THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

Lee S. Alford, Circuit Court Judge

Case Nos. 2012-GS-42-2624, 2012-GS-42-2625, 2012-GS-42-2626, 2012-GS-42-2627, 2012-GS-42-2633, and 2012-GS-42-2634

Appellate Case No. 2012-213228

The State of South Carolina, Respondent,

v.

Ronasha Taylor, Appellant.

INITIAL BRIEF OF APPELLANT

Andrew R. de Holl
Womble Carlyle Sandridge & Rice, LLP
Post Office Box 999
Charleston, South Carolina 29402
843-720-4634

Robert M. Dudek
Chief Appellate Defender
Post Office Box 11433
Columbia, South Carolina 29211
803-734-1343

Attorneys for Appellant

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STATEMENT OF THE CASE

On May 3, 2012, Ronasha Taylor was indicted for six counts of committing a lewd act on a minor and five counts of criminal sexual conduct with a minor. (Six Indictments dated May 3, 2012; Post-Trial Motion dated September 27, 2012, at 1). Each lewd act charge and each criminal sexual conduct charge related to one of six children who attended Kids R Kids day care, where Taylor worked. (*See* Indictments; Trial Tr. 973:1-13; 1123:14-16; 1133:4-1134:2). Assistant Attorney General Bethany Miles and Assistant Deputy Attorney General Kelly Hall prosecuted the case. (Trial Tr. 1). Stephen Henry defended Taylor. (Trial Tr. 1).

A jury trial took place from September 10 to 19, 2012. (Post-Trial Motion at 1). The State produced no physical evidence of any of the charges.[1] Rather, the State's case consisted largely of the children's testimony, testimony from other witnesses that was based on what the children had previously told them, and video recordings of forensic interviews in which the children claimed Taylor abused them.

The Children's Testimony and the Use of Closed Circuit Television

Each of the six children testified at trial that in a bathroom at Kids R Kids, Taylor touched the child, Taylor made the child touch her, or both. (Trial Tr. 342:16-349:8; 475:3-483:17; 667:5-669:16; 747:18-753:10; 762:22-763:10; 852:2-854:20; 906:2-912:15). Child 1, Child 2, and Child 5 testified in the courtroom. (Trial Tr. 338:18-356:5; 471:8-487:12; 838:23-857:21). Over Taylor's objection, the trial court granted motions by the State for Child 3, Child 4, and Child 6 to testify out of Taylor's presence and outside of the courtroom,

[1] A doctor who physically examined Child 3 and Child 6 testified she found no signs of sexual abuse. (Trial Tr. 639:23-642:3).

through a closed circuit television (CCTV) system. (Trial Tr. 644:18-677:3; 743:14-763:13; 899:21-923:12).

The Forensic Interviewers

The State's two most prominent witnesses were Lynn McMillian and Tabitha Weber, two forensic interviewers who interviewed the children in the course of the investigation of Taylor. McMillan interviewed Child 1, Child 2, and Child 3. (Trial Tr. 387:8-11; 488:21-25; 678:19-22). Weber interviewed Child 4, Child 5, and Child 6. (Trial Tr. 778:14-16; 860:2-4; 924:1-3). According to McMillan and Weber, their goal as forensic interviewers is to "get at the truth" and to "figure out the truth." (Trial Tr. 375:2-5; 771:5-9).

Over Taylor's objections, the trial court allowed McMillan and Weber to testify as experts. (Trial Tr. 373:16-22; 770:15-17). The trial court did so without placing findings on the record as to whether the jury needed expert testimony, whether the testimony McMillian or Weber would provide was reliable, or whether Weber had the qualifications of an expert. (*See* Trial Tr. 373:16-22; 770:15-17).

The Forensic Interview DVDs

McMillan and Weber made video recordings of their interviews. (Trial Tr. 386:18-22). At trial, the State sought to admit DVDs of the interviews. (Trial Tr. 389:23-390:4). Taylor objected to admission of the interviews of Child 1, Child 2, Child 3, and Child 6, arguing that they did not contain particularized guarantees of trustworthiness and therefore were not admissible under section 17-23-175 of the South Carolina Code. (Trial Tr. 392:24-393:21; 494:11-16; 682:21-682:4; 695:22-696:3; 936:14-16). The trial court overruled the objections, admitted the DVDs into evidence, and allowed the state to play the DVDs to the jury. (Trial Tr. 396:6-401:8; 494:17-496:20; 696:4-701:1; 939:4-941:10).

Each DVD contained one or more interviews of a child. In some, but not all, of those interviews, the child in question told the interviewer about touching Taylor or Taylor touching the child in a bathroom at Kids R Kids. (*See* State's Exs. 1, 2, 6, 9, 10, 19, and 22).

The Course of the Trial

The State's presentation of the above evidence followed a pattern. First, a child testified. (Trial Tr. 338:18-356:5; 471:8-487:12; 644:18-677:3; 743:14-763:13; 838:23-857:21; 899:21-923:12). Then, McMillan or Weber testified about the interviews she conducted on the child, telling the jury she took steps to ensure what the child said in the interviews was reliable and was not influenced by third parties. (Trial Tr. 387:8-389:3; 488:21-492:15; 678:19-680:15; 778:14-782:4; 860:2-862:13; 924:1-925:25). Next, the State played the DVD of the interviews that McMillan or Weber performed on the child. (Trial Tr. 402:18-403:2; 497:20-498:7; 681:21-682:13; 783:3-784:1; 863:8-864:1; 926:21-927:25). Finally, after the DVD ended, McMillan or Weber told the jury what she recommended for the child based on his or her disclosure in the interview. McMillan recommended the three children she interviewed get therapy from a clinician with experience in child sexual abuse. (Trial Tr. 406:6-407:5; 503:20-504:5; 684:9-11). Weber recommended her three interviewees get therapy have no contact with Taylor. (Trial Tr. 785:18-21; 866:20-23; 930:3-6).

