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**Nov 13 2023**

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO DORCHESTER COUNTY  
Honorable Diane S. Goodstein, Circuit Court Judge

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Appellate Case No. 2023-000362

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VERNON COOLEY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**BRIEF OF RESPONDENT  
PURSUANT TO *WHITE V. STATE***

---

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**The trial court did not abuse its discretion in allowing an expert in child abuse pediatrics who conducted a physical examination on the minor victim to testify that redness to minor victim’s genital area, as observed in a photograph from an earlier examination but not in the subsequent examination, meant the minor victim probably had an injury consistent with digital penetration because the expert (1) did not offer an opinion on the victim’s credibility, (2) did not examine the victim for an investigatory purpose, (3) did not testify to specific disclosures made by the victim, (4) an independent expert in child abuse pediatrics was called to testify regarding potential causes for the redness observed, and (5) if improper, the testimony was a harmless error.**..... 5

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**PETITIONER'S STATEMENT OF ISSUE ON APPEAL**

Did the trial judge err in allowing an expert in child abuse pediatrics who interviewed the minor and conducted a follow up examination to opine that the redness seen in a photograph from an earlier examination but not in the follow up examination was consistent with digital penetration because the testimony improperly bolstered the credibility of the minor witness?

**RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL**

Whether the trial court abused its discretion in allowing an expert in child abuse pediatrics who conducted a physical examination on the minor victim to testify that redness to minor victim's genital area, as observed in a photograph from an earlier examination but not in the subsequent examination, meant the minor victim probably had an injury consistent with digital penetration.<sup>1</sup>

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<sup>1</sup> Respondent agrees with Petitioner that the PCR judge correctly found this issue preserved, citing *State v. Forrester*, 343 S.C. 637, 541 S.E.2d 837 (2001).

## STATEMENT OF THE CASE

In August 2018, the Dorchester County Grand Jury indicted Vernon L. Cooley (“Petitioner”) for criminal sexual conduct with a minor - second degree (2016-GS-18-0534). (App. 352-53). On August 27, 2018, Petitioner proceeded to a jury trial before the Honorable Diane S. Goodstein. The State was represented by Assistant Solicitors Sheila Mims and Ryan Templeton. Petitioner was represented by Charlie Whirl (“trial counsel”). The jury convicted Petitioner, as indicted. Judge Goodstein sentenced Petitioner to twenty (20) years in prison. (App. 354). Petitioner did not file a notice of intent to appeal.

On July 23, 2019, Petitioner filed an application for post-conviction relief (“PCR”). (App. 355-61). On November 17, 2021, the State filed a return and a partial motion to dismiss. (App. 362-69). On January 25, 2023, an evidentiary hearing was convened before the Honorable Heath P. Taylor. Assistant Attorney General Caroline Whitney O’Kelly represented the State, and Christopher R. Geel, Esquire, represented Petitioner at the hearing.

On February 21, 2023, Judge Taylor granted Petitioner PCR relief in part, granting a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), and denied Petitioner relief on remaining grounds. (App. 404-12). On March 2, 2023, a notice of intent to appeal was served. On September 27, 2023, Petitioner filed a petition for writ certiorari and a separate brief pursuant to *White*.

## STATEMENT OF THE FACTS

At trial, minor victim (“Victim”) testified that on March 5, 2016, when she was twelve (12) years old, her grandfather agreed to take Victim and her siblings to breakfast. (App. 99-100). When Victim arrived at her grandfather’s house, no one was there but him. (App. 101). While alone with her grandfather, Victim testified he began kissing on her neck and touching her vaginal area inside of her pants. (App. 101). Victim testified the two went to his room, wherein she laid on the bed and he pulled down Victim’s pants and inserted his fingers in her vagina. (App. 101-02). Shortly after the incident, Victim went to a friend’s house and called her stepfather to pick her up. (App. 104-05). Victim disclosed the events to her stepfather, who contacted the police. (App. 105-06). Victim spoke to police and was taken to the hospital. (App. 106).

Melissa Blanchard (“Detective Blanchard”), a Dorchester County Sheriff’s Office detective, testified she arrived at the scene and spoke to Victim and her stepfather. (App. 182-83). Blanchard testified Victim ultimately revealed that a sexual assault occurred. (App. 183). Blanchard called a victim’s advocate to escort Victim to MUSC to submit to a sexual assault kit and set up a forensic interview at the Dorchester Children’s Advocacy Center. (App. 184).

