STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 5892 (S.C. Ct. App. filed 3/25/2022)
Lower Court Case No. 2016-GS-42-02201

THE STATE,

RESPONDENT,

V.

THOMAS STEPHEN ACKER,

PETITIONER

APPELLATE CASE NO. 2016-002368

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on March 25, 2022.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that the trial judge properly allowed a witness to testify as an expert in the field of child maltreatment and child abuse dynamics when the State failed to prove the reliability of the substance of the expert's testimony?

2. Did the Court of Appeals err in finding that the trial judge properly allowed a witness to testify as an expert in the field of child maltreatment and child abuse dynamics when the witness testified that false denials were more common than false accusations, and testified about believability, improperly vouching for and bolstering the credibility of the minor witness?

3. Did the Court of Appeals err in finding that the trial judge properly allowed a witness to testify as an expert in the field of child maltreatment and child abuse dynamics when the testimony went beyond explaining delayed disclosure making the testimony more prejudicial than probative?

4. Did the Court of Appeals err in finding unpreserved for appellate review the Rule 404(b) challenge to admitting improper character evidence by allowing a witness to testify that Petitioner admitted in a letter that he had been addicted to pornography for fifty two years?

5. Did the Court of Appeals err in finding that the trial judge properly refused to direct a verdict of acquittal for the dissemination of obscene material when the State failed to prove that the material was obscene?

STATEMENT OF THE CASE

In May of 2016, the Spartanburg County Grand Jury indicted Petitioner, Thomas Stephen Acker, for criminal sexual conduct with a minor first degree and disseminating obscene material to a minor twelve years of age or younger, indictments #2016-GS-42-2201, 2202. (R. pp. 201-205). On November 16, 2016, Petitioner proceeded to jury trial before the Honorable J. Derham Cole. Roger Poole and Paul Kreswell Neely represented Petitioner at trial. Bethany B. Miles prosecuted the case. The jury returned verdicts of guilty and Judge Cole sentenced Petitioner to twenty years for criminal sexual conduct with a minor and five years concurrent for the disseminating charge. (R. pp. 203, 206). A timely notice of intent to appeal was served on November 22, 2016, and the direct appeal perfected.

On October 10, 2019, a three judge panel of the South Carolina Court of Appeals heard oral argument in the case. Over two years later on January 19, 2022, the Court of Appeals affirmed the convictions in a published opinion. State v. Acker, 435 S.C. 716, 869 S.E.2d 873 (Ct. App. 2022). A timely petition for rehearing was filed on February 3, 2022. The panel of the Court of Appeals denied the petition for rehearing on March 25, 2022. This petition for writ of certiorari follows.

FACTS

Petitioner married the minor's maternal grandmother in December of 2002. (R. p. 55, lines 8-16). The two separated in May of 2007. (R. p. 55, lines 17-18). The grandmother testified that during the time she was married to Petitioner she would pick her granddaughter up from kindergarten and would watch her at the house she shared with Petitioner. (R. p. 56, line 22 – p. 57, 58, lines 1-11). During this time the minor's mother taught Bible study and asked her mother, the minor's grandmother, to help with the care of the minor. (R. p. 11, lines 21 – p. 12, lines 1-3). In the summer of 2014, seven years after Petitioner separated from the minor's grandmother, the minor began cutting herself. (R. p. 12, line 25 – p. 13, lines 1-2). The minor was first seen by a pastoral counselor at New Day Counseling Ministries in July of 2014. (R. p. 51, lines 10-22). According to the pastoral counselor, on September 11, 2014, the minor alleged abuse that took place at her grandmother's house beginning when she was five years old. (R. p. 52, lines 1-13).

On November 7, 2014, the minor's parents filed a report with the Spartanburg City Police Department. (R. p. 22, line 15 – p. 23, lines 1-7). An officer with the Spartanburg City Police Department made a referral for the minor to the Children's Advocacy Center. (R. p. 23, lines 13-14). The minor met with a counselor at the Children's Advocacy Center of Spartanburg, Union and Cherokee Counties on November 20, 2014. (R. p. 49, lines 14 – p. 50, lines 1-8). According to this counselor, the minor alleged abuse that took place at her nanny's house from when she was in kindergarten until she was eight or nine years of age. (R. p. 50, lines 9-21).

At the time of trial in November of 2016, the minor was seventeen years old. (R. p. 27, lines 1-2). When the minor was ten years old she was diagnosed with Ehlers-Danlos syndrome with Chiari malformation requiring multiple painful surgeries. (R. p. 27, line 25 – p. 28, lines 1-10; p. 39, line 21 – p. 40, lines 1-25). At trial the judge, over objection, qualified Shauna Galloway

–Williams[1] as an expert in child maltreatment and child abuse dynamics. (R. p. 106, line 25 – p. 107, lines 1-3). Galloway-Williams did not interview the minor in the present case. Petitioner testified at trial and denied all allegations. (R. p. 144, lines 6-10).

REASONS WHY CERTIORARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari as to issues one, two and three to establish the foundational reliability requirements for the admission of non-scientific expert testimony in regard to child maltreatment and child abuse dynamics, to limit this type of expert testimony to avoid improper vouching for and bolstering of the testimony from minor witnesses, and to clarify the proper balancing test provided by Rule 403, SCRE, for this type of non-scientific expert testimony. This Court should also grant the petition for writ of certiorari as to issue four in order to clarify the rules of preservation and Rule 404. Finally, issue five presents a novel question of law with regard to what the State must show to prove obscenity in order to survive a directed verdict motion for the charge of disseminating obscene material to a minor twelve years of age or younger pursuant to S.C. Code §16-15-355. Respectfully, this Court should grant the petition for writ of certiorari as to all five issues.

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[1] Galloway-Williams' qualification as an expert and failure to comply with a subpoena duces tecum requesting articles and publications upon which her opinions were based was recently addressed in State v. Galloway, Op. No. 5905, Howard Advance Sheet No. 14 (S.C. Ct. App. filed April 20, 2022). The trial in Galloway was held in May of 2018. In State v. Jones, 423 S.C. 631, 639, 817 S.E.2d 268, 272 (2018), this Court wrote, "Although Galloway-Williams did not identify by name the articles serving as the basis for her opinions, she indicated she could provide citations if given an opportunity to gather them." The trial in Jones was held in 2014, four years before the trial in Galloway.

ARGUMENTS

1. **The Court of Appeals erred in finding that the trial judge properly allowed a witness to testify as an expert in the field of child maltreatment and child abuse dynamics when the State failed to prove the reliability of the substance of the expert's testimony.**

Petitioner objected to allowing the State's witness, Shauna Galloway-Williams, to testify as an expert in the field of child maltreatment and child abuse dynamics arguing that the subject matter of the testimony was not reliable. (R. p. 96, lines 1-5). The judge overruled the objection stating, "And I do find the testimony is sufficiently reliable to be admitted because it is based upon the requisite education, training and experience." (R. p. 100, lines 7-9). Petitioner renewed the objection immediately following the judge's ruling and again when the State moved to qualify the witness as an expert in front of the jury. (R. p. 100, lines 12-14; p. 107, line 3). Petitioner renewed the objection at the close of the State's case, the close of the Defense case and after the jury returned the verdict. (R. p. 123, lines 17-19; p.152, line 23 – p. 153, lines 1-2; p. 193, lines 15-19). The judge denied all of the renewed motions. The judge erred in allowing the witness to testify as an expert when the State failed to prove that the subject matter of the witness's testimony was reliable.