At the end of the State's case, the State withdrew two of the criminal sexual conduct charges due to lack of evidence. (Trial Tr. 1014:24-1015:11). For the same reason, the trial court directed a verdict on a third criminal sexual conduct charge. (Trial Tr. 1026:10-1029:3).

Taylor then presented her case, in which she and other witnesses testified. (*See* Trial

Tr. 803-804). Taylor denied doing any of the things the children alleged and denied that she touched any of the children inappropriately. (Trial Tr. 1149:5-1150:1).

The jury acquitted Taylor of the two criminal sexual conduct charges but found her guilty of the six lewd act charges. (Trial Tr. 1254:25-1256:9). The trial court sentenced Taylor to fifty years in prison—fifteen years each on two of the charges and five years each on the other four, all to be served consecutively. (Trial Tr. 1271:12-1272:20). Taylor made a motion for new trial asserting numerous errors in the proceedings. (*See generally* Post-Trial Motion). The trial court denied the motion on October 3, 2012. (*See* Order dated Oct. 3, 2012, at 10). Taylor served her notice of appeal of her conviction and sentence on October 16, 2012. (Notice of Appeal 1-2).

STATEMENT OF FACTS

Ronasha Taylor was an experienced day care worker employed by Kids R Kids day care center in Greer. (Trial Tr. 1120:11-18). Taylor performed a number of jobs at Kids R Kids, including teaching kindergarten. (Trial Tr. 1122:17-1123:11). She was well-liked by the children attending Kids R Kids. (Trial Tr. 1095:3-15).

In the fall of 2010, Taylor taught a four-year-old kindergarten class that included Child 1 and Child 6. (Trial Tr. 1123:14-16; 1133:10-12). Laurie Frady, another a four-year-old kindergarten teacher, taught Child 2, Child 3, Child 4, and Child 5. (Trial Tr. 973:1-13; 1133:4-1134:2). Every day, Taylor took her students to Frady's classroom for nap time, where Taylor and Frady took turns watching the children while the other was on break. (Trial Tr. 974:6-975:4; 1134:20-1135:5).

The classrooms had bathrooms in them. (Trial Tr. 891:5-13; *see* Trial Tr. 975:16-18). On several occasions, Taylor assisted some of the children in the bathroom. Child 1 had a tendency to play around in the bathroom, and on one occasion she threw toilet paper on the floor. (Trial Tr. 1138:10-19). On that occasion, Taylor wiped Child 1 to clean her up from going to the bathroom. (Trial Tr. 1164:19-25). Taylor also had to wipe Child 2 because Child 2 had trouble wiping herself after using the bathroom. (Trial Tr. 1167:7-9). Taylor also helped Child 3 in the bathroom and once helped Child 4 with his zipper. (Trial Tr. 1166:11-15; 1167:23-25).

Taylor had some difficulties with Child 6. (Trial Tr. 1137:12-13). Once, when she tried to stop him from kicking other children, he slapped her face and she sent him to the office. (Trial Tr. 1137:14-24). Other times, Child 6 turned off the bathroom lights while Child 5 was using the bathroom, and Taylor would have to go turn the light back on. (Trial

Tr. 1138:20-1139:9).

Kids R Kids had a webcam system called Watch Me Grow, which allowed parents to monitor their children online using video cameras mounted in the classrooms. (Trial Tr. 207:14-18; 252:22-253:5). The cameras in Taylor's and Frady's classrooms allowed viewers to see the doors to the bathrooms, but not inside the bathrooms. (Trial Tr. 460:2-461:3; 891:5-15). Several parents of the six children testified they used Watch Me Grow. (Trial Tr. 253:3-20; 333:12-334:24; 833:10-13; 890:13-891:4). None of them testified they saw Taylor abuse any children.

Beginning in October 2010, four of the six children began making allegations against Taylor. (Trial Tr. 293:14-294:1). Police and the local DSS office investigated the claims. (Trial Tr. 295:12-296:11). In interviews with police and DSS, Taylor denied molesting or abusing the children in any way. (Trial Tr. 1128:7-18; 1168:3-9).

As part of the investigation, McMillan or Weber questioned each child several times. Child 1 told McMillian she licked Taylor's "tummy." (State's Ex. 1, 19:46-20:47). Child 2 said she touched Taylor's "hips." (State's Ex. 6, Interview 3, 13:45-14:54). Child 3 told McMillan she and Child 2 pinched Taylor's "boobies." (State's Ex. 9, Interview 2, 7:04-9:30). Child 4 told Weber he touched and licked Taylor's chest. (*See* State's Ex. 9, 5:30-7:14).

Based on the four children's claims, police issued arrest warrants for Taylor. (Trial Tr. 300:22-301:20). She turned herself in. (Trial Tr. 1129:18-24).

After Taylor was arrested, Weber interviewed Child 5 and Child 6. Child 5 told Weber that he pinched Taylor's "boobs" and that Taylor touched parts of his body that people aren't supposed to touch. (State's Ex. 19, Interview 1, 25:00-26:00, 29:30-29:58;

Interview 2, 4:35-4:43). Child 6 told Weber that Taylor showed him her "boobies" and touched him. (State's Ex. 22, Interview 1, 30:55-34:36).

STANDARD OF REVIEW

The abuse-of-discretion standard governs this Court's review. *See State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 494-95 (2013) (admission of vouching testimony from forensic interviewer); *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) (admission of expert testimony); *State v. Whitner*, 399 S.C. 547, 558, 732 S.E.2d 861, 867 (2012) (admission of video recording of forensic interview); *State v. Bray*, 342 S.C. 23, 27, 535 S.E.2d 636, 639 (2000) (decision to have witness testify outside defendant's presence by closed circuit television). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011).

