of trauma." Mr. Dent objected, citing *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015), which requires "the subject matter of the testimony has to be deemed reliable by the trial court." He also objected because Ms. Trask's working definition had not been peer reviewed. R.391-96. Ms. Trask does not know J.M.'s social history. She does not know whether J.M. has ADHD. She did not interview Ms. Mayo. Ms. Trask acknowledged the loss of a close relative can be a source of trauma for a child. Children can have adjustment disorders unrelated to trauma. R. 403-06. On cross-examination, when asked about using her "own framework" for the working definition of trauma, Ms. Trask would only say, "My testimony is based on a combination of my education, my training, and my experience in the field." R. 402-03.

As this Court holds:

> The jury and the trial court each have distinct roles and separate responsibilities that they must execute during a trial. The jury serves as the fact finder and is charged with the duty of weighing the evidence admitted at trial and reaching a verdict. The trial court, on the other hand, is charged with the duty of determining issues of law. As a part of this duty, the trial court serves as the gatekeeper and must decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law. Once the trial court makes a ruling that the particular evidence is admissible, then it is exclusively within the jury's province to decide how much weight the evidence deserves.

Watson, 389 S.C. at 445, 699 S.E.2d at 174-75. *Watson* recognized a three-prong test to determine the admissibility of 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." *Id.* 389 S.C. at 446-47, 699 S.E.2d at 175 (citing *State v. Douglas,* 380 S.C. 499, 671 S.E.2d 606 (2009)). Second, "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." *Id*. (citing *Gooding v. St. Francis Xavier Hosp.,* 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997)). Finally, "the trial court must evaluate the substance of the testimony and determine whether it is reliable." *Id*. (citing *State v. Council,* 335 S.C. 1, 20, 515 S.E.2d 508, 518 (evaluating whether expert testimony on DNA analysis met the reliability requirements). "Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability. *Id*.

"There is no formulaic approach for determining the foundational requirements of qualifications and reliability in non-scientific evidence. However, evidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he

or she consistently applies." *Chavis*, 412 S.C. at 108, 771 S.E.2d at 339 (internal citation omitted); *and see State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009) (trial court's gatekeeping function in assuring reliability of expert testimony applies to nonscientific evidence).

As seen, the trial judge declined Mr. Dent's request to convene the full hearing required by *Chavis* and *White* by limiting the scope of that hearing to determining the background and qualifications of Ms. Trask. The trial judge erred by not determining the reliability of Ms. Trask's testimony. The record is devoid of evidence establishing the reliability Ms. Trask's methods and theories. This Court should grant the writ and consider the question.

Question IV

Did the trial judge err by allowing the prosecution to introduce State's Exhibits 1, 3, 4, 6, 11, 13, and 15 when the prosecution could not establish the chain of custody, the witness could not authenticate those images, the images were not relevant to guilt, and the prejudicial effect of those images and J.M.'s testimony about those images substantially outweighed any probative value.

Mr. Dent asked the Court of Appeals to hold "the trial judge erred by allowing the prosecution to introduce State's Exhibits 1, 3, 4, 6, 11, 13, and 15 when the prosecution could not establish the chain of custody, the witness could not authenticate those images, the images were not relevant to guilt, and the prejudicial effect of those images and J.M.'s testimony about those images substantially outweighed any probative value." Brief of Appellant, at 46-47; Reply Brief of Appellant, at 8-10. In footnote 3 of its opinion, the court below declined to decide this issue. Mr. Dent's petition for rehearing asked the Court of Appeals to address this issue because it is capable of repetition at a re-trial.

The Merits

After Mr. Dent successfully suppressed the fruits of a search warrant (R. 299-568), the State recalled J.M. and introduced State's Exhibits 1, 3, 4, 6, 11, 13, and 15, subject to the previous objections. R. 570-80. On cross-examination, J.M. acknowledged she thought her mother took State's Exhibit 1. J.M. didn't know who took State's Exhibit 3, but agreed it was not her grandfather. Regarding State's Exhibit 4, J.M. did not know who took that picture but thought it was Mr. Dent "because it was the guest bedroom that he stayed in." Regarding State's Exhibits 6, 11, 13, and 15, the following exchange occurred:

> Q. . . . . And, in fact, with these others, State's Exhibit Nos. 6, 11, 13, and 15, you really don't know who took those pictures, do you?
>
> A. I don't remember being in those photos.
>
> Q. I'm sorry?
>
> A. I don't remember being in most of those photos. I don't remember who took them, but I'm guessing.
>
> Q. So you don't remember when these were taken?
>
> A. I don't. But I do know they were in one of the houses.
>
> Q. Okay. And you don't – you're just guessing who might have taken them?
>
> A. Yes.

