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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2016-002368

THE STATE,

Respondent,

vs.

THOMAS STEPHEN ACKER,

Appellant.

RETURN TO PETITION FOR REHEARING

On January 19, 2022, this Court affirmed Appellant's convictions and sentences in a published opinion. On February 3, 2022, Appellant filed a petition for rehearing in the above referenced case. By letter dated February 4, 2022, this Court requested the State provide a return to Appellant's petition. The State's return to Appellant's petition for rehearing follows.

Appellant begins his petition by arguing this Court erred in affirming the trial judge's decision to allow Shauna Galloway-Williams to testify as an expert in the field of child maltreatment and child abuse dynamics because the State failed to prove the reliability of Galloway-Williams' testimony. In support of his argument, Appellant asserts this Court and the trial court erred because Galloway-Williams did not "name any specific research, book or case study upon which the expert based her opinion." (Petition for Rehearing 11). Respectfully, Appellant misunderstands the nature of Galloway-Williams testimony and the holding of our

Supreme Court's opinion in State v. Jones[1]. Appellant misreads Jones to require an expert witness in the field of child abuse dynamics to provide specific citations to research to be tendered as an expert. Contrary to Appellant's assertion, Jones merely noted that Galloway-Williams could have offered specific citations if she were given an opportunity to gather them. Jones 423 S.C. at 639, 817 S.E.2d at 272. Galloway-Williams' ability to gather citations was not the only factor in the court's decision. The court also noted that Galloway-Williams' testimony was supported by peer-reviewed professional journals and publications that were uniformly accepted and recognized by child sexual abuse experts. Id. Like the defendant in Jones, Appellant conflates reliability with perfection. As Galloway-Williams explained, child abuse dynamics is "soft science, meaning that we can't expose children to conditions and then test them against abuse conditions." (R. 79, lines 15-17). Because scientists cannot expose children repeatedly to abusive conditions, Galloway-William's research cannot be quantified numerically as Appellant insists. As our Supreme Court noted in Jones: "There is always a possibility that an expert witness's opinions are incorrect. However, whether to accept the expert's opinions or not is a matter for the jury to decide. Trial courts are tasked only with determining whether the basis for the expert's opinions is sufficiently reliable such that it may be offered into evidence." State v. Jones, 423 S.C. at 639-640, 817 S.E.2d at 272. Here, the trial court properly determined that Galloway-Williams' testimony was reliable based on her training and experience and this Court properly affirmed the trial judge's decision.

Appellant next argues this Court erred in affirming the trial judge's decision to allow Shauna Galloway-Williams to testify as an expert in the field of child maltreatment and child abuse dynamics because she improperly vouched for and bolstered Victim's credibility.

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[1] State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018).

Specifically, Appellant complains of Galloway-Williams' testimony that false denials were more common than false accusations. Further, Appellant complains about Galloway-William's testimony regarding children with behavioral problems being more vulnerable to abuse. As an initial matter, Appellant's complaint about Galloway-Williams' specific testimony was not preserved for appellate review, because Appellant never objected to those questions at trial. (R. 112-13). Even if preserved, both the trial judge and this Court correctly noted that Galloway-Williams could not bolster Victim's testimony because she was a blind expert who had never met Victim. In making his ruling the trial judge noted:

> She's not addressing [Victim]'s credibility. She's never met [Victim]. She couldn't possibly address her credibility. She's just going to discuss from what her experience has provided her why people delay in disclosing sexual abuse. She's not going to talk about [Victim] because she's never met her and she doesn't know her and knows nothing about her case. So she can't be bolstering her credibility."

(R. 95, lines 16-25). Similarly, this Court found "Galloway-Williams never treated child and never testified she believe Child, nor did she provide any indication that she had considered Child's specific disclosures..... Galloway-Williams never linked her general statements to this case or Child's credibility." State v. Acker Opinion No. 5892 (S.C. Ct. App. filed January 19, 2022) (Howard Adv. Sh. No. 3 at 60). Furthermore, this Court found "there was no evidence that Child exhibited behavioral problems such that others would be less likely to credit her disclosures." State v. Acker Opinion No. 5892 (S.C. Ct. App. filed January 19, 2022) (Howard Adv. Sh. No. 3 at 59). Because Galloway-Williams did not know Victim and did not know anything about her case, she could not improperly vouch for or bolster Victim's credibility. Accordingly, this Court did not err in affirming the trial judge's ruling allowing Galloway-Williams to testify as an expert witness.