ARGUMENTS

I. THE TRIAL COURT ERRED IN ALLOWING TWO FORENSIC INTERVIEWERS TO GIVE TESTIMONY THAT IMPERMISSIBLY VOUCHED FOR THE CREDIBILITY OF THE SIX COMPLAINING WITNESSES

The trial court allowed McMillan and Weber to testify that based on the children's disclosures of abuse, they recommended the children get sexual abuse therapy. (Trial Tr. 406:6-407:5; 503:20-504:5; 684:9-11; 785:18-21; 866:20-23; 930:3-6). In addition, Weber testified she recommended Child 4, Child 5, and Child 6 not have any contact with Taylor. (Trial Tr. 785:18-21; 866:20-23; 930:3-6). Admitting this testimony was error.

"The rules of evidence do not allow witnesses to vouch for or offer opinions on the credibility of others, and the work of a forensic interviewer, by its very nature, seeks to ascertain whether abuse occurred at all, i.e., whether the victim is telling the truth, and to identify the source of the abuse." *Kromah*, 401 S.C. at 357 n.5, 737 S.E.2d at 499 n.5; *see also* 401 S.C. at 358, 737 S.E.2d at 499-500 ("Our courts have previously held that '[t]he assessment of witness credibility is within the exclusive province of the jury,' and that witnesses generally are 'not allowed to testify whether another witness is telling the truth.'" (quoting *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012))). For these reasons, the Supreme Court and this Court have recently held several times that it is improper for a forensic interviewer to give testimony vouching for the credibility of a complaining witness in a child abuse case. *See Kromah*, 401 S.C. at 359, 737 S.E.2d at 500 (holding trial court erred in allowing forensic interviewer to testify about her finding of child abuse, as it "was the equivalent of [the interviewer] stating the Child was telling the truth"); *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 (stating that "[f]or an expert to comment on the

veracity of a child's accusations of sexual abuse is improper" and finding trial court erred in admitting forensic interviewer's reports that vouched for children's credibility); *Smith v. State*, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (finding a "forensic interviewer's . . . opinion testimony improperly bolstered the Victim's credibility"); *McKerley*, 397 S.C. at 464, 725 S.E.2d at 141 (stating "witnesses may not improperly bolster the testimony of other witnesses" and holding trial court erred in admitting bolstering testimony of forensic interviewer); *State v. Hill*, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011) (stating, in discussion of forensic interviewer's testimony, "[t]he law is clear that it is improper for a witness to give testimony as to his or her opinion about the credibility of a child victim in a sexual abuse matter.").

Jennings and *McKerley* made clear that improper bolstering testimony encompasses more than direct statements by the forensic interviewer that she believed the child or that the child was truthful. In *Jennings*, the Supreme Court held a trial court abused its discretion in admitting into evidence portions of a forensic interviewer's written reports of interviews she conducted with three alleged child victims. 394 S.C. at 480, 716 S.E.2d at 94. "In each report, the forensic interviewer stated that during the interviews, each child had 'provide[d] a compelling disclosure of abuse by [appellant].'" *Id.* (alterations in *Jennings*). The interviewer further noted in her reports that each child provided details consistent with background information the interviewer had received from their mother, a police report, and the other children. *Id.* The Supreme Court held the reports "allowed the forensic interviewer to improperly vouch for the children's veracity" as "there is no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful." *Id.* Therefore, the Supreme Court held the trial court abused its

discretion in admitting the reports, and it reversed Jennings' convictions for lewd act on a minor. 394 S.C. at 480, 482, 716 S.E.2d at 94-95.

Similarly, in *McKerley*, the forensic interviewer "never testified directly that she believed what the victim stated in her interviews or in her testimony." 397 S.C. at 465, 725 S.E.2d at 142. Rather, she testified that she found the child's interviews were "compelling for sexual abuse," 397 S.C. at 463, 725 S.E.2d at 141. This Court held that the testimony was no different in meaning or effect than the reports in *Jennings* and therefore the trial court abused its discretion in admitting it. 397 S.C. at 463-64, 725 S.E.2d at 141. Addressing a harmless error argument made by the State, the Court identified numerous other improper vouching statements the interviewer made in her testimony, including the following:

- "We want to be able to, . . . after assessing [the child's] behavior and what they are stating in an interview, look at that along with the other information that we may have had at the beginning of the interview and *give an opinion as to whether we think something happened*"
- "we are looking for accuracy of information" given by the victim;
- "we are going to . . . make sure that what the child is telling us is based on something they would have experienced on their own body or that they would have seen or heard, the sensory information";
- "those statements have a level of detail that . . . they would be able to tell [only] if something were to have happened";
- "we are also looking at . . . are there other possible reasons, are there other possible explanations";
- "we are looking to see if[ ] [this] could . . . be explained in another way";
- "we are looking to be sure it adds up";
- "we are looking to see if what they tell us throughout the interview is the same from the beginning to the end";

- "we are also looking at their behavior and the way they are expressing themselves in the interview . . . their behavior and their language";

- in forming her "opinion as to whether . . . something happened," she considered whether the victim's statements were "consistent with the other information" she has on the case; and

- in forming her "opinion as to whether . . . something happened," she considered "does this child appear to be giving statements that are similar to, in my experience, in my training and what I have learned, similar to what other children with the same experience may have had."

397 S.C. at 466-67, 725 S.E.2d at 142. This Court held that "none of this testimony has any relevance except insofar as it informs the jury [the interviewer] believes the story told by the victim," 397 S.C. at 467, 725 S.E.2d at 143, and that the testimony was "'patently inadmissible evidence,'" *id.* (quoting *Jennings*, 394 S.C. at 483, 716 S.E.2d at 96 (Kittredge, J., concurring)).