R. 580-83.

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901, SCRE. "Establishing a strict chain of custody is not an ironclad requirement, and the fact of a missing link does not prevent the admission of real evidence, so long as there is sufficient proof that the evidence is what it

purports to be and has not been altered in any material respect. The [trial] court's role is merely to act as a gatekeeper for the jury, and the proponent of the evidence need only make a prima facie showing of its authenticity." *State v. Brockmeyer*, 406 S.C. 324, 343, 751 S.E.2d 645, 655 (2013) (internal citations and quotations omitted).

In *State v. Langley,* this Court found the witness's testimony and the victim's photograph were not relevant to proving the guilt of appellant," and "[b]ecause the evidence of appellant's guilt was not overwhelming, [this Court] find this irrelevant evidence did not affect the outcome of the trial under a harmless error analysis." 334 S.C. 643, 648, 515 S.E.2d 98, 100 (1999). Additionally, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Rule 403, SCRE.

As seen in the Final Brief of Appellant, at 31 (citing R. 527-33), many of the images were "carved," meaning they had been deleted and recovered. The prosecution could not establish that any of the were not "carved," meaning the prosecution could not establish that any of the image has not been altered. The prosecution failed to produce the witness with personal knowledge of the examination of the electronic devices that purportedly contained those images. During the *in camera* hearing, the Solicitor acknowledged J.M. did not have the personal knowledge to know whether those images had been altered. Thus, the prosecution was not able to authenticate any of the images—either by establishing the chain of custody or presenting testimony that the images had not been altered.

State's Exhibits 1, 3, and 4 did not have any arguable relevance to establishing guilt and should have been excluded, as not relevant, under *Langley.* State's Exhibits 6, 11, 13, and 15 are extremely prejudicial, and the prosecution did not establish any probative value

of these images. It could not establish who took these photographs or whether these photographs had been altered. For example, State's Exhibit 15 could be a photograph of J.M. lying on the floor with her pet rabbit, taken by someone other than Mr. Dent, subsequently cropped to appear to be a closeup image of J.M.'s legs and the bottom portion of her dance outfit. Rule 403 excludes State's Exhibits 6, 11, 13, and 15. This Court should grant the writ and consider the question.

Question V

Did the trial judge err by overruling Charles Dent's objections during the State's opening and the direct examination of John Camelo, thereby allowing Mr. Camelo to offer opinions about whether J.M. was a victim sexual abuse based on his training, education, and experience?

Mr. Dent asked the Court of Appeals to hold "the trial judge err[ed] by overruling his objections during the State's opening statement and the direct examination of John Camelo, thereby allowing Mr. Camelo to offer opinions about whether J.M. was a victim sexual abuse based on his training, education, and experience." Brief of Appellant, at 57-48; Reply Brief of Appellant, at 10. In footnote 3 of its opinion, the court below declined to decide this issue. Mr. Dent's petition for rehearing asked the Court of Appeals to address this issue because it is capable of repetition at a re-trial.

<u>The Merits</u>

The prosecutor called John Camelo, who met J.M. through her mother Lori Michelle Mayo, in May of 2014. Mr. Camelo and Ms. Mayo began dating. The following exchange occurred between the Solicitor and Mr. Camelo:

> Q. And at any point when you and Lori started dating, did you notice anything in particular about [J.M.'s] behavior?

> A. Yes. I observed red flags – what I considered red flags in terms of her actions, gestures, mannerisms, things that a nine-year-old child at the time wouldn't normally be – you don't –
>
> Q. Okay. Now, you say "red flags." Let me back up a little bit. Have you ever worked in a law enforcement capacity?
>
> A. I did. I spent four years as a police cadet and police cadet supervisor with Beaufort City. I was, also, a volunteer fire fighter for several years. I was a private investigator for 10 years. Also, a Sunday school teacher, Boy Scout leader.
>
> And so I've had a lot of training –

R. 258-60.

Mr. Dent objected, and the trial judge considered the objection outside the presence of the jurors. Counsel reminded the trial judge, "[W]hen we had a sidebar about scheduling matters, I, also, brought up my concerns about them trying to portray Mr. Camelo as somebody who had special training in order to be able to detect child abuse or sexual abuse." Counsel reminded the trail judge about the objection during the State's opening. Counsel argued, [I]nitially, their first question sounded like it was going to be limited to just the behavior that he witnessed that he thought was odd," but the Solicitor questioned Mr. Camelo about "not just his employment history," but also about training which seems intended to show that Mr. Camelo "has some sort of training to be able to detect child abuse," which would be "improper vouching or bolstering" under the *Kromah*[5]-*Jennings*[6]-*Anderson*[7] line of cases. Counsel reminded that witnesses are not allowed to testify "that

[5] *State v. Kromah*, 401 S.C. 340, 37 S.E.2d, (2013).

