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May 23 2022

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2022-000497

THE STATE, Respondent,

v.

THOMAS ACKER, Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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II.

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STATEMENT OF THE CASE

Procedural History

In May 2016, a Spartanburg County Grand Jury indicted Petitioner for one count of first degree criminal sexual conduct with a minor and one count of disseminating obscene material to a minor. On November 16-18, 2016, a jury trial was held in the Spartanburg County Court of General Sessions with the Honorable J. Derham Cole, presiding. Petitioner was represented by Roger Poole, Esq., and Paul Neely, Esq. The State was represented by Assistant Attorney General Bethany Miles of the South Carolina Attorney General's Office. At the conclusion of trial, the jury convicted Petitioner of both counts. The trial judge sentenced Petitioner to a term of twenty years' imprisonment for first degree criminal sexual conduct with a minor and five years' imprisonment for disseminating obscene material to a minor. Both sentences ran concurrently with each other resulting in an aggregate sentence of twenty years' imprisonment for Petitioner.

Petitioner appealed his convictions. On October 10, 2019, the Court of Appeals heard oral argument in Petitioner's case. On January 19, 2022, the Court of Appeals issued a published opinion affirming Petitioner's convictions and sentences. State v. Acker, 435 S.C. 716, 869 S.E.2d 873 (Ct. App. 2022). On February 3, 2022, Petitioner filed a petition for rehearing with the Court of Appeals. At the request of the Court of Appeals, the State filed a return to the petition for rehearing on February 16, 2022. The Court of Appeals denied the petition for rehearing on March 25, 2022. 2022. Petitioner filed a petition for writ of certiorari with this Court on April 25, 2022.

Factual History

In 2014, when Victim was fifteen, she began visiting a counselor for treatment of depression and concern of self-harm. (R. 52). During a session in September, Victim disclosed to her counselor that she had been sexually abused at her grandmother's house when she was five years old. (R. 52). The counselor informed Victim's parents, who reported the abuse to the Spartanburg Police Department. (R. 22–23). Ultimately, Petitioner, who was married to Victim's grandmother (Grandmother), was arrested and charged with first degree criminal sexual conduct with a minor and dissemination of obscene material to a minor. (SROA.1–2).

At trial, Victim testified that when she was five years old, she would go to Grandmother's house after school. (R. 30). According to Victim, while Grandmother was working in her office downstairs, she would take a nap. (R. 30). During her nap, Petitioner would enter her room and use his hands to touch her chest and "to touch inside and outside of me." (R. 31, lines 8-9). Victim also stated Petitioner would take off her pants as well as his pants. (R. 31). Petitioner masturbated in front of Victim and would occasionally make Victim touch his penis. (R. 33). According to Victim, Petitioner ejaculated on her. Victim described Petitioner's ejaculate as "white and like sticky like I had to get it off, and it was like hard to get off." (R. 33, lines 18-19). Victim also testified that Petitioner would hold her neck and force her to watch pornography on his computer while he touched himself. (R. 34). Victim testified these occurrences happened more than once and continued until she was seven years old. (R. 35). Victim further stated that she told no one of the abuse until 2014, when she opened up to her counselor. (R. 35). Victim stated she had not told anyone previously because Petitioner threatened to kill Grandmother if she told anyone, and, even if she were to tell someone, no one would believe her. (R. 35).

Grandmother also testified at trial and explained that after divorcing Petitioner in 2008, she remained in contact with him via e-mails, letters, and occasional visits to her home or place of employment. (R. 58–59). During her testimony, Petitioner's counsel objected when Grandmother was asked during direct examination if she had ever received a letter from Petitioner that mentioned viewing pornography. (R. 59). After a discussion on the record, the objection was overruled. (R. 59). Grandmother then testified that Petitioner admitted to her in a letter that he had been addicted to pornography for fifty-two years. (R. 60).