Finally, in *Kromah*, the Supreme Court heavily criticized the practice of forensic interviewers testifying in child abuse cases. The Court stated that "the primary purpose for calling a 'forensic interviewer'[2] as a witness is to lend credibility to the victim's allegations." 401 S.C. at 358, 737 S.E.2d at 499. Forensic interviewer testimony is therefore inadmissible, with very narrow exceptions, because "[t]he rules of evidence do not allow

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[2] The Court put quotation marks around "forensic interviewer" because the title

> is a misnomer. The use of the word forensic indicates that the interviewer deduces evidence suitable for use in court. It also implies that the evidence is deduced as the result of the application of some scientific methodology. The exact scientific methodology applied apparently defies identification. The RATAC style of interviewing [which McMillan, Weber, and many other forensic interviewers use (*see* Trial Tr. 365:4-366:2; 767:4-16)] is not scientific. It merely represents the objectives and topics of discussion between the interviewer and the child. Somehow RATAC is supposed to convert the interviewer into a human truth-detector whose opinions of the truth are valuable and suitable for the jury's consumption.

401 S.C. at 356 n.4, 737 S.E.2d at 498 n.4.

witnesses to vouch for or offer opinions on the credibility of others, and the work of a forensic interviewer, by its very nature, seeks to ascertain whether abuse occurred at all, i.e., whether the victim is telling the truth, and to identify the source of the abuse." 401 S.C. at 357 n.5, 737 S.E.2d at 499 n.5. The Court went on to write, "Forensic interviewers might be useful as a tool to aid law enforcement officers in their initial investigative process, but this does not make their work appropriate for use in the courtroom." *Id.* This is because the RATAC method forensic interviewers use,

> which is not without its critics, involves evaluating whether the victim understands the importance of telling the truth and whether the victim has told the truth, as well as the forensic interviewer's judgment in determining what actually transpired. . . . [A]n interviewer's expectations or bias, the suggestiveness of the interviewer's questions, and the interviewer's examination of possible alternative explanations for any concerns, are all factors that can influence the interviewer's conclusions in this regard. Such subjects, while undoubtedly important in the investigative process, are not appropriate in a court of law when they run afoul of evidentiary rules and a defendant's constitutional rights.

Id.

Addressing these problems, and also recognizing the recent trend in appeals involving the admissibility of forensic interviewer evidence, the Supreme Court set forth a broad list of "the kinds of statements that a forensic interviewer should avoid at trial:"

- that the child was told to be truthful;
- a direct opinion as to a child's veracity or tendency to tell the truth;
- any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a "compelling finding" of abuse;
- any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or
- an opinion that the child's behavior indicated the child was telling the

truth.

401 S.C. at 359-60, 737 S.E.2d at 500. The Court also listed three narrow topics about which a forensic interviewer may testify:

- the time, date, and circumstances of the interview;
- any personal observations regarding the child's behavior or demeanor; or
- a statement as to events that occurred within the personal knowledge of the interviewer.

Id.

In sum, our courts have greatly limited the circumstances in which forensic interviewer testimony is admissible.

A. McMillan's Testimony Improperly Vouched for the Credibility of Child 1, Child 2, and Child 3

McMillan's testimony regarding her interviews of Child 1, Child 2, and Child 3 improperly vouched for the credibility of the children by indicating McMillan believed the children's allegations of abuse were true and credible.

McMillan's explanation about what she does as a forensic interviewer featured numerous improper statements:

- "A forensic evaluation is an opportunity for a child to tell us what happened to them and for us to make some sense of what may have happened to them and to form some opinion about what the child is saying may have happened to them." (Trial Tr. 374:23-375:1).
- "My goal is to get at the truth. And my goal is to understand as clearly as I can from that child about what that child is trying to tell me has happened to them and what their experience has been." (Trial Tr. 375:2-5).

- "We try to ask questions in a non-leading, non-suggestive manner, meaning we are opening it up very broadly for the child to tell us in their own words about what may have happened to them."[3] (Trial Tr. 375:8-10).

- Before she conducts her first interview of a child, she gets family and other background information from the parents. "It's . . . kind of a check for me about what the child's reporting, if that matches what the parent is reporting . . . . [I]t also helps me to, again, to think about alternative explanations." (Trial Tr. 377:25-378:23).

- Asked "[w]hat procedures or methods are undertaken to ensure reliability," she testified she performs multiple interviews "to check out the consistency of the child as far what they're telling between one interview and another. Is there some core consistency, core similar comments that they're making or details that they're giving us?" (Trial Tr. 367:15-21).

- "We also want to explore with the child some alternative explanation. Is there something else that may explain these allegations that have referred the child to us?" (Trial Tr. 367:22-24).

- "[W]e want to look at the child on an [sic] developmental level as far as their language. Is it a child language or are they sounding more like an adult and—and using adult language which would concern us." (Trial Tr. 367:22-368:2).

- To safeguard against third-party influence, she instructs parents to not let the child talk about the interviews until she has finished the final interview: "I don't want any kind of suggestions to her that would prompt any kind of discussion." (Trial Tr. 405:21-406:5; 490:24-491:11). "I want them to really protect and preserve the whole process." (Trial Tr. 503:10-11).

- Self-correction by an interviewee of something he or she said earlier is an indication of the interviewee "applying truthfulness." (Trial Tr. 489:19-22).

- Her "professional approach to asking a child if something they told [her] happened really happened or not" was "generally, in trying to evaluate their ability to tell the truth. And if they're telling the truth about other things and also just information; if it matches from what I've already heard from the

[3] Contrary to this assertion, at least one child sexual behavior assessment expert has criticized McMillan for using suggestive tactics. *See S.C. Dep't of Soc. Servs. v. Mary C.*, 396 S.C. 15, 23, 720 S.E.2d 503, 507 (Ct. App. 2011) (reciting opinion of expert who reviewed McMillian's interviews of a child and opined that "McMillan inappropriately led [the child] and continued to repeat the same questions to the child until she was satisfied with [the child]'s responses").

parents. . . . [I]s that just pretend or is that the truth or is that true." (Trial Tr. 692:15-25).

These statements improperly established McMillian as "a human truth-detector" whose later statements on her interviews of the children would be "opinions of the truth [that] are valuable and suitable for the jury's consumption." *Kromah*, 401 S.C. at 356 n.4, 737 S.E.2d at 498 n.4.