[6] *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011).

[7] *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015).

somebody is telling the truth" or offer "an opinion that this child was sexually abused." Counsel argued:

> I think it's done in kind of a clever way. Because they're trying to present him and tell you a little bit about the background, but doing it in a way that you would normally qualify somebody as an expert without offering him as an expert so that it has that same, you know, appeal to a jury. And – and that's my concern.
>
> So I would move to limit his testimony.

R. 260-62.

The State claimed it was "laying the foundation for him to give a lay opinion based on personal experiences. He was a private investigator for 10 years." The prosecution proffered Mr. Camelo's testimony. Mr. Camelo testified, "I was personally sexually abused by a male for a – during my youth between the ages of 12 and 13." He also raised a stepdaughter "[f]rom the age of five till she was 17." Mr. Camelo identified the "red flags" he claimed to have observed:

> Being overly clingy with men, particularly, wanting to kiss my cheek, wanting to touch me in areas that a – you know, where a child – a minor should not be touching a male, particularly, the genital area.

R. 262-64. Based on these concerns, Mr. Camelo testified he asked J.M. "if anyone had touched her, or if anyone had done anything inappropriate to her." J.M. answered, "My grandfather." R. 264-66.

Mr. Dent further noted Mr. Camelo's testimony risked violating the time and place limitations or Rule 801(d), SCRE and the Solicitor instructed Mr. Camelo not to name the alleged perpetrator. The trial judge limited the Solicitor for asking any "questions regarding whether or not he has an opinion regarding abuse." R. 266-67, 269.

The Solicitor then proffered Mr. Camelo's testimony about "a second time [J.M.] disclosed to this witness" after the first interview at Hopeful Horizons. J.M. wrote a statement on a piece of paper that she had not made during the interview because she, purportedly, "was afraid." R. 267-69.

The jury returned to the courtroom. Mr. Camelo testified about the "red flags" he observed: "Gestures of a sexual nature that a none-year-old – that a minor wouldn't normally know without having been shown or taught by someone." When J.M. told him "something had been going on," Mr. Camelo was so concerned that he immediately informed Ms. Mayo, who contacted law enforcement. R. 270-72.

As seen, the Solicitor cleverly questioned John Camelo about his education, training, and experience as a police officer and private investigator, as if the State intended to qualify him as an expert witness. The State linked Mr. Camelo's education, training, and experience to his observations of "red flags" about J.M.s' behavior, thereby suggesting Mr. Camelo believed J.M. had been sexually abused. This line of questioning was a back door introduction of opinion evidence prohibited by *Anderson, Kromah, Jennings,* and similar cases. This Court should grant the writ and consider the question.

Question VI

Did the trial judge err by denying Charles Dent his Sixth Amendment right to confront and cross-examine John Camelo about the real reasons why he ended the relationship with Lori Michelle Mayo?

Mr. Dent asked the Court of Appeals to hold "the trial judge err[ed] by denying Charles Dent his Sixth Amendment right to confront and cross-examine John Camelo about the real reasons why he ended the relationship with Lori Michelle Mayo." Brief of Appellant, at 48-49; Reply Brief of Appellant, at 11. In footnote 3 of its opinion, the court

below declined to decide this issue. Mr. Dent's petition for rehearing asked the Court of Appeals to address this issue because it is capable of repetition at a re-trial. Because it is difficult to imagine the prosecution not calling Mr. Camelo during a new trial, this Court should provide guidance about the appropriate limits of Mr. Comelo's direct testimony and permissible areas of his cross-examination.

