STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Roger M. Young, Sr., Circuit Court Judge
Appellate Case Tracking No. 2012-211729

The State, Respondent,

vs.

Keith Gadsden, Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court correctly allowed the testimony of the State's expert and Appellant's issue is not properly preserved for review on appeal.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

The victim, Theoderrick Nelson, testified Appellant was his basketball coach in the mid 1980's. (T.73-74; R.___). The victim testified he stopped playing basketball after an incident with Appellant. The victim stated Appellant drove up to his house and asked him if he wanted to go practice with Appellant so the victim could become a starter on the basketball team. (T.74; R.___). Appellant then drove the victim to St. Julian the Divine center to practice basketball. (T.76; R.___).

The victim testified Appellant told him to go to the bathroom and then followed him in. (T. 78; R.___). Once in the bathroom, Appellant told him to pull down his pants and lie on the floor. The victim complied. He said Appellant then inserted his penis in the victim's anus. (T.79; R.___). Appellant then told the victim to get a hand towel and wipe himself up. Appellant told the victim "don't worry about it, a lot of the kids went through it." (T.80; R.___). The victim went home and did not tell anyone about the incident. (T.80-81; R.___).

More than 20 years later, the victim came forward about the abuse. He was hired by the City of Charleston recreation department. He found out Appellant worked for the recreation department when he was supposed to deliver equipment to the site where Appellant worked. He avoided Appellant at that time. (T.82-83; R.___).

The victim and his stepson became involved in a heated argument. After the argument, the stepson left. The victim saw his stepson get into Appellant's vehicle. (T.84-85; R.___). It was after seeing his son leave with Appellant that the victim finally disclosed the abuse to a co-worker and a supervisor. (T.86-87; R.___).

Dr. Donald Elsey testified as an expert in childhood sexual abuse. He testified about the phenomenon of delayed disclosure. (T.172; R.___). He stated: "There is a misconception when I child is hurt they come right out and tell mom and dad, and the evidence and reality, that is just not true, for many reasons. " (T.173; R.___). He testified about studies presented and research done since the 1980's showing the delay in reporting is common. Further, he testified from his own experience that in a group of male victims the average time from abuse to disclosure was 27 years. (T.173-174; R.___). He further testified about the concept of grooming and, finally, indicated that in nearly 6000 cases he has been associated with only two have involved abuse by a stranger. (T.176; R.___).

ARGUMENT

I. The trial court correctly allowed the testimony of the State's expert and Appellant's issue is not properly preserved for review on appeal.

Appellant contends the trial court erred in allowing the testimony of Dr. Elsey regarding delayed disclosure and its causes. Appellant asserts the testimony was impermissible bolstering and vouching. First, the issue is clearly not preserved for review on appeal. Second, the testimony by Dr. Elsey stated no opinion which bolstered or vouched for the victim's truthfulness or credibility. Accordingly, this Court should affirm the trial court's ruling.

Preservation

First, the issue is clearly not preserved for review on appeal. Appellant raised his objection to Dr. Elsey's testimony in an *in limine* hearing prior to the admission of the evidence. During the hearing, Appellant maintained the testimony of Dr. Elsey would amount to impermissible bolstering of the victim. He asserted Dr. Elsey should, therefore, not be allowed to testify. The trial court ruled:

> The thing I think we need to be really careful about is to make sure that the testimony does not go into, essentially, the witness vouching for the veracity of the testimony of the victim. In fact, that's pretty much clear they cannot say whether or not they think in their opinion they're telling the truth . . . .

(T.142; R.___). After finding Dr. Elsey could testify about delayed disclosure in general, the court again ruled in Appellant's favor regarding his complaints of bolstering and vouching, indicating the witnesses "are not going to be allowed to testify as to whether or not they think the victim is telling the truth or not." (T.151; R.___).

After the in limine hearing, the State presented the testimony of Ms. McDonald, a clinical forensic counselor and psychotherapist. The next witness after Ms. McDonald was Dr. Elsey. Appellant never made a contemporaneous objection to any of Dr. Elsey's testimony, and never raised any objection when he believed Dr. Elsey's testimony crossed into the impermissible bolstering the trial court already prohibited.

Normally, a motion *in limine* to exclude evidence does not preserve the issue for appellate review because a motion *in limine* is not a final determination. State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). "A ruling on the motion is not the ultimate disposition on the admissibility of evidence. It remains subject to change based upon developments during trial." State v. Floyd, 295 S.C. 518, 520, 369 S.E.2d 842, 843 (1988).