The improper statements continued in McMillan's testimony about her interviews of Child 1, Child 2, and Child 3:

- Child 1 gave McMillan information about her family that "was consistent with what her mother had told" McMillan. (Trial Tr. 388:10-12).
- Child 2 and Child 3 gave McMillan information about their families and pets that McMillan "verified" through her parents. (Trial Tr. 490:3-7; 679:13-15).
- Child 2 exhibited self-correction in her interviews. (Trial Tr. 490:1-2).
- Child 2 "knew the difference" between telling the truth and telling a lie. (Trial Tr. 490:18-23).
- As a safeguard against third-party influence, McMillan interviewed Child 2 and Child 3 one-on-one, away from their parents. (Trial Tr. 490:24-491; 679:16-23).
- As an additional safeguard, McMillan told Child 2's parents to guard her from questions about the interviews. (Trial Tr. 490:24-491:13).
- McMillan believed Child 2's abuse disclosure was not affected in any way by any type of third-party influence. (Trial Tr. 498:15-17). "[G]enerally what I would see with a child who may have had third-party influence is, they may tell me lots of things very quickly without much explanation about them. But her avoidance was—was telling me that there was not somebody pressuring her to tell me something." (Trial Tr. 498:15-499:1).
- Child 3 used a number of tactics to try to avoid McMillan's questions about the abuse. (Trial Tr. 683:6-16).

Finally, after each time McMillan testified that one of the three children made a disclosure of abuse, (Trial Tr. 388:22-389:3; 492:3-9; 680:3-5), the State asked her what recommendation she made as a result of the disclosure. (Trial Tr. 406:6-16; 503:20-504:3; 684:9). McMillan testified each time that she recommended the child participate in therapy. (Trial Tr. 406:17-19; 504:4-5; 684:10-11). McMillan explained that she referred the children to a licensed mental health clinician with experience working with children who had been sexually abused. (Trial Tr. 406:15-407:8; 504:4-5; 684:10-11). These recommendations were the capstone on the impression McMillan had been building throughout her testimony—that the children's allegations of abuse by Taylor were credible and true.

In short, McMillan testified that she looks for the truth in her interviews and protects the reliability of the process, that the children she interviewed demonstrated signs of truthfulness, and that they told her they had been abused. This testimony is strikingly similar to the testimony in *McKerley* this Court held had no relevance "except insofar as it informs the jury [the forensic interviewer] believes the story told by the victim." 397 S.C. at 467, 725 S.E.2d at 143. In that context, "[t]here is no other way to interpret" McMillan's testimony that she recommended therapy for the children than to mean she "believed the children were being truthful," *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94. This places the recommendation testimony squarely within *Kromah*'s list of prohibited statements. The trial court erred each time it admitted McMillan's recommendation testimony.

B. Weber's Testimony Improperly Vouched for the Credibility of Child 4, Child 5, and Child 6

Weber's testimony about her interviews of Child 4, Child 5, and Child 6 improperly vouched for the credibility of the children by indicating she believed the children's allegations of abuse were credible and true.

Like McMillan, Weber explained her work to the jury using numerous improper statements:

- The safeguards she uses to ensure reliability include "[c]hecking for corroboration, seeing if it's plausible that this could have happened to the child. Was the child even where they said the incident occurred? Making sure that there is some consistency there." (Trial Tr. 769:4-8).

- She uses non-leading, non-suggestive questions, "Because we're there to try to figure out the truth; whatever that truth could be." (Trial Tr. 771:5-9).

- She tells the children she interviews that her "job is to understand things that may have happened." (Trial Tr. 772:10-11).

- She tells the children "that it's important to tell the truth; we cannot lie or pretend or make things up." (Trial Tr. 772:12-13; *see also* 780:10-11).

- She keeps parents out of the interviews because "we don't want any kind of influence." (Trial Tr. 772:22-773:5).

- She gets the child's family and social history because she is "looking for general information about the child, but you're—you also want to know what your child's been exposed to, are there any alter—alternative explanations?" (Trial Tr. 773:13-18).

- She assesses whether the child "understand[s] the difference between truth and a lie" and whether he "understand[s] the importance of telling the truth. The—the moral relation to that to understand that you get in trouble for telling a lie." (Trial Tr. 774:13-21).

- She searches for possible third-party influence or suggestibility by "[s]eeing if it seems like the child has been coached, if there's an alternative explanations [sic] for why the child might be saying the things he's saying, seeing if there is—if it's plausible for what is being disclosed could have actually happened." (Trial Tr. 864:21-865:1).

- She also considers "if there are some alternative explanations, to see if a child is—comes in making a repeated statement but can give any detail or any other information about it. And, then, looking to see their behavior; did they—is there something in particular that they are avoiding that they are—that it's obvious that there's something that they're not wanting to talk about and trying to determine why that might be." (Trial Tr. 929:17-25).

- Another reason she considers whether the child is using age-appropriate language or if there are alternative explanations for the child's statements is to "try[] to figure out and clarify the truth behind what [the child] is saying." (Trial Tr. 861:15-18).

Also like McMillan, Weber's testimony about Child 4, Child 5, and Child 6 improperly bolstered their credibility by stating the children understood the importance of the truth and were not influenced by outside sources:

- Weber assessed whether Child 4 "could tell the difference between a truth and a lie. And he was able to do that." He also "was able to" comprehend truthfulness. (Trial Tr. 779:1-3; 779:13-15).

- The information Child 4, Child 5, and Child 6 provided Weber on their families was verified through other sources. (Trial Tr. 779:16-18; 860:22-861:2; 924:13-15).

- Asked for her opinion regarding Child 4's "understanding of the moral responsibility to tell the truth," and his "understanding of negative consequences when people do not tell the truth," Weber answered that Child 4 understood those things. (Trial Tr. 780:2-7).