The Merits

"The Sixth Amendment's Confrontation Clause provides that, [i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."*Crawford v. Washington*, 541 U.S. 36, 42 (2004) (internal quotations omitted). The Supreme Court has "held that this bedrock procedural guarantee applies to both federal and state prosecutions." *Id*. citing *Pointer v. Texas,* 380 U.S. 400 (1965); *see, e.g., State v. Blackwell*, 420 S.C. 127, 801 S.E.2d 713 (2017) (court's error, in deciding not to review witness's privileged mental health records in camera to determine whether disclosure of records was necessary under Confrontation Clause); *State v. Henson*, 407 S.C. 154, 754 S.E.2d 508 (2014) (admission of codefendant's redacted confession during a joint trial violated defendant's rights under the Confrontation Clause); *State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002) (defendants' right of confrontation was violated by limitation of cross-examination into co-conspirator witness's potential sentence if convicted of same crimes as defendants). Due process also requires the prosecution to correct false testimony. *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006) (State was obligated to correct co-defendant's false testimony at trial).

As seen in the Final Brief of Appellant, at 15-16 (citing R. 277-84), the prosecution solicited testimony from John Camelo about the reason for his ending the romantic

relationship with Lori Michelle Mayo, which allowed the jurors to believe the relationship ended because of J.M.'s allegations of sexual abuse. This testimony was contradicted by information provided by Mr. Camelo during an interview with the prosecution team. R. 790-91. The trial judge erred by denying Mr. Dent's Sixth Amendment right to confront and cross-examine Mr. Camelo about his prior inconsistent statements. Rules 613 and 801(d)(1), SCRE; *State v. Caulder*, 287 S.C. 507, 339 S.E.2d 876 (Ct. App. 1986) (inconsistent statement of witness who testified at trial was admissible as substantive evidence). This Court should grant the writ and consider the question.

Question VII

Did the trial judge err by not quashing the two indictments for disseminating obscene material to a minor twelve years of age or younger because the State did not follow the procedures set forth in S.C. Code §§ 16-15-305 and 435, which require the Solicitor's Office to apply for the arrest warrants?

Mr. Dent asked the Court of Appeals to hold "the trial judge err by not quashing the two indictments for disseminating obscene material to a minor twelve years of age or younger because the State did not follow the procedures set forth in S.C. Code §§ 16-15-305 and 435, which require the Solicitor's Office to apply for the arrest warrants." Brief of Appellant, at 50-51; Reply Brief of Appellant, at 13-14. In footnote 3 of its opinion, the court below declined to decide this issue. Mr. Dent's petition for rehearing asked the Court of Appeals to address this issue because it is capable of repetition at a re-trial.

The Merits

Mr. Dent moved to quash the indictments for of disseminating obscene material to a minor twelve years or younger. He argued the two "indictments allege a violation of [S.C. Code Ann. §] 16-15-355 with regard to obscenity, which falls under the meaning of [section] 16-15-305. He argued, "[U]nder Section 16-15-355, the only party that's allowed

to seek arrest warrants or search warrants for violation of those sections is the solicitors office." The arrest warrants "were obtained by the sheriff's department," meaning the State "failed to comply with the correct procedures" and "those indictments should be quashed." R. 65, 114.

The prosecution argued (a) "this motion is not in the Defense's best interest" because, if successful, "the State will simply reindict and move forward and have another bite at the apple," (2) section 16-15-435(a) "does not apply to [section] 16-15-355," and (3) the language requiring the solicitor to seek the arrest warrant is "a recommendation only." R. 114-16.

Mr. Dent reminded the Court that obscenity law is "subject to its own unique set of interpretations by the United States Supreme Court." He also argued the statue is "intended to provide specific procedures in order to protect people who might be accused of violations" and, as a penal statute, must "be construed against the State and in a light most favorable to the accused." Finally, Mr. Dent argued the statute's use of the term "may" refers to "prosecutorial discretion" and did not create a loophole for law enforcement to "circumvent the solicitor's office." R. 116-17.

The trial judge reasoned:

> My interpretation of the statute stating the case that an arrest warrant for violation of Section 16-15-305 may be issued only upon the request of a circuit solicitor. I, certainly, would agree with Counsel, Ms. Joseph, that my interpretation of the statute is the operative word is "may." And the way I interpret that language is "may" is not required that it be issued by the circuit solicitor, but it could be issued by law enforcement.

R. 117. Mr. Dent asked the trial judge, "[H]ow do you interpret the word 'only'? Because that seems to suggest that only the Solicitor can do it." Counsel also pointed out "the legislature was aware of other procedures for getting arrest warrants. And they chose to

say that these type of arrest warrants can only be gotten by the Solicitor." R. 117-18. The trial judge denied the motion to quash these indictments. R. 118-19. Mr. Dent renewed this motion prior to the trial court swearing the jurors. R. 230.

It is well settled:

> The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. When a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant. However, all rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.