Katherine Fabrizio (“Fabrizio”), an expert in child abuse pediatrics, testified she examined Victim while working at MUSC. (App. 259). Fabrizio reviewed the SLED report, lab work, photographs, and talked to Victim. (App. 260-61). Fabrizio took pictures during her examination of Victim on March 24th. (App. 261). Fabrizio testified she observed redness of the hymenal tissue in the photos from Victim’s first examination on March 5th but did not observe redness in the subsequent examination on March 24th. (App. 261-63). Fabrizio testified the disappeared redness meant Victim probably had an acute injury to that area initially, and the injury had resolved. (App. 263). Fabrizio further testified the injury is consistent with digital penetration. (App. 263-64).

## STANDARD OF REVIEW

The decision to admit or exclude testimony from an expert witness is within the sound discretion of the trial court. *State v. Makings*, 433 S.C. 494, 500, 860 S.E.2d 666, 670 (2021). The trial court's decision to admit expert testimony will not be reversed on appeal unless there is an abuse of discretion. *Id.* An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013).

## ARGUMENT

**The trial court did not abuse its discretion in allowing an expert in child abuse pediatrics who conducted a physical examination on the minor victim to testify that redness to minor victim's genital area, as observed in a photograph from an earlier examination but not in the subsequent examination, meant the minor victim probably had an injury to the area that is consistent with digital penetration.**

The trial court did not abuse its discretion by allowing Fabrizio to testify that redness to Victim's genital area, as observed from a photograph from an earlier examination but not the subsequent examination, probably meant Victim had an injury that is consistent with digital penetration because Fabrizio did not offer an opinion on the credibility of Victim, did not examine Victim for an investigatory purpose, did not testify to specific disclosures made by Victim, and an independent expert was called to testify. An expert giving an opinion is allowed to rely on facts and data that are not admitted into evidence, or even admissible, if the facts or data are of a type reasonably relied upon by experts in the particular field. Rule 703, SCRE; *Kromah*, 401 S.C. at 358, 737 S.E.2d at 499. Although experts are allowed to give an opinion, they may not offer an opinion regarding the credibility of other witnesses. *Kromah*, 401 S.C. at 358, 737 S.E.2d at 499.

At trial, the trial court held a hearing outside of the jury's presence; during which, Fabrizio's testimony was proffered. (App. 231-55). Concerned with the potential for bolstering, the trial court limited the scope of Fabrizio's testimony by instructing her to only testify to medical diagnoses she made as Victim's treating nurse practitioner. (App. 245-248). The trial court further instructed Fabrizio not to speak on the sexual abuse disclosure Victim made to during the physical examination. (App. 251-52).

Fabrizio, qualified as an expert in child abuse pediatrics, testified that she conducted a physical examination on Victim on March 24<sup>th</sup>. (App. 25). Fabrizio testified Victim was seen in the emergency room two weeks earlier, on March 5<sup>th</sup> and photographs were taken then. (App. 260-

61). In preparation for the examination, Fabrizio reviewed photographs, lab work, and SLED notes. (App. 260). Fabrizio testified she took pictures during her March 24th examination of Victim and was able to review photographs from the March 5<sup>th</sup> visit. (App. 261). Fabrizio observed a redness in Victim's hymenal tissue in pictures from the March 5<sup>th</sup> visit, but the same redness was not seen in the subsequent March 24<sup>th</sup> visit. (App. 261; 263). Fabrizio opined the redness probably meant Victim had an acute injury to that area initially, but the injury had resolved. (App. 263). Fabrizio further testified the injury is consistent with digital penetration. (App. 263-64). On cross-examination, Fabrizio testified that the redness could also be caused by non-specific causes unrelated to sexual abuse. (App. 266).

**A. Fabrizio's testimony did not constitute improper bolstering because Fabrizio did not offer an opinion on Victim's credibility, believability, or veracity.**

Fabrizio's testimony did not constitute improper bolstering because Fabrizio did not offer an opinion on Victim's credibility, believability, or veracity. Assessment of witness credibility is within the exclusive province of the jury, and witnesses are generally not allowed to testify whether another witness is telling the truth. *Kromah*, 401 S.C. at 358, 737 S.E.2d at 499-00. Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child in a sexual abuse matter. *Id.*; compare *Smith v. State*, 386 S.C. 562, 564-65, 689 S.E.2d 629, 631 (2010) (finding a forensic interviewer's testimony that she found the victim's statement "believable" was improper bolstering), with *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (finding a forensic interviewer's testimony was not improper bolstering where an interviewer never stated she believed the victim and gave no other indication concerning the victim's veracity).