- Weber's safeguards against outside influences in her interviews of Child 4 included "letting him know that he can correct me and that it's important to tell the truth. And that he can say he doesn't know or he doesn't remember instead of trying to guess or make something up." (Trial Tr. 780:8-13).

- Weber believed Child 4's disclosure of abuse was not the result of third-party influence because "[h]e didn't want to talk about it. You know, he—he didn't come with like a script that he—there was something he needed to say." (Trial Tr. 791:18-22).

- Weber's opinion is that Child 5 "demonstrated the ability to differentiate between the truth and a lie," comprehended truthfulness, and understood the moral responsibility of telling the truth. (Trial Tr. 860:15-21; 861:3-12).

- In her interviews of Child 5, she checked "to see if he used age-appropriate language, to see if he used his own words, and see if there's any alternative explanations for the things he's—he's say—he was saying; if there's a misunderstanding of some kind for trying to figure out and clarify the truth behind what he is saying." (Trial Tr. 861:15-18).

- Child 6 "was able" to "tell the difference between the truth and a lie." (Trial Tr. 924:14-15).

- Child 6 understood the difference between truth and lies, moral responsibility to tell truth, and negative consequences of not telling truth. (Trial Tr. 924:25-925:12).

- In her interviews of Child 6, Weber was "careful about not using any—any leading or suggestive questions," and she "assess[ed] his language and [saw] if he was using childlike terms and . . . search[ed] for any alternative explanations for the things that he was saying." (Trial Tr. 925:15-17).

Finally, like McMillan, Weber testified that Child 4, Child 5, and Child 6 disclosed abuse to her. (Trial Tr. 780:14-18; 861:23-862:6; 930:1-2). She recommended they get therapy and not have any contact with Taylor. (Trial Tr. 785:18-21; 866:20-23; 930:3-6).

In sum, Weber testified that she searches for the truth in her interviews, that she avoids suggestive questioning, that she uses various tactics to preserve the reliability of the children's statements, that the three children she interviewed demonstrated truthfulness, and that they disclosed abuse to her. In light of these improper statements, Weber's recommendations that the children get therapy and avoid Taylor can be interpreted only as a comment that she believed the children's claims of abuse against Taylor were credible and true. *See Jennings*, 394 S.C. at 480, 716 S.E.2d at 94. Weber's recommendation testimony was improper and is precisely what the Supreme Court in *Kromah* prohibited. The trial court erred each time it admitted the testimony.

C. Admitting The Testimony Prejudiced Taylor and Was Not Harmless Error

Admitting McMillan's and Weber's testimony prejudiced Taylor by allowing the jury to hear testimony that not only improperly vouched for the children's credibility but also indicated that Taylor abused the children to such a degree that they needed therapy.

Further, the error was not harmless. In *Jennings*, the Supreme Court held the trial court's error in admitting forensic interview reports was not harmless because

> [t]here was no physical evidence presented in this case. The only evidence presented by the State was the children's accounts of what occurred and other hearsay evidence of the children's accounts. Because the children's credibility was the most critical determination of this case, we find the admission of the written reports was not harmless.

394 S.C. at 480, 716 S.E.2d at 94.

The same circumstances are present in this case. The State presented no physical evidence of the acts it contends Taylor committed. The State's case for each charge consisted of "the children's accounts of what occurred and other hearsay evidence of the children's accounts." Just as in *Jennings*, the record in this case cannot support a conclusion beyond a reasonable doubt that the trial court's errors did not contribute to the verdicts. *See McKerley*, 397 S.C. at 467, 725 S.E.2d at 143 ("To deem an error harmless, this court must determine 'beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.'" (quoting *State v. Fonseca*, 383 S.C. 640, 650, 681 S.E.2d 1, 6 (Ct. App. 2009))). The trial court's abuses of discretion require reversing Taylor's convictions and remanding for a new trial.

II. THE TRIAL COURT ERRED IN ALLOWING THE TWO FORENSIC INTERVIEWERS TO GIVE IMPERMISSIBLE VOUCHING TESTIMONY AS EXPERT WITNESSES

Compounding the error of allowing McMillan and Weber to give testimony that vouched for complaining witnesses' credibility, the trial court allowed them to make those impermissible statements in the form of expert testimony. *See Kromah*, 401 S.C. at 358, 737 S.E.2d at 499 (stating that when a forensic interviewer "is qualified as an expert the impermissible harm is compounded"). For two reasons, this was error.

A. Forensic Interviewers May Not Testify as Expert Witnesses

The Supreme Court in *Kromah* did not mince words about whether forensic interviewers may testify as experts: "we can envision no circumstance where their qualification as an expert at trial would be appropriate." 401 S.C. at 357 n.5, 737 S.E.2d at 499 n.5. This statement stemmed in part from the Court's sharp criticism that the RATAC method is not scientific and relies substantially on the interviewer's subjective beliefs, biases, and expectations about the interviewee. 401 S.C. at 356 n.4, 357 n.5, 737 S.E.2d at 498 n.4, 499 n.5. Further, the Court recognized that "although an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." 401 S.C. at 357, 737 S.E.2d at 499. Accordingly, the Court reasoned, allowing forensic interviewers to testify as expert witnesses only compounds the "impermissible harm" they cause in vouching for the credibility of complaining witnesses. 401 S.C. at 358, 737 S.E.2d at 499.

As the testimony discussed in Argument I demonstrates, McMillan's and Weber's testimony features precisely the types of statements that led the Supreme Court in *Kromah* to condemn the practice of trial courts allowing forensic interviewers to testify as experts. McMillan and Weber both indicated they use RATAC. (Trial Tr. 365:4-366:2; 767:4-16). For example, they both testified the children understood the difference between truth and lies or the moral obligation of telling the truth. (Trial Tr. 490:18-23; 779:13-15; 780:2-7; 799:1-3; 860:15-21; 861:3-12). McMillan and Weber both testified that when they question a child, they look for alternative explanations. (Trial Tr. 367:22-24; 864:21-865:1). They testified that some of the children tried to avoid their questions, and that avoidance indicated the children's statements had not been influenced by other people. (Trial Tr. 498:14-499:6;

683:6-16; 865:8-13; 928:3-8; 929:17-24). The determination of whether a young child is intentionally avoiding a question is utterly subjective. Finally, although McMillan and Weber insisted they do not use leading questions or suggestive questioning tactics, (Trial Tr. 375:6-11; 491:12-17; 680:24-681:2; 765:7-13; 770:21-771:6; 925:13-17), the DVDs of their interviews of the children prove otherwise.