Appellant next argues this Court erred in affirming the trial judge's decision to allow Shauna Galloway-Williams to testify as an expert in the field of child maltreatment and child abuse dynamics because the probative value of her testimony was substantially outweighed by the danger of unfair prejudice. Appellant's argument fails for two reasons. First, Galloway-Williams' testimony was relevant and had probative value because it assisted the jury in understanding how children react differently to abuse. As our Supreme Court observed in Jones: "the law in South Carolina is settled: behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized." Jones, 423 S.C. at 636, 817 S.E.2d at 271.

Second, Galloway-Williams' testimony could not be unfairly prejudicial because she did not know anything about Victim's case. When calling a witness to testify about behavioral characteristics of child abuse, the better practice is "not to have the individual who examined the alleged victim testify, but rather to call an independent expert." State v. Anderson, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015). Here, the State complied with the Supreme Court's recommendation in Anderson and called a blind expert who didn't know anything about Victim's case. Thus, as this Court correctly noted, Appellant did not suffer any unfair prejudice because Galloway-Williams "did not testify that *Child* displayed behaviors associated with abuse or that she harmed herself and suffered depression." State v. Acker Opinion No. 5892 (S.C. Ct. App. filed January 19, 2022) (Howard Adv. Sh. No. 3 at 62). This Court correctly affirmed the trial judge's ruling.

Appellant next argues this Court erred in determining that Appellant's objection to the testimony of Victim's grandmother regarding Appellant's addiction to pornography was not preserved for appeal. Appellant asserts that his general reference to Rule 404 SCRE and

character evidence preserved his objection for appeal. On the contrary, a review of the record reveals Appellant had an opportunity to place his specific objection on the record and he failed to do so. When Victim's grandmother testified at trial, Appellant offered an objection that was addressed in an off the record bench conference. (R. 59). The trial judge overruled Appellant's objection, but gave Appellant an opportunity to place his objection more fully on the record. (App. 66-68). Appellant objected under Rule 401, Rule 403, and Rule 404 SCRE. In regard to Rule 404, Appellant offered "Additionally, under 404 I don't see any type of exception. It's character evidence, and character evidence, of course as the Court knows, is generally inadmissible." (R. 68, lines 6-9). Appellant did not specify whether he was objecting under Rule 404(a) or Rule 404(b) SCRE. Appellant merely stated that character evidence is generally inadmissible which closely resembles the language of Rule 404(a) SCRE. By contrast, Appellant did not use the words "prior bad acts", "Lyle evidence", or any language that would otherwise indicate Appellant was objecting under Rule 404(b) SCRE. Because a Rule 404(b) argument was not presented to the trial court, this Court correctly held Appellant failed to preserve the issue for appeal.

Finally, Appellant argues this Court erred in affirming the trial judge's decision to deny Appellant's directed verdict motion as to the charge of disseminating obscene material to a minor. While Appellant concedes the State is not required to introduce the obscene material into evidence, Appellant nonetheless maintains the State failed to prove the material was obscene. (Petition for Rehearing 34). In support of his argument, Appellant maintains the State relied solely on Victim's testimony that Appellant forced her to watch "videos of people of having sex." Appellant's argument ignores the remainder of Victim's testimony in which she stated Appellant put his hand around her neck and held her so she couldn't move while he touched

himself. (R. 34). This testimony belies Appellant's assertion that the material he showed Victim was not obscene. To the contrary, when considered in the light most favorable to the State, evidence existed that the material shown to Victim appealed to the prurient interest in sex by virtue of Appellant touching himself while he forced Victim to watch the material. Accordingly, this Court correctly held that the trial judge properly denied Appellant's motion for a directed verdict on the charge of dissemination of obscene material to a minor.

CONCLUSION

For all of the foregoing reasons, the State requests the panel deny Appellant's petition for rehearing.

Respectfully submitted,

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THE STATE, Respondent,

vs.

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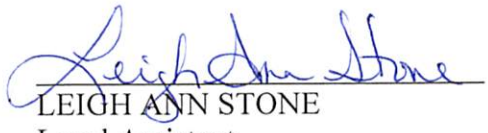
PROOF OF SERVICE

I, Leigh Ann Stone, certify that I have served the within Return to Petition for Rehearing on Appellant by sending an electronic copy via email to the address listed in AIS for the following individual:

Katherine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 16th day of February, 2022.



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From: Leigh Ann Stone
Sent: Wednesday, February 16, 2022 3:09 PM
To: 'khudgins@sccid.sc.gov'
Cc: Scott Matthews; William Blitch; 'Stock, Chris'
Subject: The State v. Thomas Stephen Acker (2016-002368)
Attachments: ACKER Thomas S. - Return to Petition for Rehearing (02903030xD2C78).PDF

Good Afternoon Ms. Hudgins,

Attached please find a copy of the Return to Petition for Rehearing in The State v. Thomas Stephen Acker (2016-002368). This return will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to confirm receipt of this email.

Thank you,
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