Pursuant to Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), prior to admitting expert testimony the judge must determine that the testimony is reliable. "Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable. See 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)." Id. 389 S.C. at 445-447, 699 S.E.2d at 175. In State v. Chavis, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015) the South Carolina Supreme Court wrote, "Both parties argue, and we agree, that State v. White should apply in qualifying child abuse assessment experts because their testimony is non-scientific." In the present case the judge

allowed the witness to testify as an expert in child maltreatment and child abuse dynamics. (R. p. 107, lines 1-4). Pursuant to Chavis, the witness testimony in the present case is non-scientific expert testimony. Non-scientific expert testimony must still satisfy the reliability requirement of Rule 702, SCRE, and Watson. State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). In White the South Carolina Supreme Court set forth foundational requirements for the admission of non-scientific expert testimony in regard to dog tracking, recognizing that the standard reliability factors set forth for scientific expert testimony in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) may not be useful when evaluating non-scientific expert testimony. In a footnote in White the Court wrote:

> The State v. Council factors for scientific expert testimony are: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.

382 S.C. 265, 274, 676 S.E.2d 684, 688 fn# 7.

> The factors for expert dog tracking testimony set forth in White are:
>
> (1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) by experience the dog is found to be reliable; (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and (6) the trail was not otherwise contaminated.

382 S.C. at 272, 676 S.E.2d at 687. In the present case the trial judge found the expert testimony reliable "based upon the requisite education, training and experience." (R. p. 100, lines 7-9). These factors go to the qualification of the witness not the reliability of the subject of the testimony. The judge abused his discretion in allowing the witness to testify as an expert when the State failed to prove that the substance of the testimony was reliable.

The challenge to reliability goes to the subject of the testimony rather than the individual qualification of the witness. Based on the ruling by the trial judge in the present case, expert testimony in regard to any matter - scientific, non-scientific, or "junk science" - would be reliable if the witness had the requisite education, training and experience. The qualification of the witness and the reliability of the subject of the witness' testimony are two different findings the trial judge must make before admitting expert testimony. In White, the South Carolina Supreme Court wrote:

> We hold that the trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.

382 S.C. at 274, 676 S.E.2d at 689. The trial judge must make a determination on the reliability of the non-scientific expert testimony based on factors other than the qualification of the witness. In the present case the State failed to provide the judge with any factors upon which he could base a reliability finding.

During the in-camera proffer Petitioner asked the witness, "The information that you have reviewed on your own in preparation for giving testimony, do you have any specific examples of studies that have looked at the evidence in those particular cases as being reliable?" (R. p. 79, lines 2-5). The witness answered, "So my testimony will be based on my experience in the field, as well and my education and training. And in our field the research that's been done has primarily been done based on information that's gathered from actual clients, case studies." (R. p. 79, lines 6-10). The witness, however, did not identify any research, case study or publication to support the substance of her testimony. The witness testified that although she was not published she was

familiar with publications in the field. She testified "Well, as part of the – in most of the trainings that I go to there—the training itself is based on peer-reviewed articles, information. Just as part of my general education I continue to read peer-reviewed articles and information related to the field." (R. p. 75, lines 3-7). The witness, however, did not provide any specific information about the publications or trainings. The judge asked the witness, "And has your experience revealed common factors that attribute to a delayed disclosure?" (R. p. 90, lines 17-18). The witness responded yes but offered no other source to support her testimony. The witness offered no statistics to demonstrate how often disclosure was delayed in allegations of child sexual abuse. The witness offered no support for her testimony in regard to grooming or behaviors. The State failed to demonstrate that the subject matter of the expert testimony was reliable.

In State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), the South Carolina Supreme Court found that the State failed to show the individual reliability of one of the witnesses sufficient to allow her to testify as a child abuse assessment expert. The Court in Chavis wrote:

> There is no formulaic approach for determining the foundational requirements of qualifications and reliability in non-scientific evidence. Id. at 274, 676 S.E.2d at 688. 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. We find no evidence in this record as to Mrs. Elliott's ability to draw reliable results from the RATAC procedures she consistently follows, and thus find that the threshold reliability requirement of Rule 702 is not met. Accordingly, we hold that the circuit court abused its discretion in allowing Mrs. Elliot to testify as an expert regarding the report by Mrs. Gist.

412 S.C. at 108, 771 S.E.2d at 339. As in Chavis, the State in the present case failed to establish that the witness's testimony was reliable. Unlike Chavis, the error in the present case was not harmless.

While the witness testified that she read peer-reviewed articles and information related to the field, she failed to name one of these articles. The witness failed to identify any research, case

study, publication or treatise to support the substance of her testimony. In the Court of Appeals' decision in State v. Jones, 417 S.C. 319, 333, 790 S.E.2d 17, 25 (Ct. App. 2016), aff'd as modified, 423 S.C. 631, 817 S.E.2d 268 (2018), decided prior to the trial in this case, this same witness was able to reference a textbook titled *Child Maltreatment* that included information about delayed disclosure and non-offending caregivers. The witness made no such reference in the present case.

In distinguishing Chavis the South Carolina Supreme Court in Jones wrote:

> Unlike the proposed expert in Chavis, Galloway-Williams did not testify about forensic interviewing methods nor the use of the RATAC protocol. Instead, her testimony focused on explaining the concept of delayed disclosure and the role of nonoffending caregivers in the dynamics of sexual abuse. Although Galloway-Williams did not identify by name the articles serving as the basis for her opinions, she indicated she could provide citations if given an opportunity to gather them. Additionally, she explained her opinions were supported by peer-reviewed professional journals and trade publications, all of which were uniformly accepted and recognized by child sexual abuse experts and professionals. Galloway-Williams also testified she participates in the peer review process and has given numerous presentations on the subject. When questioned on cross, she testified she was unaware of any organizations that found her methods unreliable and that, out of all cases involving delayed disclosure of child abuse, statistically two to four percent are considered false allegations.

State v. Jones, 423 S.C. 631, 639, 817 S.E.2d 268, 272 (2018). In contrast, in the present case this same witness failed to explain that her opinions were supported by peer-reviewed professional journals and trade publications, all of which were uniformly accepted and recognized by child abuse experts and professionals. This same witness failed to testify in the present case that her opinions were supported by peer-reviewed articles. Instead, she testified that she read peer-reviewed articles and training was based on peer reviewed articles. (R. p. 75, lines 3-7). The false denial and false allegation testimony, is not addressed in Jones. The fact that this particular witness had been previously qualified as an expert 36 times (R. p. 76, lines 9-12) did not relieve the trial court

from its duty as a gatekeeper to require the State to establish the reliability of the expert testimony in this case.

The trial court in the present case failed to perform its gatekeeping role pursuant to Rule 702, SCRE. The State failed to establish the foundational reliability requirement for the admission of the expert testimony. The trial judge's reliability determination was based on the education, training and experience of the witness. These factors go to the qualification of the witness, not the reliability of the testimony. The present case is analogous to cases in which the trial judge failed to make a reliability determination prior to admission of the testimony. In State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) the South Carolina Supreme Court found that the trial judge erred in admitting expert testimony before vetting it for reliability but found the error harmless. In the present case the trial judge erred in admitting expert testimony before vetting it for reliability. The error, however, was not harmless.