In *State v. Kromah*, the Supreme Court found a forensic interviewer's testimony was improper bolstering when the interviewer testified there was a "compelling finding" of child abuse. *Kromah*, 401 S.C. at 356, 737 S.E.2d at 498-99. The Court analogized the forensic interviewer's

comments with similar comments made by another forensic interviewer in *State v. Jennings*, in which the *Jennings* interviewer testified to a “compelling finding” of abuse. *Id.* at 359, 737 S.E.2d at 500 (citing *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011)). Concerned with comments by forensic interviewers, the Court set forth the following list of comments *forensic interviewers* should avoid at trial:

- Statements that the child was told to be truthful;
- A direct opinion as to the child’s veracity or tendency to tell the truth;
- Any statement that vouches for the child’s believability, such as stating a “compelling finding of abuse;”
- Any statement to indicate the interviewer believes the child’s allegations; or
- An opinion that the child’s behavior indicated the child was telling the truth.

*Id.* at 360, 737 S.E.2d at 500 (emphasis added).

Fabrizio did not speak to the credibility of Victim, unlike the forensic interviewers in *Kromah* and *Jennings*. Instead, Fabrizio opined to possible causes of the redness she observed in the photographs from the physical examination, which included causes both related and unrelated to sexual assault. Fabrizio never opined or gave any statement on whether she believed Victim and gave no indication regarding Victim’s veracity or credibility. Thus, Fabrizio’s testimony does not constitute improper bolstering because she did not testify to or give any opinion on Victim’s credibility, believability, or veracity.

**B. Fabrizio interviewed Victim as a nurse practitioner for a medical purpose to conduct a physical examination, not an investigatory purpose to fact-find or aid law enforcement.**

Fabrizio’s testimony does not constitute improper witness bolstering because Fabrizio interviewed Victim for medical purposes to conduct a physical examination, not for an investigatory purpose. The *Kromah* Court was primarily concerned with testimony from forensic interviewers, stating *forensic interviewers* are specially trained to talk to children when there is a

suspicion of abuse or neglect. *Kromah*, 401 S.C. at 357, 737 S.E.2d at 499 (emphasis added). “The job of the interviewer is not to provide therapy but to collect facts.” *Id.*

In *Briggs v. State*, the Court found a forensic interviewer improperly vouched for the credibility of the minor victim where the interviewer conducted forensic interviews for the purpose of finding out whether a sexual abuse occurred and later testified regarding the facts she obtained from the victim. *Briggs v. State*, 421 S.C. 316, 328-39, 806 S.E.2d 713, 720 (2017). The Court identified two purposes forensic interviewers served in child sex abuse cases: evidentiary and investigatory. *Briggs v. State*, 421 S.C. at 327-28, 806 S.E.2d at 719. A forensic interviewer serves an evidentiary purpose by using specially trained skills to talk to children to determine “if something happened.” *Id.* A forensic interviewer serves an investigatory purpose when the interviewer is used as a tool “to aid law enforcement officers in their initial investigative process.” *Id.* The purpose of a forensic interview is to allow law enforcement to determine whether a criminal investigation is warranted. *Id.* (citing *State v. Anderson*, 413 S.C. 212, 221, 776 S.E.2d 76, 80 (2015)). This investigatory purpose should not be discussed in the forensic interviewer’s testimony before the jury. *Id.* (citing *Kromah*, 401 S.C. at 357-58 n. 5, 737 S.E. 2d at 499 n.5; *Anderson*, 413 S.C. at 221, 776 S.E.2d at 80). Both the *Kromah* and *Briggs* Courts found the purpose for which an interviewer questions a child in a sex abuse case is consequential to the admissibility of the interviewer’s testimony before the jury. *See Id.*; *see Kromah*, 401 S.C. at 357-58 n. 5, 737 S.E. 2d at 499 n.5.

Fabrizio interviewed Victim, as a treating nurse practitioner, during the course of a physical medical examination. Fabrizio testified she was working at MUSC as a nurse practitioner at the time when the Victim was examined. (App. 259). According to Fabrizio, before conducting a physical examination on Victim, Fabrizio was required to follow protocol that included review of

photographs and lab reports. (App. 259-60). Fabrizio indicated she “talked to” Victim as a part of the physical examination. (App. 260). On direct and cross-examination, Fabrizio also testified to the method of conducting the physical examination, which included using a scope inside of Victim’s vagina to check for injuries. (App. 263). When asked what Fabrizio looks for when conducting the subsequent physical exam, she testified that the examination is to ensure the patient is healthy and observe physical changes, such as herpes, warts, or breakouts. (App. 262).

