STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

THOMAS STEPHEN ACKER,

APPELLANT

APPELLATE CASE NO 2016-002368

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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF THE CASE

In May of 2016, the Spartanburg County Grand Jury indicted Appellant 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. On November 16, 2016, Appellant proceeded to jury trial before the Honorable J. Derham Cole. Roger Poole and Paul Kreswell Neely represented Appellant at trial. Bethany B. Miles prosecuted the case. The jury returned verdicts of guilty and Judge Cole sentenced Appellant to twenty years for criminal sexual conduct with a minor and five years concurrent for the disseminating charge. A timely notice of intent to appeal was served on November 22, 2016. This appeal follows.

## FACTS

Appellant 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 Appellant she would pick her granddaughter up from kindergarten and would watch her at the house she shared with Appellant. (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 Appellant 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 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. Appellant testified at trial and denied all allegations. (R. p. 144, lines 6-10).

## ARGUMENTS

1. The trial judge erred in allowing a witness to testify as an expert in the field of child maltreatment and child abuse dynamics when the subject matter of the testimony was not beyond the ordinary knowledge of the jury.

Prior to moving to qualify Shauna Galloway-Williams as an expert in the field of child maltreatment and child abuse dynamics, the State proffered her testimony. The witness testified about her employment, educational background and experience. (R. pp. 73-76). The witness testified that she was a licensed professional counselor in South Carolina. (R. p. 75, lines 8-10). She 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. She testified that there is a "unique set of characteristics and information associated with" child sexual abuse. (R. p. 77, lines 6-14). She then testified about reasons a child might delay disclosure. (R. p. 77, line 15 – p. 78, lines 1-10). The witness testified, "So my testimony will be based on my experience in the field as well as 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 characterized her testimony as "soft science." (R. p. 79, lines 18-25).

The trial judge asked the witness specific questions about delayed disclosure. (R. pp. 88-90). The State, however, clarified that the witness would be testifying about risk factors, grooming, and behaviors in addition to delayed disclosure. (R. p. 92, lines 14-16). Appellant objected stating, "Your Honor, I would object to her being qualified as an expert in this area and

to what her testimony is going to be in this case, basically, based on four reasons." (R. p. 93, lines 7-10). Appellant first objected to the testimony because, "Her testimony is not outside the realm of lay knowledge that's required by rule 702 of the South Carolina Rules of Evidence." (R. p. 93, lines 11-13).

The judge overruled the objection stating:

> I do find that the subject matter of the witness' testimony is beyond the ordinary knowledge of the jury and the jury would benefit from the witness' specialized knowledge, experience and skill because the subject matter falls outside the realm of ordinary lay knowledge.
>
> I do also find that the witness should be qualified as an expert based upon her education, training and considerable experience of the last 15 years with respect to the subject matter of her testimony.

(R. p. 99, line 22 – p. 100, lines 1-6). Appellant 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). Appellant 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' testimony was beyond the ordinary knowledge of the jury.

The witness testified, as an expert, to matters that were in the ordinary knowledge of the jury and the testimony did not assist the jury in understanding the evidence or determining a fact in question. While the witness is an experienced child advocate, her testimony as an expert should have been limited to delayed disclosure. Rule 702, SCRE provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience,

training, or education, may testify thereto in the form of an opinion or otherwise." In Watson v. Ford Motor Co., 389 S.C. 434, 445-447, 699 S.E.2d 169, 175 (2010), the South Carolina Supreme Court wrote:

> Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. *See* State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that the witness was improperly qualified as a forensic interviewing expert where the nature of her testimony was based on personal observations and discussions with the child victim). Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. *See* Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (observing that to be competent to testify as an expert, a witness must have acquired by reason of study or experience such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony). 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).

In the present case the witness testimony in reference to risk factors, grooming and other behaviors did not meet the first requirement for admission pursuant to Watson. The State failed to demonstrate that the testimony was beyond the ordinary knowledge of the jury. Additionally, the testimony did not assist the jury in understanding the evidence or determining a fact. The witness testified that there is a unique set of characteristics and information associated with child sexual abuse but she never specified or identified those characteristics, other than the fact that delayed disclosure is present in many allegations of child sexual abuse. (R. p. 77, lines 6-14).

In discussing risk factors the witness testified, "Another risk factor for a child might be their age. Younger children are more vulnerable or more at risk If for no other reason, because they are so much more reliant on adults for caregiving." (R. p. 108, lines 21-24). The jury did not need an expert to tell them that children are vulnerable. The witness also testified that substance abuse in the home is a risk factor for child abuse and neglect. (Tr. p. 108, lines 15-20). Jurors, using their common sense, not expert testimony, know that substance abuse may lead to many negative outcomes including abuse and neglect. The witness also testified that children with disabilities, special needs or who have behavioral, social or emotional problems are at risk for abuse because they are vulnerable. Again, the testimony of the witness was not outside of the ordinary knowledge of the jury. Additionally the risk factors discussed by the witness, unlike the testimony in regard to delayed disclosure, did not assist the jury in understanding the evidence or determining a fact in question. The risk factors testimony should not have been admitted.