"To deem an error harmless, this court must determine 'beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.' " State v. Fonseca, 383 S.C. 640, 650, 681 S.E.2d 1, 6 (Ct.App.2009) (quoting Taylor v. State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993)), *aff'd,* 393 S.C. 229, 711 S.E.2d 906 (2011); see also State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006) ("When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside a conviction for insubstantial errors not affecting the result."); State v. Mizzell, 349 S.C. 326, 333–34, 563 S.E.2d 315, 319 (2002) (finding error is harmless beyond a reasonable doubt if the "reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt"); State v. Pradubsri, 403 S.C. 270, 281, 743 S.E.2d 98, 104 (Ct.App. 2013) (explaining the requirement that a reviewing court must review the entire record to determine the effect of an error on the verdict in determining

whether an error is harmless). Reviewing the entire record in the present case, guilt was not conclusively proven such that no other rational conclusion could be reached. The State presented no physical evidence. The State's case was based on the testimony of the minor. The State called as witnesses the minor's mother, father and grandmother, the minor, a police officer, a forensic interviewer, a pastoral counselor and Galloway-Williams. There were no eye-witnesses. The unreliable testimony given by Galloway-Williams, as an expert, was not harmless.

In affirming the convictions the Court of Appeals wrote:

> Similarly, we find the circuit court did not abuse its discretion in determining Galloway-Williams's testimony here satisfied the reliability threshold. As in Jones, Chavis is distinguishable because Galloway-Williams was not qualified as a forensic interviewer and did not testify as to the specifics of this child's disclosure. Instead, she testified as a blind expert on child sexual abuse dynamics, addressing general concepts and characteristics of victims in such cases. Her testimony was based on her experience and the research conducted in her field, and this research was based on case studies for which the researchers analyzed cases of known abuse to determine whether there were similarities among cases. Thus, the circuit court did not err in admitting Galloway-Williams's testimony after properly considering its reliability.

State v. Acker, 435 S.C. 716, 869 S.E.2d 873, 881 (Ct. App. 2022). The Court of Appeals erred.

The trial judge in the present case failed to perform its gatekeeping function when the State failed to establish the foundational reliability requirement for the admission of the expert testimony. The present case is distinguished from Jones where at least there was a bare minimal reference to a textbook as a basis for which to support the reliability of the expert's opinion. There was no basis for which the trial judge to base his reliability determination in the present case. The witness failed to name any specific research, book or case study upon which the expert based her opinion. The fact that the witness was not qualified as a forensic interviewer and did not testify as to the specifics of the disclosure does not render her testimony reliable. The State failed to prove the

reliability of the expert's testimony. The trial judge erred in admitting the testimony. The error requires reversal.

2. **The Court of Appeals erred in finding that the trial judge properly allowed a witness to testify as an expert in the field of child maltreatment and child abuse dynamics when the witness testified that false denials were more common than false accusations, and testified about believability, improperly vouching for and bolstering the credibility of the minor witness**

In addition to lacking reliability, Galloway-Williams' testimony went beyond discussing risk factors, grooming, delayed disclosure and general behavioral characteristics when the State asked her on direct examination about false denials and false disclosures. (R. p. 111, lines 6-7). The witness discussed false denials and false disclosures and testified that it was more common for children to deny abuse when something happened than to make a false allegation of abuse when it did not happen. (R. p. 111, line 8 – p. 112, lines 1-10). Petitioner objected arguing that the testimony bolstered the credibility of the complaining minor witness as prohibited by State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). (R. p. 95, lines 10-12). The judge replied, "She's not addressing Minor's credibility. She's never met Minor. She couldn't possibly address her credibility. She's just going to discuss from what her experience has provided why people delay in disclosing sexual abuse. She's not going to talk about Minor 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. p. 95, lines 16-25). The judge then overruled the objection and stated:

> It's not bolstering because the witness is simply testifying about things within her expertise. They may or may not specifically apply in this case, but the witness doesn't know anything about this case because she's not talked to anybody about it; she's not interviewed any witness; she's not interviewed the child; she's not interviewed the parents; she's not interviewed the police officers; she's not interviewed the counselors; she's not interviewed the Children's Advocacy

> interviewer. She knows nothing about the case, and she didn't even hear the witness' testimony.
>
> So there's nothing that she could do that would – nothing she could reasonably do to bolster the witness' testimony because she doesn't even know what it is. The fact that she testifies to things that might be similar to those things experienced by the witness is not considered bolstering. It's simply an expert's explanation as to certain behavior perhaps. But to that extent it might be supported. But it's not improper bolstering. So I still find the testimony to be admissible.

(R. p. 100, line 20 – p. 101, lines 1-15). The trial judge erred. The witness improperly vouched for the credibility of the minor witness even though she never met the minor witness. Petitioner renewed the objection immediately following the judge's ruling and again when the State moved to qualify the witness as an expert in front of the jury. (R. p. 100, lines 12-14; p. 107, line 3). Petitioner renewed the objection at the close of the State's case, the close of the Defense case and after the jury returned the verdict. (R. p. 123, lines 17-19; p. 152, line 23 – p. 153, lines 1-2; p. 193, lines 15-19). The judge denied all of the renewed motions.

During the direct examination of Galloway-Williams the State asked, "Okay. I want to talk to you about false denials and false disclosures. Can you explain to us what those are?" (R. p. 111, lines 6-7). The witness explained. "Well, a false denial or a – would be when there's actually knowledge or something to support that a child has actually been abused, and yet they're denying that it happened." (R. p. 111, lines 8-11). The witness then testified, "So what we see more often than false allegations of abuse with child disclosure, we see – tend to see more false denials, meaning that children are denying that something happened when, in fact, there may be something that did happen." (R. p. 111, lines 18-22). The State then asked the witness, "And what's a false disclosure?" (R. p. 111, line 23). The witness answered. "A false disclosure? That would be when the child has made a disclosure that didn't really happen." (R. p. 111, lines 24-25). The State then asked the witness which was more common and the witness again testified,

"What's more common would be the false denial where we – where a child denies that something happened when, in fact, something did occur." (R. p. 112, lines 8-10). The witness' testimony improperly implied that the witness in the present case was credible because false denials are more common than false allegations. The prosecutor went too far with this line of questioning.

Witness credibility is to be determined by the jury. Witnesses are prohibited from testifying about the credibility of other witnesses. In State v. Makins, 433 S.C. 494, 860 S.E.2d 666, 670 (2021), the South Carolina Supreme Court wrote:

> "The assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). While experts can testify to their opinion, they are precluded from offering an opinion about the credibility of other witnesses. State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). "Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." Id. at 358-59, 737 S.E.2d at 500. "A witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." Briggs v. State, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017).

In State v. Barrett, 416 S.C. 124, 131, 785 S.E.2d 387, 390 (Ct. App. 2016), this Court wrote:

> The assessment of witness credibility is within the exclusive province of the jury. State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977). Therefore, witnesses are generally not allowed to testify whether another witness is telling the truth. See Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (stating it is improper for a solicitor to ask a defendant "to comment on the truthfulness or explain the testimony of an adverse witness" and "the defendant is in effect being pitted against the adverse witness"). Similarly, witnesses may not improperly bolster the testimony of other witnesses. See Smith v. State, 386 S.C. 562, 564, 569, 689 S.E.2d 629, 631, 633 (2010) (stating a forensic interviewer's opinion that she found the victim's statement believable "improperly bolstered the [v]ictim's credibility"). "For an expert to comment on the veracity of a child's accusations of sexual abuse is improper." State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011).

Galloway-Williams' testimony in the present case indirectly commented on the child witness's credibility and improperly bolstered her testimony.