"Making a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced." See State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996). The Appellate Courts have crafted an exception to this rule:

> [W]here a judge makes a ruling on the admission of evidence on the record **immediately prior** to the introduction of the evidence in question, the aggrieved party does not need to renew the objection. The issue is preserved: Because **no evidence** was presented between the ruling and [the] testimony, there was no basis for the trial court to change its ruling. Thus, ... [the] motion was not a motion in limine. The trial court's ruling in this instance was in no way preliminary, but to the contrary, was a final ruling. Accordingly, [the defendant] was not required to renew her objection to the admission of the testimony in order to preserve the issue for appeal. State v. Mueller, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410 (Ct. App. 1995).

State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). After conceding no contemporaneous objections were made, Appellant attempts to invoke the Forrester rule to claim the issue he has raised is preserved for review on appeal. The rule, however, is inapplicable in this case because the State presented evidence between the court's *in limine* ruling and Dr. Elsey's testimony. The *in limine* ruling was not "immediately prior" to the testimony Appellant now raises as objectionable. As a result, the issue is clearly not preserved for review on appeal.

Further, the issue is not preserved because the trial court ruled in Appellant's favor on the bolstering and vouching issue, finding Dr. Elsey would not be allowed to bolster or vouch for the victim's credibility, veracity or truthfulness. Appellant then was required to object to any testimony he believed violated the trial court's ruling. He failed to object to any of Dr. Elsey's testimony, and he has waived any objection on the basis of bolstering or vouching. See State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court). If a party fails to properly object, the party is procedurally barred from raising the issue on appeal. Id. Accordingly, Appellant's issue related to the improper bolstering or vouching by Dr. Elsey's testimony is no properly preserved and not properly before this Court for review on appeal.

Merits

Appellant's issue also fails on the merits. In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). This Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000) (citing State v.

Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993) (appellate courts are bound by the trial court's fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law)). This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant. State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

"[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." State v. Kromah, 401 S.C. 340, ___, 737 S.E.2d 490, 499 (2013). "For an expert to comment on the veracity of a [victim's] accusations of sexual abuse is improper." State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). This Court recently stated:

> "Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror." State v. Douglas, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), rev'd in part on other grounds, 380 S.C. 499, 671 S.E.2d 606 (2009). Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain "the

> assessment of witness credibility . . . within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012).

State v. Taylor, Op. No. 5084 (S.C.Ct. App. Refiled May 22, 2013). Any time an expert testifies or provides evidence which supports the underlying charge levied by the victim, it does not result in improper or impermissible bolstering or vouching. It is only when the testimony invades the province of the jury and makes a comment on the credibility or veracity of the victim. Otherwise, any medical doctor's testimony that the victim suffered some injury would be bolstering of the victim's testimony. Dr. Elsey never commented on the credibility or veracity of the victim. He never indicated he believed the victim or that the victim's story was consistent with sexual abuse. He merely informed the jury of the reality of delayed disclosure and educated them on the fact it is the rule and not the exception.

Five categories of behavior exemplified by children who are victims of sexual abuse have been identified: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted, and unconvincing disclosure; and, (5) retraction. John E. B. Myers, et al, Expert Testimony in Child Sexual Abuse Litigation, 68 Nebraska Law Review 1, 66–67 (1989).[1] Testimony regarding the behavioral characteristics of sex abuse victims should be admissible for the purpose of disabusing a jury of misconceptions it might hold about how a child reacts to molestation. As the trial court found, the testimony was admissible to "answer a reasonable juror's question as to why did you take so long to report this to anyone, and to the extent that this is not an unusual

[1] "This article was written by an interdisciplinary group of authors, including a social worker, two psychologists, a pediatrician, a child psychiatrist, and an attorney, and it has been cited favorably as a comprehensive overview of the use of experts in child sexual abuse cases." State v. Morgan, 326 S.C. 503, 508, 485 S.E.2d 112, 115 (Ct. App. 1997), overruled on other grounds, State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009).

phenomenon, based on studies and evidence that these folks have developed over the years." (T.150; R.___). This is clearly an issue in this case when disclosure took many years. Further, Appellant's counsel made it an issue in this case in his opening statement commenting on how long it took the victim to report the abuse and if the alleged abuse affected him so traumatically how did the victim continue living in the same area without reporting. (T.60-62; 252-255; R.___). The State, therefore, should have the right to respond.

The Courts of this state have examined behavioral testimony in several cases. Initially in State v. Hudnall, 293 S.C. 97, 359 S.E.2d 59 (1987), the South Carolina Supreme Court held expert testimony regarding common behavioral characteristics exhibited by child victims of sexual abuse was not admissible to establish abuse had occurred. The Court held this evidence admissible only to rebut a defense claim that the victim's response was inconsistent with such a trauma. Id. at 100-101, 359 S.E.2d at 61. The Supreme Court changed direction in State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), holding trauma testimony of a rape victim is relevant to prove the elements of criminal sexual conduct since such evidence makes it more or less probable that the offense occurred.