Nelson v. Ozmint, 390 S.C. 432, 436, 702 S.E.2d 369, 371 (2010) (internal quotations and citations omitted). An "arrest warrant for a violation of Sections 16-15-305 . . . may be issued ***only*** upon request of a circuit solicitor." S.C. Code Ann. § 16-15-435(A) (emphasis added). The State did not follow this procedure, as law enforcement—not the Solicitor—sought the arrest warrants. The trial judge erred by accepting the Solicitor's argument that these code sections provide an alternate—rather than the only—method of obtaining the search warrants. This Court should strictly construe the requirements set forth in S.C. Code §§ 16-15-305 and 435. "When a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (citing *State v. Blackmon,* 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991)). This Court should grant the writ and consider the questions.

Question VIII

Did the trial judge err by not suppressing State's Exhibits 1, 3, 4, 6, 11, 13, and 15 because the State did not follow the procedures set forth in S.C. Code §§ 16-15-305 and 435, which require the Solicitor's Office to apply for the search warrant and arrest warrants?

Mr. Dent asked the Court of Appeals to hold "the trial judge erred by not suppressing State's Exhibits 1, 3, 4, 6, 11, 13, and 15 because the State did not follow the procedures set forth in S.C. Code §§ 16-15-305 and 435, which require the Solicitor's Office to apply for the search warrant and arrest warrants." Brief of Appellant, at 52; Reply Brief of Appellant, at 14. In footnote 3 of its opinion, the court below declined to decide this issue. Mr. Dent's petition for rehearing asked the Court of Appeals to address this issue because it is capable of repetition at a re-trial. If this Court agrees with Mr. Dent, then the State will not be allowed to use these exhibits during a new trial.

The Merits

A search warrant . . . for a violation of Sections 16-15-305 . . . may be issued only upon request of a circuit solicitor." S.C. Code Ann. § 16-15-435. This statute must be strictly construed. *See Roberts, Nelson,* and *Blackmon, supra.* As seen, the search warrant was sought based on information provided by Investigator LaVan—not the Solicitor. The trial judge erred by not suppressing this evidence. This Court should reverse the trial court and suppress the evidence.

Question IX

Did the trial judge err by not directing the verdict on the two indictments for disseminating obscene material to a minor twelve years of age or younger because the State did not satisfy the requirements of the statute.

Mr. Dent asked the Court of Appeals to hold "the trial judge err[ed] by not directing the verdict on the two indictments for disseminating obscene material to a minor twelve years of age or younger because the State did not satisfy the requirements of the statute." Brief of Appellant, at 51-52; Reply Brief of Appellant, at 14-15. In footnote 3 of its opinion, the court below declined to decide this issue. In his Petition for Rehearing (A. at 961-67),

Mr. Dent argued it was error for the court below to decline to decide this issue because it is potentially dispositive. *Hepburn, supra.* If this Court agrees with Mr. Dent and enters a directed verdict, then double jeopardy will bar the State from prosecuting Mr. Dent a second time for disseminating obscene material to a minor. U.S. Const. Am. V; S.C. Const. Art. I, § 12.

The Merits

As seen, the State did not follow the statutory requirements of S.C. Code §§ 16-15-305 and 435 for obtaining the search warrant and arrest warrants for the two indictments for disseminating obscene material to a minor twelve years of age or younger. These statutes must be strictly construed. *See Roberts, Nelson,* and *Blackmon, supra.* Section 16-15-305, additionally, sets forth specific requirements before the allegedly obscene material can support a conviction. Not only did the prosecution not present any obscene material in during the trial, J.M.'s testimony did not satisfy the prerequisites of section 16-15-305 to support a conviction for disseminating obscene material. This Court should grant the writ and consider the question.

Question X

Should this Court grant Charles Dent a new trial based on the cumulative error doctrine?

Each of the foregoing arguments independently entitles Charles Dent to a new trial. This Court, however, should not overlook the cumulative error doctrine, which "provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial." *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). *And see State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000), *reversed on other grounds by State v. Blurton,* 352 S.C. 203, 573

S.E.2d 802 (2002) (cumulative error of solicitor's improper argument and improperly excluded evidence warranted reversal). Many of Mr. Dent's questions on appeal are intertwined, thereby compounding the prejudice. This Court should grant the writ and consider the question.

CONCLUSION

For the forgoing reasons, this Court should grant the writ and consider the questions.

Respectfully Submitted,

By s/*E. Charles Grose, Jr.*

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

Attorney for Charles Dent

November 22, 2021.