With regard to Galloway-Williams' testimony that false denials are more common than false allegations, the Court of Appeals wrote:

> Nor did Galloway-Williams's testimony about false denials being more common than false allegations improperly bolster Child's credibility. As stated previously, Galloway-Williams did not testify regarding Child; rather, she testified as to the general behavioral reactions of children who have been abused, risk factors, and the concepts of grooming and delayed disclosure. Although we acknowledge Galloway-Williams's testimony could be interpreted as having insinuated Child's testimony was credible because false allegations are not as common as false denials, Galloway-Williams's statement here is distinguishable from those in cases in which our courts have found there was no way to interpret the challenged statements *other than as* bolstering a victim's credibility. Compare State v. Makins, 433 S.C. 494, 505, 860 S.E.2d 666, 672 (2021) (holding dual expert's testimony served foundational purpose other than to vouch for minor's credibility but cautioning that the use of "one witness as both a characteristics expert and the treatment witness is a risky undertaking" and the better practice is to use a blind witness as Anderson urged), *with* State v. McKerley, 397 S.C. 461, 465-67, 725 S.E.2d 139, 142-43 (Ct. App. 2012) (finding although the expert never directly stated she believed the victim, the jury could not interpret the expert's testimony in any way other than that she believed the victim was telling the truth); see also Chavis, 412 S.C. at 109, 771 S.E.2d at 340 (finding the circuit court erred when allowing an expert witness to testify about her recommendation that the victim "not be around the [defendant] for any reason" because this testimony could only be interpreted as indicating the expert believed the victim's allegations).

State v. Acker, 435 S.C. 716, 869 S.E.2d 873, 882 (Ct. App. 2022). The Court of Appeals erred.

The expert witness's testimony went beyond discussing risk factors, grooming, delayed disclosure and general behavioral characteristics when the State asked her on direct examination about false denials and false disclosures. There is no way to interpret Galloway-Williams' testimony in any way other than children who make allegations of sexual abuse, like the witness in this case, are credible because false allegations are not as common as false denials. The testimony went beyond explaining that children may deny abuse as a behavioral characteristic of child sex abuse victims. Instead, the testimony improperly reflected the expert's opinion about the credibility of sex abuse allegations made by children, and, by inference, the credibility of the child witness in the present case.

The Court of Appeals' reliance on Makins is misplaced. Makins did not address improper credibility testimony from a "blind expert." Instead, as the Court wrote, "We address one primary issue in this appeal: by testifying both as an expert in characteristics of child trauma and child sexual abuse dynamics and as Minor's treating therapist, did Rich imply she thought Minor was truthful, thereby improperly bolstering Minor's credibility?" State v. Makins, 433 S.C. 494, 860 S.E.2d 666, 668 (2021). In finding that, under the specific facts of the case, the dual expert's testimony did not improperly bolster the Minor's credibility, the Court wrote:

> Rich's simple affirmation that she provided therapy to Minor also differs from previous indirect vouching cases in which expert witness testimony was more extensive. See Briggs, 421 S.C. at 329, 806 S.E.2d at 720 (ruling forensic interviewer's testimony she made the determination the child understood the difference between the truth and a lie "indirectly revealed she believed the subsequent disclosure ... was the truth"); State v. Chavis, 412 S.C. 101, 108, 771 S.E.2d 336, 340 (2015) (holding forensic interviewer's testimony that child victim should "not be around [Petitioner] for any reason" improperly bolstered the child victim's credibility); Kromah, 401 S.C. at 359, 737 S.E.2d at 500 (ruling forensic interviewer's testimony about "a compelling finding of child abuse" was the equivalent of her stating the child was being truthful); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (concluding there was no other way to interpret the language in the forensic interviewer's reports that each child had "provide[d] a compelling disclosure of abuse by [Petitioner]" than to mean she believed the children were truthful).

State v. Makins, 433 S.C. 494, 860 S.E.2d 666, 671 (2021). The Court in Makins noted that the dual expert's testimony did not contain direct or indirect bolstering writing, "The trial court's limitations on Rich's testimony achieved their purpose—her testimony contained no direct or indirect bolstering discernible to this Court. The trial court deftly navigated the issue and protected the proceeding from improper bolstering. We find no abuse of discretion in the trial court's decisions to deny Makins's motion for mistrial or to admit Rich's limited testimony." 433 S.C. at 860 S.E.2d at 672 (n. 2 omitted).

In contrast, in the present case the expert did not affirm that she provided therapy because she did not. Instead, the "blind expert" testified that false denials are more common than false allegations, testimony far more problematic than the "simple affirmation" in Makins. The "blind expert's" testimony in this case was not limited and indirectly implied that she believed the child witness because false denials are more common than false allegations. Importantly, the improper testimony took place during the direct examination by the State and not in response to cross-examination. The essence of Galloway-Williams' testimony about false denials being more common that false allegations is to say that children do not lie about sexual abuse. This is improper.

In State v. Kromah, 401 S.C. 340, 359, 737 S.E.2d 490, 500 (2013), the South Carolina Supreme Court found that the forensic interviewer should not have been allowed to testify about a compelling finding of child abuse because that was the equivalent of Smith [the forensic interviewer] stating the Child was telling the truth. The fact that the witness in the present case did not interview the minor does not render her testimony admissible. A witness can improperly vouch for the credibility of another witness without having had any direct contact with that witness. In the present case expert's testimony was the equivalent of stating that the witness was telling the truth because false denials are more common than false allegations and children with behavioral problems should be believed.

While the witness in the present case was not the forensic interviewer, she was qualified as an expert in the field of child maltreatment and child abuse dynamics. As noted by the Court in Kromah, "Smith was qualified as an expert and, although an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts. The label of expert should

be jealously guarded by the court and never loosely bandied about." 401 S.C. at 357, 737 S.E.2d at 499 (fn #5 omitted). As an expert witness, the jury would tend to attach more significance to Galloway-Williams's credibility determinations, making the error more prejudicial. Galloway-Williams, testifying as an expert, improperly suggested that the jury should believe the minor witness because children are more likely to deny that abuse occurred than make a false allegation of abuse.

In Chavis the Court found that the testimony of the second forensic interviewer improperly bolstered the credibility of the minor witness. The Court wrote, "Mrs. Griggs's recommendation that Petitioner not be around Victim for any reason, can only be interpreted as Mrs. Griggs believing Victim's claim that Petitioner sexually abused her." State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015). As noted by the Court in Chavis, testimony indicating that the witness believed the minor witness is improper as it invades the province of the jury to determine credibility. See State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding error where there was "no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful"); State v. Dawkins, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989) (finding admission of therapist's testimony indicating he believed victim's allegations were genuine was improper). The bolstering is especially damaging when given by a witness imbued with imprimatur of an expert. State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977) ("It is axiomatic that the credibility of the testimony of these witnesses is for the jury."); State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). In the present case the witness' testimony about believability and false denials being more common than false accusations indicates to the jury that she, as an expert, believes the minor witness. Her testimony was improper.

Additionally, when discussing the fact that children with behavioral problems are at risk for abuse the witness testified, "They are more vulnerable to it for many reasons, one of them being that if they are troublemakers or seen as bad children and then they make a disclosure, an outcry, sometimes they're not believed because they have a previous history of getting in trouble or making things up." (R. p. 109, lines 6-10). This testimony improperly implied that children with behavioral problems who make allegations of sexual abuse, like the witness in this case, are credible and should be believed. This believability testimony, like the testimony about false denials being more common than false accusations, is improper because it goes to the credibility of the minor witness. The witness should not have been allowed to testify about false denials, false accusations, or believability. The trial judge abused his discretion in admitting the testimony.