Because McMillan's and Weber's testimony features so many of the traits that make forensic interviewer expert testimony improper, the trial court abused its discretion in giving their testimony "expert" status.

B. The Trial Court Failed to Perform Its Gatekeeping Duty by Admitting McMillan's and Weber's Testimony without Finding, as Rule 702, SCRE, Requires, that Expert Testimony Was Required and that the Testimony Was Reliable

Even if *Kromah* could be read as leaving any room for forensic interviewers to testify as experts, the trial court in this case still erred because it allowed McMillan and Weber to testify as experts without first making the findings required for the admission of expert testimony.

Rule 702, SCRE, governs the admissibility of expert testimony. It imposes upon trial courts "an affirmative and meaningful gatekeeping duty" to scrutinize proposed expert testimony before admitting it. *White*, 382 S.C. at 270, 676 S.E.2d at 686; *see also Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (stating "expert testimony receives additional scrutiny relative to other evidentiary decisions"). "[T]he trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony":

> First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the

> jury. Next, . . . the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.

Watson, 389 S.C. at 446, 699 S.E.2d at 175 (internal citations omitted).

In *Watson*, the trial court admitted a proposed expert witness's testimony by ruling the witness "does have [requisite] education, knowledge, experience, and would be of scientific help to the jury in this case . . . he's going to be qualified as an expert in the field of electrical engineering." 389 S.C. at 452 n.6, 699 S.E.2d at 178 n.6. The Supreme Court held the trial court erred in admitting the testimony because its ruling "solely focus[ed] on whether [the witness] was qualified as an expert . . . and fail[ed] to analyze the reliability of the proposed testimony." 389 S.C. at 452, 699 S.E.2d at 178.

The trial court in this case committed the same error when it ruled McMillan could testify as an expert. Its ruling that focused only on the qualification requirement of Rule 702:

> The Court finds—of course, this witness has been qualified on forty (40) or fifty (50) other different occasions in court as an expert witness in child abuse assessment. She's had extensive training, plus thirty (30) years in her field working extensively with the child abuse assessment, attending many seminars, treat—peer assessment and all of that. And the Court will find her qualified in the field of child abuse assessment. And she'll be allowed to testify in that field.

(Trial Tr. 373:16-22). The court did not determine whether the jury needed McMillan's testimony to understand a fact at issue in the case or whether her testimony was reliable.

The trial court did even less before allowing Weber to testify as an expert. The court's entire ruling was, "over objection then, the Court would find Tabitha Weber a—to be able to testify as an expert in the field of child abuse forensic assessment." (Trial Tr. 770:15-17). It made none of the three required findings.

The Supreme Court in *Watson* made clear that "[e]xpert testimony is not admissible unless it satisfies all three requirements . . . . [O]nly after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence." 389 S.C. at 446-47, 699 S.E.2d at 175; *see also State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (stating that after trial court determined witness was an expert, court should "should have then evaluated the substance of [the witness's] testimony to determine if it was reliable, as required by Rule 702, SCRE"). Despite this, the trial court allowed two key prosecution witnesses to testify as experts without first deciding whether their testimony was necessary or substantively reliable. *Watson* and *Tapp* demonstrate this was error. Additionally, the court never decided whether Weber had the requisite knowledge and skill to qualify as an expert. If, as *Watson* and *Tapp* show, failing to make all three findings is error, then failing to make any of them is error as well.

Had the court considered the first prong, it would have confronted the fact that the subject matter of McMillian's and Weber's testimony was not beyond the ordinary knowledge of the jury and therefore did not require an expert's explanation. When the Supreme Court in *Watson* set forth the first prong of the test, it cited *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009), an opinion involving forensic interviewer expert testimony. *Watson*, 389 S.C. at 446, 699 S.E.2d at 175. The Court in *Watson* used forensic interviewing as its example of when this prong cannot be met, noting that in *Douglas*, the Court held "the witness was improperly qualified as a forensic interviewing expert where the nature of her testimony was based on personal observations and discussions with the child victim." *Watson*, 389 S.C. at 446, 699 S.E.2d at 175.

The same is true of McMillian and Weber. Their testimony was based on their interviews of the children, in which they personally observed the children and conversed with them. Accordingly, their testimony could not satisfy the first prong of *Watson*, which means the trial court's failure to address this prong cannot be deemed immaterial or inconsequential.

Further, as to the reliability prong, the Supreme Court in *Kromah* recognized that what makes forensic interview testimony inappropriate for expert status is that the interviewer's conclusions can be influenced by her bias, expectations, and judgment, and by the suggestiveness of her questions. 401 S.C. at 357 n.5, 737 S.E.2d at 499 n.5. Relating this statement in *Kromah* to *Watson*, it means that forensic interview testimony typically cannot satisfy the reliability requirement. This case presents no exception. In addition to offering inherently subjective opinions, such as whether the children were trying to avoid questions because they felt uncomfortable, McMillan and Weber each testified that they used "focused narrative" questions to "refocus" the children on discussing the abuse. (Trial Tr. 375:23-376:2; 928:24-929:3). Such tactics are necessarily suggestive and involve the questioner's expectations and judgment. Thus, McMillan and Weber's testimony could not have satisfied the last prong of *Watson*. The trial court erred in not addressing this issue.