In State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), the South Carolina Supreme Court considered expert testimony regarding rape trauma syndrome. The expert testified to characteristics commonly found in sexual assault victims. Id. at 505, 435 S.E.2d at 861. The Supreme Court overturned its holding in Hudnall, and specifically found: "both expert testimony and behavioral evidence are admissible as rape trauma

evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect."

This Court had a chance to address similar behavior testimony in State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). In Weaverling, an expert testified regarding behavior and characteristics of a sexually abused victim. This Court stated: "Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible." Id. at 474-475, 523 S.E.2d at 794 (citing Frenzel v. State, 849 P.2d 741 (Wyo.1993); State v. Lujan, 192 Ariz. 448, 967 P.2d 123 (1998) (opinion testimony describing behavioral characteristics outside jurors' common experience is permitted as long as it meets other admissibility requirements)). This Court explained:

> Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. Frenzel, *supra*. It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor. Id. See also Lujan, *supra* (when facts of case raise questions of credibility or accuracy that might not be explained by experiences common to jurors—like reactions of child victims of sexual abuse—expert testimony on general behavioral characteristics of such victims should be admitted).

Id. at 475, 523 S.E.2d at 794. Significantly, this Court went one step further in its holding:

> There is no requirement the sexual assault victim be personally interviewed or examined by the expert before the expert can give behavioral evidence testimony. The fact that the expert does not personally interview the victim bears on the weight of the behavioral evidence not on its admissibility. See Henson v. State, 535 N.E.2d 1189 (Ind.1989). Such facts may be brought out by opposing counsel on cross-examination. Id.

Id.

Numerous other states which have considered the issue have also found it admissible, finding the behavioral traits appropriate testimony for an expert. See State v. J.Q., 617 A.2d 1196, 1206 (N.J. 1993) ("There does not appear to be a dispute about acceptance within the scientific community of the clinical theory that CSAAS identifies or describes behavioral traits commonly found in child-abuse victims."); State v. Reser, 767 P.2d 1277, 1282 (Kan. 1989) ("There are numerous cases from other jurisdictions where expert testimony regarding characteristics of sexually abused children has been held properly admitted as providing helpful background information to the jury."); Keri v. State, 347 S.E.2d 236, 238 (Ga. App. 1986) (finding expert testimony assisted jury in understanding why sexually abused children are secretive, why they were frightened, why they act out and become disciplinary problems, and why the children could not give specific dates for the acts they say were committed by the defendant); see also John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y 1, 45-46 (2010) ("Psychological research demonstrates that delayed reporting is common among sexually abused children. Frequently when children finally disclose, they give slightly different versions of the abuse to different interviewers. Finally, although there is debate about how many sexually abused children recant, it is undisputed that some children recant and some recant their recantation. Thus, from a psychological point of view, expert testimony about delay, inconsistency, and recantation is not controversial. From the legal perspective, such testimony is not worrisome." (footnotes omitted)).

This Court should find, consistent with Weaverling and numerous other cases, that the testimony by Dr. Elsey was properly admitted. It did not comment in any way on the veracity or credibility of the victim, instead it explained to the jury the phenomenon of delayed disclosure, something the average jury may not understand or accept otherwise. Accordingly, this Court should affirm the finding of the trial court.

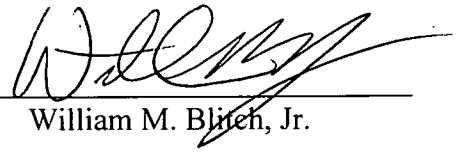
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

BY: 
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

May 24, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Roger M. Young, Sr., Circuit Court Judge
Appellate Case Tracking No. 2012-211729

The State, Respondent,

vs.

Keith Gadsden, Appellant.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

(1) True-billed indictment(s); and

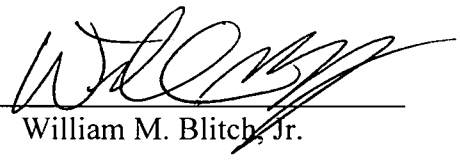
(2) Trial Transcript pages 1, 8-10, 55-88, 93-125, 141-177, 250-282, 291, 296.

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

BY: 
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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May 24, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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The State, Respondent,

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PROOF OF SERVICE

I, William M. Blitch, Jr., certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 24th day of May, 2013.

WILLIAM M. BLITCH, JR.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

May 24, 2013

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Keith Gadsden
Appellate Case Tracking No. 2012-211729

Dear Ms. Hackett:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

WMB/erd
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services