In finding that Galloway-Williams' believability testimony did not constitute improper bolstering the Court of Appeals emphasized that she was a "blind expert" and then wrote:

> First, Galloway-Williams's testimony regarding disclosures by children with behavioral problems did not improperly bolster Child's credibility because the testimony was included in her general testimony addressing multiple risk factors that make certain children more vulnerable to abuse. See State v. Barrett, 416 S.C. 124, 131-33, 785 S.E.2d 387, 390-91 (Ct. App. 2016) (finding an expert's testimony regarding general behavioral characteristics did not improperly vouch for the victim's credibility because she never directly or indirectly commented on the victim's veracity and truthfulness or the credibility of the victim's claims and she did not limit her testimony to only those behavioral characteristics displayed by the victim). She did not comment on Child's credibility, and she did not seek to link her general characteristics testimony to any type of behavioral reaction Child may—or may not—have exhibited. See id.; Brown, 411 S.C. at 345, 768 S.E.2d at 253 (finding the expert did not improperly bolster the victim's credibility because she testified in broad terms about the reasons victims delay disclosing abuse and she never applied her testimony to the victims in the case).

State v. Acker, 435 S.C. 716, 869 S.E.2d 873, 881–82 (Ct. App. 2022). The Court of Appeals erred.

The witness's status as a "blind expert" did not prevent the witness from indirectly commenting on the child witness's credibility when the expert testified that children with behavioral problems are more vulnerable because they are **not believed** when they make a disclosure. The expert witness's testimony in the present case went beyond generally addressing risk factors that make certain children more vulnerable to abuse. The expert's testimony in the present case improperly reflected her opinion about the credibility of sex abuse allegations made by children with behavioral problems. The clear implication from the testimony is that children with behavioral problems, like the witness in the present case, are credible and should be believed when they make an allegation of abuse.

The expert testimony in the present case went beyond the general behavioral characteristics discussed in State v. Barrett, 416 S.C. 124, 131, 785 S.E.2d 387, 390 (Ct. App. 2016) and State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), abrogated by State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018).

In Barrett this Court wrote:

> Barrett argues Twitty's testimony circumvented the mandates outlined in Kromah. We disagree. Although Twitty conducted Victim's forensic interview, she was not qualified as an expert forensic interviewer and her testimony fell within the parameters of Kromah. Regarding the forensic interview Twitty conducted, she testified as to the date, time, and place of the interview and her personal observations of Victim's demeanor. In fact, Twitty never directly or indirectly commented on the credibility of Victim's accounts of the alleged sexual assault. Moreover, she never addressed the veracity of Victim or opined whether Victim was being truthful. Conversely, on cross-examination, Twitty admitted children lie, she could not give a diagnosis, and she was "certainly not a human lie detector." She elaborated that the focus of her interview was to assess overall child safety and she was "not going in there looking for fact details to prove or not prove child sexual abuse."
>
> Importantly, Twitty did not limit her testimony to explaining the exact behavioral characteristics Victim exhibited. Cf. Anderson, 413 S.C. at 219, 776 S.E.2d at 79 (holding the forensic interviewer "vouched for the minor when she testified only to those characteristics [that] she observed in the minor"). Although Twitty explained

> some of the behavioral patterns Victim exhibited—i.e., delayed reporting and sequence of reporting to peers before adults—she also explained additional characteristics that Victim did not display.

State v. Barrett, 416 S.C. 124, 132–33, 785 S.E.2d 387, 391 (Ct. App. 2016)(n. 2 omitted). The expert in Barrett never directly or indirectly expressed an opinion on the credibility of the witness, as the expert did in the present case.

In Brown the Court of Appeals wrote:

> Subsequently, Galloway–Williams testified she did not review any incident reports or statements associated with this case, never met with or interviewed the minor victims prior to trial, and was not present for their testimony during trial. In fact, her only knowledge about the case came from discussions with the Solicitor's Office. According to Galloway–Williams, research indicates that between seventy and eighty percent of abused children delay disclosing the abuse into adulthood. Further, she stated children delay disclosing abuse for a number of reasons, including: (1) fear of consequences to themselves, the perpetrator, or someone the child loves; (2) the child's age; (3) the child's relationship to the perpetrator; (4) a lack of vocabulary or language to describe what has happened to them; (5) threats by the perpetrator; (6) grooming by the perpetrator; and (7) the perpetrator's normalization of the abusive conduct. Galloway–Williams further explained that most disclosures happen accidentally, and children generally reveal more details over time throughout the disclosure process. When children suffer chronic abuse, she stated it is more difficult for them to sort out the timing of individual incidents and the order in which they occurred. Galloway–Williams also explained that having a close and trusting relationship with the perpetrator can have a very strong impact on whether a child feels like he or she can disclose the abuse. Finally, she testified that child abuse victims will sometimes tolerate sexual abuse to maintain a relationship, particularly if the perpetrator is someone they love and trust.

State v. Brown, 411 S.C. 332, 337–38, 768 S.E.2d 246, 248–49 (Ct. App. 2015), abrogated by State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018). The general behavioral characteristic testimony from the same witness in Brown is distinguished from the testimony in the present case that children with behavioral problems are more vulnerable because they are not believed when they make a disclosure, improperly implying that children with behavioral problems, like the witness in the present case, should be believed when they make an allegation of abuse. The witness went too far in this case.

In distinguishing State v. Jennings, 394 S.C. 473, 716 S.E.2d 91, (2011); State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989); and State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct.App. 2000), the Court of Appeals in Brown wrote:

> In Jennings, our supreme court held the written report prepared by a forensic interviewer regarding her interviews with the victims was inadmissible hearsay and impermissibly vouched for the victims' credibility because the expert concluded the victims "provided a compelling disclosure of abuse." 394 S.C. at 480, 716 S.E.2d at 94. Both Dawkins and Dempsey involved therapists who actually treated the victims and offered testimony clearly indicating they believed the victims were telling the truth about the allegations of sexual abuse. Dawkins, 297 S.C. at 393–94, 377 S.E.2d at 302; Dempsey, 340 S.C. at 571, 532 S.E.2d at 309–10. Contrary to the experts in those cases, Galloway–Williams (1) was not testifying as a forensic interviewer, (2) never interviewed the victims, (3) did not prepare a report for her testimony, (4) did not express an opinion or belief regarding the credibility of child sex abuse victims' allegations, and (5) did not express an opinion regarding the credibility of the minor victims in this case. Thus, we agree with the State's argument that the cases cited by Petitioner are factually and legally distinguishable from this case.

State v. Brown, 411 S.C. 332, 344–45, 768 S.E.2d 246, 252–53 (Ct. App. 2015), abrogated by State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018). In the present case, however, Galloway-Williams expressed an opinion or belief regarding the credibility of child sex abuse victims' allegations. Her testimony indicated that children with behavioral problems who make allegations of sexual abuse should be believed.

Additionally, with regard to the testimony about children with behavioral problems not being believed, the Court of Appeals wrote:

> Additionally, there was no evidence that Child had behavioral problems such that others would be less likely to credit her disclosures. Rather, the testimony indicated Child did not exhibit behavioral or emotional problems until she began cutting her arms. Thus, as in Brown, we do not believe Galloway-Williams's general testimony in this case about children with behavioral problems potentially not being believed bolstered Child's credibility. See State v. Cartwright, 425 S.C. 81, 96, 819 S.E.2d 756, 764 (2018) (concluding the independent expert did not improperly bolster the victims' credibility because she never testified she believed the victims; rather, her testimony generally explained the potential reasons why children recant and the behaviors common to sexually abused children).