The State called Shauna Galloway-Williams, to testify as an expert in the field of child maltreatment and child abuse dynamics. (R. 73, 76). Galloway-Williams never met Victim or had any contact with her parents or counselors. (R. 88, 91). The State explained to the court that it intended to have Galloway-Williams testify regarding risk factors, grooming, delayed disclosure, and other behaviors within the field of child sexual abuse dynamics. (R. 92). Petitioner objected to Galloway-Williams' being qualified as an expert in her field on four grounds: (1) that her testimony contained material that was "all within the realm of the domain of a common person"; (2) that the probative value of her testimony is outweighed by its prejudicial effect and that this contention "speaks for itself"; (3) that the purpose of the testimony was to bolster Victim's credibility; and (4) that the subject matter of her testimony is unreliable due to the fact that her area of expertise is "non-scientific." (R. 93–96). The trial judge overruled Petitioner's objections and allowed Galloway-Williams' to testify as an expert in the field of child maltreatment and child abuse dynamics. (R. 95-101). Before the jury, Galloway-Williams testified regarding risk factors for sexual abuse, delayed disclosures, grooming, false denials and false disclosures, and behavioral characteristics of children who have been abused. (R. 108-17).

Petitioner testified in his own defense. (R. 124). Petitioner stated that he and Grandmother would occasionally pick up Victim from kindergarten. (R. 141). Petitioner denied ever assaulting Victim and also denied showing her pornography. (R. 141, 143). Petitioner acknowledged that he told his wife that he "had some problems, but it is not entirely pornography." (R. 143, lines 14-15). However, on cross examination, Petitioner testified that he began having contact with pornography from an early age. (R. 149). Furthermore, Petitioner conceded he told Grandmother he was addicted to pornography for fifty-two years. (R. 149). At the conclusion of trial, Petitioner was convicted of both counts.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Appellate courts are "bound by the trial court's factual findings unless they are clearly erroneous." Id. 354 S.C. at 6, 545 S.E.2d at 829. "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

In determining whether a directed verdict should be granted, "the trial judge shall consider only the existence or non-existence of the evidence and not its weight." Rule 19 SCRCrimP. "On an appeal from the trial court's denial of a motion for a directed verdict, the appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling." State v. Lindsey, 355 S.C. 15, 20, 583 S.E.2d 740, 742 (2003).

ARGUMENT

I.

The Court of Appeals did not err in finding the trial judge properly allowed Shauna Galloway-Williams to testify in the field of child maltreatment and child abuse dynamics because the trial judge properly evaluated the reliability of her testimony based on her role as a blind expert testifying about general topics related to child sexual abuse that were based on cases studies and peer reviewed research of known instances of abuse.

Petitioner argues the Court of Appeals erred in affirming the trial judge's decision to allow Shauna Galloway-Williams to testify as an expert in the field of child maltreatment and child abuse dynamics because the State failed to prove the reliability of Galloway-Williams' testimony. In support of his argument, Petitioner asserts the trial judge erred because Galloway-Williams did not "identify any research, case study or publication to support the substance of her testimony" (Petition for Cert. 7). Petitioner further complains that Galloway Williams "offered no statistics to demonstrate how often disclosure was delayed in allegations of child sexual abuse." (Petition for Cert. 7). Petitioner's argument misunderstands the nature of Galloway-Williams testimony and this Court's opinions in State v. Chavis[1] and State v. Jones[2]. The Court of Appeals properly distinguished Chavis from the facts of Petitioner's case and found 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." Acker, 435 S.C. at 731, 869 S.E.2d at 881. Therefore, the Court of Appeals correctly reasoned that Galloway Williams' testimony was admissible, just as this Court concluded in Jones[3], because it was based

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[1] State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015).
[2] State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018).
[3] In Jones this Court concluded the same witness, Shauna Galloway-Williams, "met the threshold reliability requirement when she testified her methods were published in professional articles and

on "her experience and the research conducted in her field, and this research was based on cased studies for which the researchers analyzed cases of known abuse to determine whether there were similarities among cases." Id.

"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." Rule 702 SCRE. "All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). "There is no formulaic approach for determining the foundational requirements of qualifications and reliability in non-scientific evidence." Chavis, 412 S.C. at 108, 771 S.E.2d at 339.