Unlike the forensic interviewers in *Briggs* and *Kromah*, Fabrizio spoke to Victim, not to fact-find to aid law enforcement but to render a medical diagnosis. Petitioner asserts Fabrizio’s interview of Victim is analogous with forensic interviews. However, a medical practitioner questioning a Victim to better understand Victim’s alleged injury for purposes of rendering an accurate medical diagnosis is distinctly different from a forensic interviewer that interviews a victim to “determine if something happened.” The purpose of Fabrizio’s questioning matters in determining the admissibility of her testimony. If Fabrizio were questioning Victim for purposes of aiding a law enforcement investigation, the potential for bolstering would be greater. That is not the case here as Fabrizio’s interview was not for the purpose of aiding a law enforcement investigation but to conduct a medical physical examination and render medical diagnosis. Thus, Fabrizio’s testimony does not constitute improper bolstering because Fabrizio did not interview Victim for an investigatory purpose to aid a law enforcement investigation.

**C. Fabrizio’s testimony did not constitute improper bolstering because Fabrizio testified to her opinion regarding the results of the physical examination and did not testify to specific disclosures made by Victim.**

Fabrizio’s testimony did not constitute improper bolstering because Fabrizio did not testify to the specific disclosures made by Victim during the examination. In *State v. Perry*, the Court of Appeals found a treating physician’s testimony did not constitute improper witness bolstering when the physician did not testify to the minor victim’s

disclosures, did not comment on the truthfulness of the victim's history of sexual assault, and testified to the results of the medical examination. *State v. Perry*, 420 S.C. 643, 665-66, 803 S.E.2d 899, 911 (2017), *overruled on other grounds by State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020). The physician, qualified as an expert, testified that she conducted an examination on the minor victim. *Id.* at 653, 803 S.E.2d 899 at 904. The physician testified that before the examinations, she spoke to the minor victim about what occurred. *Id.* The physician did not testify to the specific statements or disclosures of the minor victim. *Id.* at 664, 803 S.E.2d at 910. The physician testified that the victim's experience of sexual abuse was consistent with the physician's findings in the results of the physical examination, which did not reveal anything because of the victim's delayed disclosure. *Id.* at 653, 803 S.E.2d 899 at 904. The court reasoned that although the question asking the physician whether her findings were "consistent with sexual abuse" was "inartfully worded," the physician's affirmative response did not amount to improper bolstering because the physician neither commented on the veracity of the victim's statements nor repeated to the jury the details of victim's disclosures. *Id.* at 655-66, 803 S.E. at 911. The court further wrote that the physician was allowed to provide this opinion to assist the jury in understanding the results of the medical examination. *Id.* (citing Rule 702, SCRE).

Although Fabrizio spoke to Victim for purposes of the physical examination, Fabrizio did not testify to her conversation with the victim. Fabrizio did not repeat to the jury the disclosures made by Victim during the examination, similar to the physician in *Perry*. Fabrizio also did not comment on the veracity of the victim, similar to the physician in *Perry*. Fabrizio testified to her observations and the results of the medical examination; such testimony is allowed under Rule 702. *See* Rule 702, SCRE ("if...specialized

knowledge will assist the trier of fact to understand the evidence...a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion”). Thus, Fabrizio’s testimony regarding the redness being consistent with digital penetration did not constitute improper bolstering.

**D. Fabrizio’s testimony, as both the treating nurse practitioner and an expert in child abuse pediatrics, did not constitute improper bolstering because the State called Dr. Amaya as an independent expert in child abuse pediatrics to testify regarding potential causes for the redness observed.**

Fabrizio’s testimony as both the treating nurse practitioner and an expert in child abuse pediatrics did not constitute improper bolstering because the State called an independent expert in child abuse pediatrics to testify. The credibility of witnesses is for the jury to determine. *Briggs*, 421 S.C. at 328, 806 S.E.2d at 719-20. An issue arises where the State sought to have the *forensic interviewer*, improperly imbued with the imprimatur of an expert witness, invade the province of the jury by vouching for the credibility of the alleged victim. *Id.* (emphasis added). The better practice is to not have the individual who examined the alleged victim testify, but rather to call an independent expert. *State v. Anderson*, 413 S.C. 212, 219, 776 S.E.2d 76, 80 (2015). To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim’s credibility. *Id.* Though a dual expert testifying is not improper bolstering per se, the risk of improper bolstering might be avoided where the State calls a blind expert. *State v. Makins*, 433 S.C. 494, 860 S.E.2d 666 (2021).