State v. Acker, 435 S.C. 716, 869 S.E.2d 873, 882 (Ct. App. 2022). The minor witness in the present case began cutting herself in the summer of 2014, seven years after Petitioner separated from the child's grandmother. (R. p. 12, line 25 – p. 13, lines 1-2). The child was first seen by a pastoral counselor at New Day Counseling Ministries in July of 2014. (R. p. 51, lines 10-22). According to the pastoral counselor, on September 11, 2014, the child alleged abuse that took place at her grandmother's house beginning when she was five years old. (R. p. 52, lines 1-13). At the time of trial in November of 2016, minor witness was seventeen years old. (R. p. 27, lines 1-2). Again, the clear implication from the expert's testimony is that children with behavioral problems, like the witness in this case, should be believed when they make an allegation of abuse.

The expert testimony in the present case went beyond the general behavioral characteristics discussed in Cartwright and Brown. In Cartwright the South Carolina Supreme Court wrote:

> As part of its case, the State called Dr. Alicia Benedetto, a clinical psychologist, as an expert in "child sexual abuse dynamics." Over defense counsel's objection, the trial court qualified Dr. Benedetto as an expert in clinical psychology. Dr. Benedetto acknowledged that she had not talked to any witnesses or victims in the case. She explained that "Child Sexual Abuse Accommodation Syndrome" involved patterns of behavior that children engage in that may not make sense to adults. She stated that children often respond to sexual abuse in a different manner than adults. She acknowledged that a child's response, although different from an adult's, is not necessarily indicative of abuse or untruthfulness. She explained that, to maintain the secrecy of the abuse, it was common for an abuser to bribe or buy gifts for the abused children. Dr. Benedetto asserted that manipulation and fear also play roles in maintaining secrecy. Specifically, she testified "[children] may be afraid for their own safety or the safety of siblings or the safety of the other parent in the home." Additionally, she noted that sexual abuse may cause children to "act out" and abuse alcohol or drugs.
>
> When asked about recantations, Dr. Benedetto maintained that "children routinely delay reporting" and any delay was not indicative of whether or not sexual abuse occurred. Dr. Benedetto added "[c]ertainly we're open to the possibility that it is a true recantation, but we also know that many times a child recants because of what happens after they tell. And, so, we want to be sure not to miss those cases."

State v. Cartwright, 425 S.C. 81, 88, 819 S.E.2d 756, 759–60 (2018). Again, the testimony from the expert witness in Cartwright was limited to general behavioral characteristic. The witness in Cartwright did not testify that children with behavioral problems are more vulnerable because they are not believed when they make a disclosure, improperly implying that children with behavioral problems who make allegations of sexual abuse should be believed.

The error in admitting the testimony was not harmless. The State's case was based on the testimony of the minor and her credibility was a critical factor to be determined by the jury. The State presented no physical evidence. The improper bolstering requires reversal.

3. The Court of Appeals erred in finding that the trial judge properly allowed a witness to testify as an expert in the field of child maltreatment and child abuse dynamics when the testimony went beyond explaining delayed disclosure making the testimony more prejudicial than probative

Without conceding the challenge to the reliability of Galloway-Williams' testimony and the challenge to the portions of her testimony commenting on the credibility of the witness, alternatively, the probative value of the credibility portion of her testimony is substantially outweighed by the danger of unfair prejudice. Petitioner also objected to the witness testimony as being more prejudicial than probative. Petitioner argued, "The probative value of her testimony is substantially outweighed by its prejudicial effect under 403." (R. p. 95, lines 2-4). The judge immediately ruled, "All right. Well, I believe it to be relevant to the issues in this case, and I do not find that the probative value is substantially outweighed by the danger of unfair prejudice." (R. p. 95, lines 6-9). Petitioner renewed the objection immediately following the judge's ruling and again when the State moved to qualify the witness as an expert in front of the jury. (R. p. 100, lines 12-14; p. 107, line 3). Petitioner renewed the objection at the close of the State's case, the

close of the Defense case and after the jury returned the verdict. (R. p. 123, lines 17-19; p. 152, line 23 – p. 153, lines 1-2; p. 193, lines 15-19). The judge denied all of the renewed motions. The judge erred.

The State failed to establish that Galloway-Williams' testimony was reliable and, as discussed above, the judge, as gatekeeper, should have excluded the testimony. Additionally, Galloway-Williams' improper testimony about the credibility of the child witness should have been excluded. Alternatively, the probative value of Galloway-Williams' testimony that false denials were more common than false allegations and that children with behavior problems were vulnerable because they were not believed when they made an allegation of sexual abuse is substantially outweighed by the danger of unfair prejudice.

In State v. Gray, 408 S.C. 601, 609–10, 759 S.E.2d 160, 165 (Ct. App. 2014) this Court wrote:

> Rule 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "Probative" means "[t]ending to prove or disprove." *Black's Law Dictionary* 1323 (9th ed.2009). "Probative value" is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. "[T]he more essential the evidence, the greater its probative value." United States v. Stout, 509 F.3d 796, 804 (6th Cir.2007) (internal quotation marks omitted). Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates.

The improper bolstering testimony was not probative of anything other than that the expert witness believed the allegations. The probative value of the testimony was substantially outweighed by the danger of unfair prejudice. In State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) this Court wrote:

> "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." United States v. Bonds, 12 F.3d

> 540, 567 (6th Cir.1993); United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir.1989) ("[A]ll evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided.").

The testimony resulted in unfair prejudice because it tended to suggest a decision on an improper basis. Specifically, the testimony implied that the child witness was credible.

In finding no error in the trial judge's Rule 403, SCRE, analysis the Court of Appeals wrote:

> Galloway-Williams's testimony was relevant and assisted the jury in understanding child sexual abuse victims' behavior and how children react differently to abuse: some demonstrate self-harm, depression, or anxiety, while others exhibit no outward change in behavior at all. See Jones, 417 S.C. at 336-37, 790 S.E.2d at 26-27 (finding the probative value of the expert's testimony outweighed its prejudicial effect because it helped the jury understand the victim's behavior and demeanor and was "crucial" in explaining why child victims "are often unable to effectively relay incidents of criminal sexual abuse"); Brown, 411 S.C. at 347-48, 768 S.E.2d at 254 (concluding the expert's testimony was highly probative and helped the jury understand sex abuse victims' behavior and did not unfairly prejudice the defendant); Weaverling, 337 S.C. at 475, 523 S.E.2d at 794 (stating behavioral evidence "assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor"). This testimony further assisted the jury in understanding why victims delay disclosure, how close relationships can affect disclosure, and how certain factors may increase the risk of abuse. Therefore, we agree with the circuit court that this testimony was relevant and probative.
>
> Significantly, Galloway-Williams did not testify that *Child* displayed behaviors associated with abuse or that she harmed herself and suffered depression. In fact, she did not—and as observed by the circuit court, could not—speak to Child's behavior at all. Rather, she generally explained behaviors commonly exhibited by sex abuse victims, risk factors, and grooming. Thus, we find no abuse of discretion in the circuit court's admission of this testimony. *See* Rule 403, SCRE (stating relevant evidence is inadmissible if the unfair prejudice substantially outweighs its probative value); Brown, 411 S.C. at 347-48, 768 S.E.2d at 254; Gilchrist, 329 S.C. at 630, 496 S.E.2d at 429 ("All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided." (quoting United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir. 1989))).