Petitioner begins his argument by comparing his case to this Court's holding in Chavis. The facts in Chavis are plainly distinguishable from the facts of Petitioner's case. In Chavis this Court considered whether the trial judge erred in qualifying a forensic interviewer as an expert in the field of child abuse assessment. The State's expert in that case, Mrs. Elliot, offered an opinion about whether a disclosure of abuse was made to another forensic interviewer who was unavailable for trial. Chavis, 412 S.C. at 107, 771 S.E.2d at 339. Ms. Elliot's opinion was based on her training and experience in the RATAC method. Id. In Jones, this Court distinguished Galloway-Williams' testimony from the kind presented in Chavis when it 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

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trade publications, subject to peer review, and uniformly accepted and relied upon by other professionals in the field." Jones 412 S.C. at 640, 817 S.E.2d at 272.

concept of delayed disclosure and the role of non-offending caregivers." Jones, 423 S.C. at 639, 817 S.E.2d at 272.

Just as she did in Jones, Galloway-Williams presented blind testimony about general concepts in child abuse dynamics in Petitioner's case. Such testimony cannot be quantified with mathematic precision as Petitioner seems to argue to this Court. Like the defendant in Jones, Petitioner conflates reliability with perfection. As Galloway-Williams explained in Petitioner's case, child abuse dynamics is "soft science, meaning that we can't expose children to conditions and then test them against abuse conditions." (R. 79, lines 15-17). Because scientists cannot expose children repeatedly to abusive conditions, Galloway-William's research cannot be quantified numerically as Petitioner insists. As this Court noted in Jones: "There is always a possibility that an expert witness's opinions are incorrect. However, whether to accept the expert's opinions or not is a matter for the jury to decide. Trial courts are tasked only with determining whether the basis for the expert's opinions is sufficiently reliable such that it may be offered into evidence." Jones, 423 S.C. at 639-640, 817 S.E.2d at 272. Here, the trial judge properly determined the basis of Galloway-Williams opinion was sufficiently reliable as this Court's precedent requires.

Petitioner also misreads Jones to require an expert witness in the field of child abuse dynamics to provide specific citations to the research they relied upon to be tendered as an expert. Contrary to Petitioner's assertion, Jones has no such requirement. On the contrary, Jones merely noted that Galloway-Williams could have offered specific citations if she were given an opportunity to gather them. Jones 423 S.C. at 639, 817 S.E.2d at 272. Despite Galloway-Williams not possessing a bibliography of all the research she relied on, this Court noted in Jones, as the Court of Appeals did here, that Galloway-Williams' testimony was supported by

peer-reviewed professional journals and publications that were uniformly accepted and recognized by child sexual abuse experts. Id. Because the trial court properly determined that Galloway-Williams' testimony met the threshold of reliability based on her training, experience, and reliance on peer reviewed research, the Court of Appeals properly affirmed the trial judge's decision to tender Galloway-Williams as an expert.

II.

The Court of Appeals did not err in finding the trial judge properly allowed Shauna Galloway-Williams to testify in the field of child maltreatment and child abuse dynamics because the trial judge correctly held Galloway-Williams could not bolster Victim's testimony because she never met Victim and did not know anything about Victim's case.

Petitioner next argues the Court of Appeal erred in affirming the trial judge's decision to allow Shauna Galloway-Williams to testify as an expert in the field of child maltreatment and child abuse dynamics because she improperly vouched for and bolstered Victim's credibility. Specifically, Petitioner complains of Galloway-Williams' testimony that false denials were more common than false accusations[4], as well as her testimony regarding children with behavioral problems being more vulnerable to abuse. Despite Galloway-Williams never having met Victim and knowing nothing about her case, Petitioner nonetheless maintains "the witness improperly vouched for the credibility of the minor witness even though she never met the minor witness." (Petition for Cert. 11). Contrary to Petitioner's argument, the State heeded the warnings of this Court in State v. Anderson[5] and State v. Makins[6] and properly used an expert who had not met Victim, nor knew anything about her case to avoid bolstering Victim's testimony.

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[4] When discussing whether Galloway-Williams' testimony bolstered Victim's testimony at oral argument, Counsel for Petitioner acknowledged this Court's opinion in Jones and the Court of Appeals opinion in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) "have begun to close the door on some of these arguments.", particularly in regard to delayed disclosure, but maintained testimony regarding false denials and false accusations has yet to be addressed. (Oral Argument 28:05-28:40)

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

When calling a witness to testify about behavioral characteristics of child abuse, this Court has suggested the better practice is "not to have the individual who examined the alleged victim testify, but rather to call an independent expert." Anderson, 413 S.C. at 218, 776 S.E.2d at 79. This Court reaffirmed this recommendation recently in State v. Makins. In Makins, this Court wrote "While we find no improper bolstering occurred in this case, we repeat our warning in Anderson about dual experts. Using one witness as both a characteristics expert and the treatment witness is a risky undertaking. This issue might have been avoided completely had the State called a blind characteristics expert." State v. Makins, 433 S.C. at 505, 860 S.E.2d at 672. Here, the State complied with this Court's recommendation in Anderson and Makins by calling a blind expert who didn't know anything about Victim's case.