The witness also testified about "grooming." (R. p. 109, lines 11 – p. 110, lines 1-14). The grooming testimony, like the risk factor testimony, should not have been admitted because the testimony did not assist the jury in understanding the evidence or determining a fact in question and fell within the ordinary knowledge of the jury.

Finally, the witness testified that after abuse a child may or may not demonstrate a particular behavior or change their behavior. (R. p. 116, line 15 – p. 117 lines 1-17). The testimony simply indicated that individual children react differently to situations. The jury did not need an expert to explain that children will react differently. Additionally, the behavior testimony did not assist the jury in understanding the evidence or determining a fact in question.

In State v. Brown, 411 S.C. 332, 341–42, 768 S.E.2d 246, 251 (Ct. App. 2015), a case involving the same witness, this Court wrote:

> Accordingly, we find Galloway–Williams' specialized knowledge of the behavioral characteristics of child sex abuse victims was relevant and crucial in assisting the jury's understanding of why children might delay disclosing sexual abuse, as well as why their recollections may become clearer each time they discuss the instances of abuse. See White, 361 S.C. at 414–15, 605 S.E.2d at 544; Weaverling, 337 S.C. at 474–75, 523 S.E.2d at 794.

The present case is distinguished from Brown. In the present case the witness testimony was not limited to delayed disclosure. The witness was also allowed to testify about risk factors, grooming and behaviors outside of delayed disclosure. The witness should not have testified as an expert in regard to the additional factors. The present case can also be distinguished from State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) and State v. Weaverling 337 S.C. 460, 523 S.E.2d 787 (Ct.App. 1990) cited in Brown. In Schumpert and Weaverling the appellate courts found that behavioral evidence and rape trauma evidence was admissible to prove a sexual assault occurred where the probative value outweighed the prejudicial effect. The testimony in the present case in regard to risk factors, grooming and behaviors did not prove that a sexual offense occurred. As the testimony did not assist the jury in understanding the evidence or in determining a fact in question, and as will be discussed in further detail below in issue four, any possible probative value was far out-weighed by the prejudicial effect. The trial judge abused his discretion in allowing the witness to testify as an expert in regard to risk factors, grooming and behaviors because this testimony was not outside the ordinary knowledge of the jury and did not assist the jury in understanding any particular evidence or determining a fact. The error was not harmless.

2. The trial judge erred in allowing 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.

Appellant also objected to allowing Galloway-Williams to testify as an expert because 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). Appellant 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). Appellant 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' 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 reliability.

During the in-camera proffer Appellant 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 witness testified that there is a unique set of characteristics and information associated with child sexual abuse but she never specified or identified those characteristics. (R. p. 77, lines 6-14). 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' testimony was reliable. Unlike Chavis, the error in the present case was not harmless.

In State v. Jones, 417 S.C. 319, 333, 790 S.E.2d 17, 25 (Ct. App. 2016) this Court found that the subject of this same witness' testimony was reliable and wrote: "In light of Galloway–Williams' testimony regarding her methods, we are unable to conclude the circuit court abused its discretion in finding Galloway–Williams' testimony reliable." First, in the present case, the witness' testimony in regard to her "methods" does not render the subject matter of her testimony reliable. As in the present case, the witness in Jones did not interview the children. In Jones the witness was qualified, over objection, as an expert in child abuse dynamics and testified about delayed disclosure and the responses of nonoffending caregivers. Testimony about the "methods" used by the witness does not establish that child abuse dynamics testimony is reliable. Second, the witness in the present case did not provide any testimony from which the trial judge could have concluded that the subject of her testimony, including delayed disclosure, grooming and behavioral characteristic, was reliable.

In the present case 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.

3. The trial judge erred in allowing 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, improperly vouching for and bolstering the credibility of the minor witness.

Appellant also objected to allowing Galloway-Williams to testify as an expert because 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. Appellant 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). Appellant 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 the witness 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 that false denials were more common than false allegations improperly bolstered the credibility of the complaining child witness. 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. 100, lines 6-10). The witness should not have been allowed to testify about other children not being believed, false denials and false accusations. These matters go to the credibility of the minor witness. The trial judge abused his discretion in admitting the testimony.

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. The Court in Kromah wrote:

> Because the admissibility of forensic interviews and the testimony based thereon at trial has been the subject of several recent appeals, we believe it would be helpful to set forth, by way of example, the kinds of statements that a forensic interviewer should avoid at trial:
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> • that the child was told to be truthful;
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> • a direct opinion as to a child's veracity or tendency to tell the truth;
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> • any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a "compelling finding" of abuse;
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> • any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or
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> • an opinion that the child's behavior indicated the child was telling the truth.