State v. Acker, 435 S.C. 716, 869 S.E.2d 873, 883–84 (Ct. App. 2022).

Galloway-Williams's testimony went beyond generally explaining behaviors commonly exhibited by sex abuse victims, risk factors, and grooming. The improper credibility testimony was not relevant or probative and resulted in unfair prejudice. The testimony should have been excluded pursuant to Rule 403, SCRE.

4. The Court of Appeals erred in finding unpreserved for appellate review the Rule 404(b) challenge to allowing a witness to testify that Petitioner admitted in a letter that he had been addicted to pornography for fifty-two years.

During the direct examination of the minor's grandmother, the State asked, "Okay. You mentioned letters. In those letters did he ever mention viewing pornography to you?" (R. p. 59, lines 9-10). Petitioner objected as irrelevant and a bench conference was held. (R. p. 59, lines 13-15). The State again asked if Petitioner ever mentioned viewing pornography. (R. p. 59, lines 18-19). Petitioner again objected. (R. p. 59, lines 21-22). The judge overruled the objection. (R. p. 59, line 23). The witness then testified, "He admitted to me in that letter that he had been addicted to pornography for 52 years." (R. p. 60, lines 1-2).

Later, the trial judge allowed Petitioner to state the grounds for his objection on the record. (R. p. 66, line 24 – p. 67, lines 1-2). Petitioner objected based on Rule 401, SCRE, arguing the testimony was irrelevant. Petitioner argued:

> My objection is based on this. The testimony that the defendant, Mr. Acker, communicated to Ms. Jett in a written form, I believe, that he had been addicted to pornography for a period of 52 years. I reject - - I object based upon Rule 401, state in my belief that it is not relevant. It does not - - we're talking about a period of time that goes back all the way to when he would be a teenager, an early teenager, and the majority of his life if, in fact, that statement was true. It does not even go toward how this pornography was viewed in the content of computer, television, V.C.R. or magazines or printed forms. There's just too much room left for speculation by the jury and as to what the nature of the addiction is and to what extent and what form it would take.

(R. p. 67, lines 5-19).

Petitioner also objected based on Rule 403, SCRE, arguing that the prejudicial effect outweighed the probative value. Petitioner argued:

> Furthermore, if the Court finds that it is relevant because it would tend to make more probable - - to make a determination of a particular fact in this case, we would say that under Rule 403 that the - - the prejudicial effect outweighs the probative effect, value rather, because basically, the same reason I just stated. It's too long a period of time. We don't know what from that the so-called addiction took, and it does not necessarily go toward the fact that he had a propensity for showing this as a person in his mid 60s to a young child that is five years old. It's too prejudicial.

(R. p. 67, lines 20 – p. 68, lines 1-5).

Finally, Petitioner objected based on Rule 404, SCRE, arguing the testimony constituted improper character evidence and did not meet an exception. Petitioner argued, "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. And based on that I would respectfully submit to the Court that the testimony should not have been submitted. (R. p. 68, lines 6-11). Petitioner then moved for a mistrial. (R. p. 68, lines 12-19).

The judge ruled, "Well, I think it's clearly relevant to the charge of dissemination of obscene material, and I do find that the probative value is not substantially outweighed by the danger of unfair prejudice, and therefore that's why I admitted it pursuant to Rule 401 and 403." (R. p. 69, lines 12-17). The trial judge erred. The testimony consisted of improper character evidence and did not meet an exception pursuant to Rule 404(b).

The Court of Appeals found the Rule 404(b) objection was not preserved for appellate review writing:

> The State argues Acker's Rule 404 argument is not preserved for review because the circuit court did not rule on this ground of his argument. Although the circuit court did not expressly rule on Acker's Rule 404 argument, the circuit court addressed it by implication in overruling Acker's objection and admitting the evidence. The grounds for the objection, however, are more problematic. At trial,

> Acker objected to the admission of the statement in the letter to Grandmother as improper character evidence under Rule 404(a). *See* Rule 404(a), SCRE ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion ..." other than as set forth in certain exceptions.). Before this court, however, Acker asserts the testimony was improperly admitted under Rule 404(b) as inadmissible evidence of other crimes, wrongs, or acts. *See* Rule 404(b), SCRE ("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. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."). As the Rule 404(b) argument was not made to the circuit court, we find it unpreserved for our review. See State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("Arguments not raised to or ruled upon by the trial court are not preserved for appellate review. Moreover, a defendant may not argue one ground below and another on appeal." (citation omitted)).

State v. Acker, No. 2016-002368, 2022 WL 164518, at *11 (S.C. Ct. App. Jan. 19, 2022)(n. 7 omitted). The Court of Appeals erred.

The Rule 404, SCRE, objection made at trial is preserved for appellate review. The objection to the testimony that Petitioner admitted in a letter that he had been addicted to pornography for fifty-two years was made generally pursuant to Rule 404 and did not specify Rule 404(a) or (b). (R. p. 68, line 6). Petitioner specifically stated that the addiction to pornography testimony did not meet an exception. (R. p. 68, lines 6-7). In the Rule 403 argument, counsel specifically uses the word "propensity." (R. p. 68, lines 1-5). While Rule 404(a)(1)(2) and (3) provide exceptions, none are applicable to the pornography addiction testimony. In Johnson v. State, 433 S.C. 550, 860 S.E.2d 696, 699 (Ct. App. 2021), this Court wrote:

> We start with the familiar rule that, in general, evidence of a person's character is not admissible to prove the person acted "in conformity therewith on a particular occasion." Rule 404(a), SCRE. We say in general because Rule 404(a) sets forth three exceptions that tell us when character evidence of an accused, a victim, or a witness is allowed. None of the three exceptions are in play here. Rule 404(b) commands that just as a person's general character is off limits unless it fits one of Rule 404(a)'s exceptions, evidence of a person's "other crimes, wrongs, or acts" is likewise inadmissible "to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. Such evidence—commonly referred to

> in our state as "prior bad act" or *Lyle* evidence—is not admissible unless its proponent can demonstrate it has a legitimate purpose, i.e. the evidence does something more than prove a person has a propensity to commit crimes. Rule 404(b), SCRE, recognizes only five legitimate purposes for prior bad act evidence: to prove "motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

As in Johnson, the only exceptions that could possibly be applicable to the pornography addiction testimony in the present case are found in Rule 404(b).

Rule 404, SCRE provides:

> **(a) Character Evidence Generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) *Character of Accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
> (2) *Character of Victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
> (3) *Character of Witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.
>
> **(b) Other Crimes, Wrongs, or Acts.** 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. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

As the Court of Appeals correctly noted, "Although the circuit court did not expressly rule on Acker's Rule 404 argument, the circuit court addressed it by implication in overruling Acker's objection and admitting the evidence." The only possible ground for the objection is the applicable portion of Rule 404, Rule 404(b). The issue is preserved. "Preservation rules are intended to ensure that appellate courts review considered decisions of our trial courts and that issues are not being raised for the first time on appeal. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)." State v. Jones, No. 2020-000653, 2021 WL 5823847, at *3 (S.C. Dec. 8, 2021).

The pornography addiction testimony was properly objected to as "prior bad act" or Lyle evidence not meeting an exception pursuant to Rule 404(b). The trial judge overruled the objection by admitting the testimony. The issue is preserved for appellate review.