Because Galloway-Williams did not know anything about Victim's case, she could not have bolstered Victim's credibility. In regard to Petitioner's complaint about Galloway-Williams' testimony regarding false denials and false allegations, the Court of Appeals noted such testimony could not have bolstered Victim's testimony because "Galloway-Williams never treated child and never testified she believed Child, nor did she provide any indication that she had considered Child's specific disclosures..... Galloway-Williams never linked her general statements to this case or Child's credibility." Acker, 435 S.C. at 734, 869 S.E.2d at 882. Similarly, when making his ruling, the trial judge noted:

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

(R. 95, lines 16-25).

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[6] State v. Makins, 433 S.C. 494, 860 S.E.2d 666 (2021).

In regard to Petitioner's second complaint about Galloway-Williams' testimony related to children with behavioral problems, the Court of Appeals found "there was no evidence that Child exhibited behavioral problems such that others would be less likely to credit her disclosures." Acker, 435 S.C. at 733, 869 S.E.2d at 882. Because Galloway-Williams did not know Victim and did not know anything about her case, she could not improperly vouch for or bolster Victim's credibility. Accordingly, the Court of Appeals did not err in affirming the trial judge's ruling allowing Galloway-Williams to testify as an expert witness.

III.

The Court of Appeals did not err in finding the trial judge properly allowed Shauna Galloway-Williams to testify in the field of child maltreatment and child abuse dynamics because her testimony was probative and did not prejudice Petitioner because she testified as a blind expert.

Petitioner next argues that the Court of Appeals erred in affirming the trial judge's decision to allow Shauna Galloway-Williams to testify as an expert in the field of child maltreatment and child abuse dynamics because the probative value of her testimony was substantially outweighed by the danger of unfair prejudice. Petitioner's argument fails for two reasons. First, Galloway-Williams' testimony was relevant and had probative value because it assisted the jury in understanding how children react differently to abuse. In Jones this Court effectively resolved the question of whether this type of testimony is relevant and probative when it wrote: "the law in South Carolina is settled: behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized." Jones, 423 S.C. at 636, 817 S.E.2d at 271. Here, the Court of Appeals found "Galloway-William'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." Acker, 435 S.C. at 735, 869 S.E.2d at 883.

Second, as previously argued, Galloway-Williams' testimony could not be unfairly prejudicial because she did not know anything about Victim's case. The Court of Appeals recognized this when they noted 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." Acker, 435 S.C. at 736, 869 S.E.2d at 883. Because Petitioner did not suffer any prejudice from Galloway-Williams' testimony, let alone enough prejudice to substantially outweigh the probative value of the testimony, the Court of Appeals correctly affirmed the trial judge's ruling.

IV.

The Court of Appeals did not err in holding the issue of whether Grandmother properly testified about Petitioner's porn addiction was not preserved for appeal. Even if preserved, the trial judge did not err in allowing the testimony because it was not offered as a prior bad act. Even if Grandmother's testimony was admitted in error, any error was harmless because Grandmother's testimony was cumulative to Petitioner's admission that he was addicted to porn for fifty-two years.

The Court of Appeals correctly held that Petitioner did not preserve for appeal the issue of whether Grandmother was properly allowed to testify that Petitioner admitted he was addicted to porn. However, even if preserved, Petitioner's argument fails on the merits, because Petitioner's addiction to porn was not a prior bad act and even if it were, Grandmother's testimony was cumulative to Petitioner's admission that he had problems with pornography and he admitted his addiction to Grandmother. (R. 143, 149).

Error Preservation

Petitioner argues that his general reference to Rule 404 SCRE and character evidence preserved his objection for appeal. On the contrary, a review of the record reveals Petitioner had an opportunity to place his specific objection on the record and he failed to do so. When Grandmother testified at trial, Petitioner offered an objection that was addressed in an off the record bench conference. (R. 59). The trial judge overruled Petitioner's objection, but gave Petitioner an opportunity to place his objection more fully on the record. (R. 66-68). Petitioner objected under Rule 401, Rule 403, and Rule 404 SCRE. In regard to Rule 404, Petitioner offered "Additionally, under 404 I don't see any type of exception. It's character evidence, and character evidence, of course as the Court knows, is generally inadmissible." (R. 68, lines 6-9). Petitioner did not specify whether he was objecting under Rule 404(a) or Rule 404(b) SCRE. Petitioner merely stated that character evidence is generally inadmissible which closely resembles the language of Rule 404(a) SCRE. By contrast, Petitioner did not use the words "prior bad acts", "Lyle evidence", or any language that would otherwise indicate Petitioner was objecting under Rule 404(b) SCRE. The Court of Appeals properly recognized Petitioner's failure when they wrote "as the Rule 404(b) argument was not made to the circuit court, we find it unpreserved for our review." Acker, 435 S.C. at 740, 869 S.E.2d at 885.Because a Rule 404(b) argument was not presented to the trial court, the Court of Appeals correctly held Petitioner failed to preserve the issue for appeal.

Merits

Even if preserved for appeal, Petitioner's argument nonetheless fails on the merits. Petitioner's addiction was not offered as a prior bad act. Possessing or viewing pornography is not illegal in South Carolina. Therefore, Petitioner's admission that he was addicted to a legal

activity could not be construed as a prior bad act. Additionally, any error in the admission of Grandmother's testimony was harmless because her testimony was merely cumulative to Petitioner's admission that he struggled with porn addiction and admitted to Grandmother that he had been addicted for fifty-two years. (R. 143, 149). Therefore, the Court of Appeals did not err in affirming the trial judge's ruling.

V.

The Court of Appeals did not err in holding the trial judge properly refused to direct a verdict of acquittal on the dissemination of obscene material to a minor charge when the State proved Petitioner disseminated obscene material to Victim through Victim's testimony.

Finally, Petitioner argues the trial judge erred in not granting him a directed verdict of acquittal on the dissemination of obscene material to a minor charge because the State did not prove the material was obscene. Petitioner acknowledges the State was not required to introduce the obscene material into evidence, but still claims Victim's testimony did not prove the material was obscene. (Petition for Cert. 23-24). Petitioner's argument ignores the whole of Victim's testimony. Victim did not merely testify that Petitioner forced her to watch videos of people having sex, but he did so while holding Victim down and touching himself. When taken in the light most favorable to the State, the Court of Appeals properly affirmed the decision of the trial judge to deny Petitioner's directed verdict motion.

Section 16-15-305(B) defines material as 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; [or]
> (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.

S.C. Code Ann. § 16-15-305 (2015). Prurient interest is defined as "a shameful or morbid interest in nudity, sex, or excretion and is reflective of an arousal or lewd or lascivious desires and thoughts." S.C. Code Ann. § 16-15-305(C)(3). Finally, the statute provides that obscenity "must be judged with reference to ordinary adults except that it must be judged with reference to children or other especially susceptible audiences..." S.C. Code Ann. § 16-15-305(D).

Here, Petitioner ignores the whole of Victim's testimony. Victim testified she was forced to watch videos of people having sex when she was just five years old. (R. 34). This testimony alone was sufficient to prove Petitioner disseminated obscene material. However, Victim further elaborated that Petitioner put his hand around her neck and held her so she couldn't move while he touched himself. (R. 34). Victim's testimony belies Petitioner's assertion that the material he showed Victim was anything but obscene. To the contrary, when considered in the light most favorable to the State, evidence existed that the material shown to Victim appealed to the prurient interest in sex by virtue of Petitioner touching himself while he forced Victim to watch the material. When this testimony is combined with Victim's earlier testimony about Petitioner masturbating and ejaculating on her at the conclusion of his sexual assaults, there can be little doubt the material Petitioner forced Victim to watch was obscene. (R. 33). Accordingly, the Court of Appeals correctly affirmed the trial judge's denial of Petitioner's motion for a directed verdict on the charge of dissemination of obscene material to a minor.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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