401 S.C. at 360, 737 S.E.2d at 500. The witness' testimony in the present case, that false denials are more common that false accusations, indirectly vouches for the minor's believability. The witness, testifying as an expert, 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. 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).

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 Appellant not be around Victim for any reason, can only be interpreted as Mrs. Griggs believing Victim's claim that Appellant 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.

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. Unlike in Kromah and Douglas, there was no physical evidence in the present case. The improper bolstering requires reversal.

4. The trial judge erred in allowing 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.

Appellant also objected to the witness testimony as being more prejudicial than probative. Appellant 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). Appellant 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). Appellant 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.

As discussed in issue one, outside the possibility of explaining delayed disclosure, the testimony of the witness as an expert did not assist the jury in understanding the evidence or determining a fact. In addition to delayed disclosure, the witness also testified about risk factors, grooming and unspecified behavioral characteristics. The testimony may not have been relevant because the testimony did not assist the jury in understanding the evidence or determining a fact. If relevant, the testimony had very little probative value. As discussed in issues two and three, the testimony was prejudicial because it was unreliable and improperly bolstered the credibility of the minor witness.

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 witness' testimony in regard to risk factors, grooming and unspecified behavioral characteristics did not prove or disprove anything.

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.").

While the testimony of the expert in the present case had very little probative value, the danger of unfair prejudice was high because the testimony tended to suggest a decision based on unreliable testimony that improperly suggested to the jury that the expert believed the minor witness.

In State v. Jones, 417 S.C. 319, 336–37, 790 S.E.2d 17, 26–27 (Ct. App. 2016) this Court wrote:

> Moreover, we find the high probative value of her testimony outweighed any prejudicial effect on Jones's case. *See* Rule 403, SCRE. As in Brown, "Galloway–Williams' testimony was relevant to help the jury understand various aspects of victims' behavior and provided insight into the often strange demeanors of sexually abused children." 411 S.C. at 347, 768 S.E.2d at 254; see also Weaverling, 337 S.C. at 474, 523 S.E.2d at 794 noting expert testimony "assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the abused child's often strange demeanor" ). Her "testimony was also crucial in explaining to the jury why child sex abuse victims are often unable to effectively relay incidents of criminal sexual abuse." Brown, 411 S.C. at 347, 768 S.E.2d at 254; see also White, 361 S.C. at 414–15, 605 S.E.2d at 544 (noting "[t]he inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior").

The present case can be distinguished from Jones and Brown. Other than explaining delayed disclosure, the jury in the present case did not need to understand that the inexperience

and impressionability of children render them unable to effectively articulate events. First, as discussed in issue one, most juror know this information. Second, the minor in the present case was seventeen years of age at the time of trial. (R. p. 27, lines 1-2). Additionally, while there was testimony that the minor was harming herself and was depressed, the expert did not and could not testify that this behavior was the result of abuse. The witness was unable to testify to specific behavioral characteristics exhibited by child abuse victims. The prejudicial effect of the witness' testimony far outweighed any possible probative value. The judge erred in admitting the testimony. The error was not harmless.

5. The trial judge erred in admitting improper character evidence by allowing a witness to testify that Appellant 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). Appellant objected as irrelevant and a bench conference was held. (R. p. 59, lines 13-15). The State again asked if Appellant ever mentioned viewing pornography. (R. p. 59, lines 18-19). Appellant 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 Appellant to state the ground for his objection on the record. (R. p. 66, line 24 – p. 67, lines 1-2). Appellant objected based on Rule 401, SCRE, arguing the testimony was irrelevant. (R. p. 67, lines 3-19). Appellant also objected based on Rule 403, SCRE, arguing that the prejudicial effect outweighed the probative value. (R. p. 67, lines 20 – p. 68, lines 1-5). Finally, Appellant objected based on Rule 404, SCRE, arguing the testimony constituted improper

character evidence and did not meet an exception. (R. p. 68, lines 6-11). Appellant 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).

In State v. King, 416 S.C. 92, 109, 784 S.E.2d 252, 261 (Ct. App. 2016), reh'g denied (May 2, 2016), cert. granted (Feb. 10, 2017) this Court wrote:

> "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." Rule 404(b), SCRE. Such evidence "may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." *Id.* To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006) (citations omitted).

The testimony that Appellant was addicted to pornography for 52 years is testimony about a prior bad act and inadmissible unless the act met an exception and the State proved the prior bad act by clear and convincing evidence. The State did not argue that the testimony met an exception pursuant to Rule 4049b). (R. p. 68, line 21 – p. 69, lines 1-11). The testimony did not show motive, identity, common scheme or plan or the absence of mistake or accident. The judge erred in admitting the improper testimony. See State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). The error was not harmless.

6. The trial judge erred in refusing 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 Appellant 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 Appellant 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.

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 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.

## CONCLUSION

Based on the above arguments, this Court should reverse Appellant's convictions and remand the case for a new trial.

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ATTORNEY FOR APPELLANT

This 8th day of September, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



September 8th, 2017

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