As to the merits, the testimony that Petitioner admitted being addicted to pornography for fifty-two years is inadmissible propensity evidence that should have been excluded pursuant to Rule 404(b), State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020). As discussed by this Court in Johnson v. State, 433 S.C. 550, 860 S.E.2d 696, 699 (Ct. App. 2021):

> Our supreme court addressed the proper approach to Rule 404(b) admissibility in State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020). In a criminal case, the State must convince the trial court that the prior bad act evidence is logically relevant to a material fact at issue in the case: "If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime." Lyle, 125 S.C. at 417, 118 S.E. at 807. If, after applying the logical relevancy test with "rigid scrutiny," the trial court concludes the prior bad act evidence serves some purpose other than to show the defendant's proclivity for criminal conduct (and that purpose is one of the five listed in Rule 404(b)), then the evidence is admissible unless its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE; see Perry, 430 S.C. at 44, 842 S.E.2d at 665. If the prior bad act did not result in a criminal conviction, the State also bears the burden of proving the prior bad act by clear and convincing evidence. State v. Smith, 300 S.C. 216, 218, 387 S.E.2d 245, 247 (1989).

The State failed to prove that the bad act testimony that Petitioner admitted an addiction to pornography was logically relevant to a material fact at issue in the case. The State argued:

> Your Honor, I believe the fact that it's not just the pornography statement, is the fact that pornography was encompassed over – admission by the defendant was that it was over a 52-year span, which included the timeframe of the 2004 and 2005 where the Minor disclosed that he showed her child pornography. I think it is relevant in that, and I think it's more probative than it is prejudicial. An element of that is that there was pornography, you know, present in that home. You know, I think the jury can decide whether or not he showed it to that child. Him just having the pornography is not illegal. It's him showing it to the child. So his

admission that he had been addicted to it for 52 years is something relevant to the fact that he had it during that timeframe. And I think it's more probative than it is prejudicial.

(R. p. 68, line 21 – p. 69, lines 1-11). An alleged addiction to pornography does not establish that Petitioner showed pornography to the Minor. The State failed to show that pornography was present in the house. The grandmother only testified about the letter and did not testify about seeing pornography at the house. Additionally, the State failed to prove that the testimony met an exception pursuant to Rule 404(b). The State failed to make any argument in response to the Rule 404 objection. The trial judge erred in admitting the propensity evidence. The error was not harmless.

5. The Court of Appeals erred in finding that the trial judge properly refused to direct a verdict of acquittal for the dissemination of obscene material when the State failed to prove that the material was obscene.

At the close of the State's case Petitioner moved for a directed verdict of acquittal. (R. p. 122, lines 4-7). The State argued that the motion should be denied because the witness testified that Petitioner subjected "her to watching child porno – pornography" and that would satisfy proof of dissemination of obscene material to a person under the age of twelve. (R. p. 122, lines 17-19). The judge denied the motion for a directed verdict of acquittal. (R. p. 123, line 20). The trial judge erred.

The minor testified, "He showed me pornography." (R. p. 34, line 7). When asked about the pornography, the minor testified, "On his computer he showed me videos of people having sex." (R. p. 34, lines 9-10). No videos were introduced in evidence. The State failed to prove that the videos were obscene.

Petitioner was indicted for disseminating obscene material to minor twelve years of age or younger pursuant to S.C. Code §16-15-355. (R. pp. 204-205). S.C. Code §16-15-305 provides:

> For purposes of this article any material is obscene if:
>
> (1) to the average person applying contemporary community standards, the material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (C) of this section;
>
> (2) the average person applying contemporary community standards relating to the depiction or description of sexual conduct would find that the material taken as a whole appeals to the prurient interest in sex;
>
> (3) to a reasonable person, the material taken as a whole lacks serious literary, artistic, political, or scientific value; and
>
> (4) the material as used is not otherwise protected or privileged under the Constitutions of the United States or of this State.

While the statute does not require the State to introduce into evidence at trial the actual alleged obscene material, the State still bears the burden of proving that the material is obscene pursuant to the statute. The testimony of the minor in the present case did not establish that the material was obscene. The testimony failed to establish that the material depicted sexual conduct in a patently offensive way, failed to establish that the material appealed to a prurient interest in sex and failed to prove that the material lacked literary, artistic, political or artistic value. The fact that the minor testified that Petitioner touched himself while he showed her the material on the computer does not establish that the material was obscene. The State failed to meet its burden of proving that the material was obscene. The judge erred in refusing to direct a verdict of acquittal for the dissemination of obscene material charges.

The testimony of the minor does not establish that the material shown constituted obscene material pursuant to S.C. Code §16-15-305. In State v. Brouwer, 346 S.C. 375, 379, 550 S.E.2d 915, 917 (Ct. App. 2001), the South Carolina Court of Appeals wrote, "In considering a directed

verdict motion, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998). On appeal of a criminal case, the reviewing court considers the evidence in the light most favorable to the State. State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000). If any direct or substantial circumstantial evidence exists which reasonably tends to prove the defendant's guilt, or from which his guilt may be fairly and logically deduced, this Court must find the trial court properly submitted the case to the jury. State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000). Viewing the evidence in the light most favorable to the State, the testimony of the minor is simply not sufficient to establish that the video she testified to seeing was obscene pursuant to the statute. The trial judge erred in refusing to direct a verdict of acquittal for the dissemination charges.

In finding that the trial judge correctly denied the motion for directed verdict on the dissemination of obscene material charge the Court of Appeals wrote:

> Child testified Acker showed her pornography on his computer in his home office, specifically "videos of people having sex." Viewing this evidence in the light most favorable to the State, we find the circuit court properly denied Acker's motion for a directed verdict. See generally Weaverling, 337 S.C. at 465-67, 523 S.E.2d at 789-90 (noting the victim stated the defendant showed him "dirty" magazines, a pornographic movie, and nude photographs and the defendant was convicted of disseminating harmful material to a minor).

State v. Acker, 435 S.C. 716, 737–38, 869 S.E.2d 873, 884 (Ct. App. 2022).

The State failed to prove that alleged videos in the present case were obscene. The Court of Appeals' reliance on State v. Weaverling, 337 S.C. 460, 466, 523 S.E.2d 787, 790 (Ct. App. 1999), is misplaced because in Weaverling, "Doe remembered Weaverling kept the pornographic magazine under his bed, the movie in his dresser, and the photographs of his wife in her makeup drawer. With this information the police obtained and executed a search warrant on Weaverling's home. Officers discovered the pornographic magazine and an x-rated movie, but did not find nude

photographs of Weaverling's wife, although she helped in the search for them. Doe identified a pornographic magazine police seized from Weaverling's home as the magazine Weaverling showed him."

In contrast, no video was recovered by the police in the present case. No videos were introduced in evidence. The State relied solely on the witness's testimony that Petitioner showed her "videos of people having sex" to prove dissemination of obscene material. The State failed to prove that the purported videos "of people having sex" were obscene as required pursuant to S.C. Code §16-15-305. The trial judge erred in refusing to direct a verdict of acquittal for the dissemination charge.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on all five of the issues.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of April, 2022.

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Apr 21 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 5892 (S.C. Ct. App. filed 3/25/2022)
Lower Court Case No. 2016-GS-42-02201

THE STATE,

RESPONDENT,

V.

THOMAS STEPHEN ACKER,

PETITIONER

APPELLATE CASE NO. 2016-002368

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari to the Court of Appeals in this case has been served on Scott Matthews, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and the South Carolina Court of Appeals; and Thomas Stephen Acker, #370575, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 21st day of April, 2022.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER