STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Jun 02 2022

S.C. SUPREME COURT

---

Certiorari to Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

THOMAS STEPHEN ACKER,

PETITIONER

APPELLATE CASE NO. 2022-000497

---

# REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

---

KATHRINE HAGGARD HUDGINS
Appellate Defender

ADAM SINCLAIR RUFFIN
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEYS FOR PETITIONER

## INDEX

## 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?

## ARGUMENTS IN REPLY

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.**

The trial judge allowed Shauna Galloway-Williams to testify, over objection, as an expert in the field of child maltreatment and child abuse dynamics. The State, however, failed to prove that the subject matter of the expert testimony, child maltreatment and child abuse dynamics, was reliable. The Court of Appeals found that the expert's testimony was reliable because the 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. State v. Acker, 435 S.C. 716, 869 S.E.2d 873, 881 (Ct. App. 2022). The record reflects, however, that neither the expert nor the State provided the trial judge with any research material upon which the expert testimony was purportedly based. Neither the expert nor the State provided the trial judge with any case studies upon which the expert testimony was purportedly based. Respondent, citing State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018), argues that the expert's testimony was supported by peer-reviewed professional journals and publications that were uniformly accepted and recognized by child abuse experts. (Return to Petition for Writ of Certiorari pp. 9-10). Neither the expert nor the State provided the trial judge with the names of any peer-reviewed professional journals or publications.

The trial judge found the testimony reliable 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). Education, training and experience alone does not render the subject matter of expert testimony reliable. As Justice Scalia wrote in his concurring opinion in

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 158–59, 119 S. Ct. 1167, 1179, 143 L. Ed. 2d 238 (1999):

> I join the opinion of the Court, which makes clear that the discretion it endorses—trial-court discretion in choosing the manner of testing expert reliability—is not discretion to abandon the gatekeeping function. I think it worth adding that it is not discretion to perform the function inadequately. Rather, it is discretion to choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky. Though, as the Court makes clear today, the *Daubert* factors are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion.

The trial judge in the present case abandoned his gatekeeping function by admitting expert testimony without a basis to find that the subject matter of the testimony was reliable. While the reliability determination does not require perfection, the State, as proponent of the expert testimony, must provide the trial judge with some information, other than education, training and experience, upon which to base a reliability determination. The trial judge abused his discretion by admitting expert testimony without a basis to determine reliability. 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.**

The expert witness in the present case improperly vouched for and bolstered the credibility of the minor witness when 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). Respondent argues that, "Because Galloway-Williams did not know anything about Victim's case, she could not have bolstered Victim's credibility." (Return to Petition for Writ of Certiorari p. 11). Improper vouching

and bolstering can come from a witness, like the expert witness in the present case, who did not treat the complaining minor witness. See Chappell v. State, 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019).

While the State in the present case heeded the warnings of this Court in State v. Makins, 433 S.C. 494, 860 S.E.2d 666 (2021) and State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), by calling an expert witness who did not treat the minor witness, the State went too far in asking the expert witness on direct examination about false denials and false disclosures. (R. p. 111, lines 6-7). The questioning on direct went beyond risk factors, grooming, delayed disclosure and general behavioral characteristics. The questioning improperly implied that the expert witness believed that the testimony of the minor witness was credible.

The expert's testimony in the present case 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 is analogous to this same witness's testimony in Chappell v. State, 429 S.C. 68, 74, 837 S.E.2d 496, 499 (Ct. App. 2019), that, "Children don't often lie about sexual abuse incidents." In Chappell the Court of Appeals found trial counsel ineffective for failing to object to the testimony that improperly bolstered the minor witness's credibility. The improper bolstering in the present case requires a new trial.

**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.**

The probative value of the expert witness' testimony 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 is substantially outweighed by the danger of unfair prejudice. Respondent and the Court of Appeals failed to consider the improper false denial, false accusation testimony from the expert

witness in addressing the Rule 403, SCRE, issue. The testimony went beyond generally explaining behaviors commonly exhibited by sex abuse victims, risk factors, and grooming

Importantly, the minor witness in the present case did not deny abuse and later recant, minimizing the probative value of the testimony. "To understand the probative value of any evidence, we must consider what was practically in dispute at trial. State v. Gray, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014)." State v. Phillips, 430 S.C. 319, 327, 844 S.E.2d 651, 655 (2020). The dispute in the present case did not involve an initial denial. The dispute was whether or not the jury believed the allegations made against Petitioner by the minor witness. The improper testimony was not relevant or probative. Unfair prejudice resulted because the improper testimony from the expert bolstered the testimony of the minor witness, as discussed in issue two, and credibility was a critical factor to be determined by the jury. 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.**

Although 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), a reasonable reading of the record and both Rule 404(a) and (b) support the position that Petitioner was making the objection pursuant to Rule 404(b). Rule 404(a) does not apply. Rule 404(a)(1) involves "[e]videcne of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same." Rule 404(a)(2) involves the character of a victim. Rule 404(a)(3) involve the character of a witness. Testimony that Petitioner admitted in a letter that he had been addicted to pornography is not covered by Rule 404(a).

Rule 404(b) provides that, "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." Petitioner specifically stated that the addiction to pornography testimony did not meet an exception. (R. p. 68, lines 6-7). The objection to the pornography addiction was pursuant to Rule 404(b). The issue is preserved for appellate review.

Respondent does not argue that the pornography addiction testimony meets an exception to Rule 404(b). Instead, Respondent argues that, "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." (Return to Petition for Writ of Certiorari pp. 14-15). Respondent's reading of Rule 404(b) to require an illegal act is too restrictive. There is no illegality requirement for the other crimes, wrongs or acts of Rule 404(b). The pornography addiction was a prior bad act that did not meet an exception pursuant to Rule 404(b).

Respondent additionally argues that, [A]ny 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." Counsel for Petitioner would not have questioned Petitioner about the pornography addiction if the testimony had been properly excluded during the grandmother's testimony. The error in admitting the pornography addiction testimony 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.**

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(B) 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.

The minor witness testified that between the time she was in kindergarten until she was about seven years old Petitioner showed her videos on his computer of people having sex. (R. pp. 34-35). She also testified that Petitioner held her by her neck so she couldn't move and touched himself while showing her the video. (R. p. 34, lines 11-23). No videos of obscene material were recovered or introduced in evidence at trial. The grandmother did not testify about seeing obscene material. The State's evidence of obscene material was based solely on the testimony of the minor.

The minor's testimony in this case was not sufficient for the State to prove that the videos were obscene pursuant to the statute. 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 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
Adam S. Ruffin
Appellate Defenders

ATTORNEYS FOR PETITIONER

This 2nd day of June, 2022.