In *Anderson*, the Court found a forensic interviewer improperly vouched for the minor victim when the State called a forensic interviewer to testify as both forensic interviewer and an expert, and the forensic interviewer testified to the characteristics of the victim, based on conversations the forensic interviewer had with the victim. *Id.* In a pretrial hearing, the court found the forensic interviewer to be an expert in forensic interviewing. *Id.* However, at trial, the State

offered, and the court qualified the forensic interviewer as an expert in both forensic interviewing and child abuse assessment. *Id.* The Court found the testimony constituted improper bolstering because the forensic interviewer conducted the interview to aid law enforcement and testified as an expert to behavioral characteristics she observed in the victim. *See Id.* at 219-20, 776 S.E.2d at 79-80.

In *State v. Makins*, the Court found a witness' testimony did not constitute improper bolstering when the minor victim's therapist testified as both an expert and the treating therapist. *Makins*, 433 S.C. at 504, 860 S.E.2d at 672. The therapist gave limited testimony about certain disclosures the victim made during therapy sessions. *Id.* at 497, 860 S.E.2d at 668. The therapist testified to her specialization in trauma training and stated that "every person" the therapist worked with has trauma, which defense counsel argued improperly vouched for the victim by saying "if [the victim] didn't suffer trauma, [the therapist] wouldn't be working with her." *Id.* at 498-99, 860 S.E.2d at 668-69. The therapist further testified that the victim disclosed that sexual abuse had occurred. *Id.* The Court disagreed that the therapist's testimony was improper vouching, distinguishing the therapist's testimony from other cases in which expert testimony was "more extensive." *Id.* (comparing *Briggs*, 421 S.C. at 329, 806 S.E.2d at 720 with *Kromah*, 401 S.C. at 359, 737 S.E.2d at 500). The Court noted the question of whether the therapist's testimony was improper bolstering was a close question, but found the testimony served a purpose other than to vouch for the victim's credibility. *Id.* at 503-05, 860 S.E.2d at 671-72. The Court suggested the risk of improper bolstering might be avoided by calling an independent expert to testify. *Id.* at 505, 860 S.E.2d at 672.

Although Fabrizio was qualified as an expert in child abuse pediatrics and testified as the nurse practitioner that treated Victim, as the Court noted in *Makins*, this does not constitute

improper bolstering per se. The primary concern of the *Anderson* Court is forensic investigators being allowed to testify to disclosures made by victims under the guise of an expert qualification. As the *Anderson* Court noted, the better practice is to call an independent expert to testify, which the State did in Petitioner's trial by calling Dr. Amaya to testify.

Dr. Amaya was qualified as an expert in child abuse pediatrics and testified she reviewed the images and report from the March 5<sup>th</sup> examination and the March 24<sup>th</sup> examination conducted by Fabrizio. (App. 268; 271). Dr. Amaya testified she did not observe the redness in Victim's genital areas, as seen in photographs from the initial examination, in photographs from the subsequent examination. (App. 271). Dr. Amaya opined the redness to Victim's genital area could have been caused by digital penetration but could also have other causes. (App. 272).

Petitioner's premise that the cumulation of Dr. Amaya's testimony and Fabrizio's testimony regarding causes of the redness contributed to alleged improper bolstering by Fabrizio's testimony is disparaged and contradicted by the fact that two experts in child abuse pediatrics opined that the redness to Victim's genital area could have resulted from causes unrelated to sexual assault. By testifying to non-sexual assault related causes, Fabrizio and Dr. Amaya did not give an impression to the jury regarding the veracity of Victim's sexual assault disclosure based on the injury sustained. Dr. Amaya's corroboration of Fabrizio's testimony that the redness is attributable to digital penetration, or other causes, further shows the facts supporting the opinion is one reasonably relied upon by experts in the field of child abuse pediatrics.

Petitioner contends the cumulative nature of Dr. Amaya and Fabrizio's testimonies increased the prejudicial impact of any improper bolstering by Fabrizio, citing *Kromah*, 401 S.C. at 357, 737 S.E.2d at 499 (n. 5 omitted), stating "jurors can have a tendency to attach more

significance to the testimony of experts.” This observation by the *Kromah* Court was addressed and remedied by the trial court in Petitioner’s trial by charging the jury as follows.

You should consider expert opinions received in evidence in this case and like any other evidence, give it the weight that you think it deserves. If you decide that the opinion of an expert witness is not based on sufficient education and experience, or if you conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely. *An expert witness’ testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert.*

(App. 329) (emphasis added). The trial court made every reasonable effort to address concerns about both direct and indirect bolstering by limiting the scope of Fabrizio’s testimony and charging the jury that it should give the opinions of experts the weight they think it deserves.

Fabrizio’s testimony did not improperly vouch for the Victim’s credibility because it served a purpose other than to vouch for Victim’s credibility as the testimony could assist the jury in understanding the results of the medical examination. Petitioner contends Fabrizio’s testimony served a purpose to vouch for Victim because it was prejudicial in light of testimony from Detective Blanchard. However, Detective Blanchard and Fabrizio’s testimonies are distinguishable. Detective Blanchard interviewed Victim for an investigatory purpose and testified regarding disclosures made by Victim. By contrast, Fabrizio’s interviewed Victim for a medical purpose and did not testify to disclosures made by Victim. Thus, Fabrizio’s testimony did not constitute improper bolstering.

**E. Even if Fabrizio’s testimony was improper, the testimony was a harmless error that resulted in no articulable prejudice to Petitioner because Petitioner’s trial did not turn solely on the credibility of Victim.**

Petitioner asserts the trial court’s admission of Fabrizio’s testimony warrants reversal. However, even assuming Fabrizio’s testimony constituted improper bolstering, the testimony was a harmless error that did not result in articulable prejudice to Petitioner. Appellate courts will

generally decline to set aside a conviction because of insubstantial errors not affecting the result of the trial. *Kromah*, 401 S.C. at 360, 737 S.E.2d at 501. In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial, and the court must be able to declare such belief beyond a reasonable doubt. *Id.*

In *Jennings*, the Court found the trial court abused its discretion by admitting a forensic interviewer's testimony of "compelling disclosure of abuse" which improperly bolstered the minor victims. *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94-95. The Court determined such error was not harmless because there was *no physical evidence* presented at trial, and the credibility of the minor victims was "the most critical determination" of the case. *Id.* (emphasis added). In *Anderson*, the Court found the trial court abused its discretion by admitting a forensic interviewer's testimony on the behavioral characteristics of the minor victim which improperly bolstered the minor victim. *Anderson*, 413 S.C. at 219, 776 S.E.2d at 79. The Court determined such error was not harmless because there was *no physical evidence* of sexual abuse, and the case "turned solely on the credibility of the victim[.]" *Id.* (emphasis added).

Fabrizio's testimony was a harmless error because there were several pieces of physical evidence of sexual abuse presented at Petitioner's trial. The State presented the following at trial: Victim's underwear from the day of the incident (State's Ex. 1; app. 106-07); SLED analysis of Victim's underwear (State's Ex. 12; app. 216-17); a CSC kit from MUSC (State's Ex. 8); and a sexual assault evidence collection kit (State's Ex. 11; app. 217-23). Fabrizio and Dr. Amaya testified to their observations of redness to Victim's genital area in photographs taken from the physical examination. Fabrizio and Dr. Amaya both testified the redness observed is consistent with digital penetration. Further, Donna Money, qualified as an expert in forensic DNA analysis, testified that DNA profiles from Victim's underwear contained an overabundance of female DNA

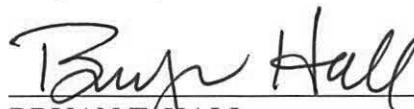
and some indication that male DNA was present. (App. 226). Petitioner's trial is distinguishable from the facts of *Jennings* and *Anderson* because the State presented physical evidence of sexual abuse at Petitioner's trial, and the case did not turn solely on the credibility of Victim. Thus, even if Fabrizio's testimony constituted improper bolstering, it was a harmless error that did not result in articulable prejudice to Petitioner because the jury could have found Petitioner guilty regardless of the alleged bolstering.

*[Space left blank intentionally. Conclusion follows on next page.]*

**CONCLUSION**

Based on the foregoing argument, this Court should find the trial court did not abuse its discretion and affirm Petitioner's convictions and sentences accordingly.

Respectfully submitted,



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