C. The Errors Prejudiced Taylor and Were Not Harmless

As the result of the trial court's erroneous rulings, the jury heard two witnesses designated as experts give testimony indicating that they believed all six complaining witnesses' allegations of abuse by Taylor and that the allegations were credible. As the Supreme Court in *Kromah* stated, "it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." 401 S.C. at 358, 737 S.E.2d at 499. Thus, the trial court's errors prejudiced Taylor, in that the jury may have attached more

significance McMillan's and Weber's improper vouching testimony than it would have if McMillan or Weber had not testified as experts.

Further, the errors were not harmless. McMillan and Weber played prominent roles in the State's case. Blessed by the court as experts, they provided substantial, improper support for the children's credibility, which, in the absence of physical evidence, was crucial to the State's case. Thus, under *Jennings*, the trial court's errors cannot be deemed harmless. This Court should reverse Taylor's convictions and remand for a new trial.

III. THE TRIAL COURT ERRED IN ADMITTING DVD RECORDINGS OF FOUR COMPLAINING WITNESSES' OUT-OF-COURT STATEMENTS THAT DID NOT HAVE PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS AS REQUIRED BY STATUTE

Before a court may admit a child's out-of-court statement in a criminal trial, the court must find "that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness." S.C. Code Ann. § 17-23-175(A)(4) (Supp. 2012).[4] In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider:

(1) whether the statement was elicited by leading questions;

(2) whether the interviewer has been trained in conducting investigative interviews of children;

(3) whether the statement represents a detailed account of the alleged offense;

(4) whether the statement has internal coherence; and

(5) sworn testimony of any participant which may be determined as necessary by the court.

[4] This statute provides three other elements to the foundation for admitting the statement. *See* § 17-23-175(A)(1)-(3). Taylor does not challenge the trial court's findings that those elements were met.

S.C. Code Ann. § 17-23-175(B) (Supp. 2012).

At trial, Taylor contended the statements of Child 1, Child 2, and Child 3 in their respective interviews did not contain particularized guarantees of trustworthiness because the statements were not internally coherent, were not sufficiently detailed, and were elicited by leading questions. (Trial Tr. 392:24-393:21; 494:11-16; 682:21-682:4; 695:22-696:3). Taylor argued Child 6's statements in his interviews were not internally coherent and were elicited by leading questions. (Trial Tr. 936:14-16). The trial court disagreed with Taylor and admitted the DVDs. (Trial Tr. 396:6-401:8; 494:17-496:20; 696:4-701:1; 939:4-941:10). For two reasons, this was error.

First, the court's decisions regarding the videos of Child 1, Child 2, and Child 3 were based on an error of law: the misapplication of the internal coherence factor. Rather than considering whether a child gave reasonably comprehensible and consistent statements in his or her interviews—that is, whether those statements were internally coherent—the court focused on whether a child's recorded statement matched what he or she later said at trial:

As to Child 1:	• "[S]he testified exactly in court today as she did on the forensic interview or the—and she—she used—she testified exactly the same; very consistent with what she said on there." (Trial Tr. 397:7-9). • "I think there was internal coherence, not only in the statement but also in her testimony today. She testified exactly the same as to the pertinent information." (Trial Tr. 400:10-12).
As to Child 2:	• "[S]light differences between the—the child's testimony in court today and what is shown on the video interview, taped video interview . . . . And so there is internal—and the Court finds there is internal incoherence." (Trial Tr. 496:8-16).
As to Child 3:	• "[W]ith regard to internal coherence, there was not a lot of statements—not a lot of detail provided by the child. And that's the same as it was in court when she was—

	was offered to testify, with the jury and the Defendant Ms. Taylor, present. (Trial Tr. 699:22-700:1).

It appears there are no court opinions explaining what constitutes "internal coherence" under the statute. However, as the word "internal" indicates, this phrase cannot mean that a court is to determine coherence by comparing the statements in question with something extrinsic, such as testimony that a child provides over a year and a half later at trial.[5] The fact that the statute requires the court base its trustworthiness determination on the "circumstances surrounding the making of the statement," § 17-23-175(A)(4), is further indication that the court may not consider trial testimony in the internal coherence determination. A child's trial testimony about the abuse she claims the defendant committed is not a circumstance surrounding the making of a statement she made more than a year and a half before the trial. Therefore, the court erred by basing its internal coherence findings on extrinsic evidence that it was not allowed to consider.

Second, in finding that the children's statements on the DVDs were detailed and were not elicited by leading questions, the trial court acknowledged that the opposite was true as to one of both of those factors:

As to Child 1:	• "[Y]ou might say it's leading if you say 'Well can you tell me about Ms. Ronasha,' or 'Can you tell me what happened at the school?' And you can say that's a leading question, but it's not. It's just you've got to ask some question with a small child to at least have—give them something to respond to. But I didn't see any significant leading at all whatsoever; anything other than absolutely necessary." (Trial Tr. 397:15-21). • "I don't know how much detail you're going to get with a small child." (Trial Tr. 399:15-16). • "[J]ust pure speculation on that, but I would say that, as

5 The DVDs Indicate the interviews took place between October 28, 2010 and February 2, 2011.

	much detail as you could get, you know, you got." (Trial Tr. 400:3-4)
As to Child 2:	• "I do not find that there was any significant leading in the questions." (Trial Tr. 495:25-496:1)
As to Child 3:	• "[T]here was not a lot of detail in here, but there was to the extent that—that it met the criteria of—of one of the elements of this offense in that it—it provided some detailed [sic] or some accounting." (Trial Tr. 699:19-21). • "[T]here was not a lot of statements—not a lot of detail provided by the child." (Trial Tr. 699:23-24).
As to Child 6:	• "[A]ny time you refocus a child and go back to a question and try to get an answer to it, the interviewer naturally—it may look like leading. And you may consider it somewhat leading, but it's also necessary to refocus the child or they would have been there all day trying to get the child back to the subject at hand." (Trial Tr. 939:17-21).

In other words, the court acknowledged that the statements were not detailed, were elicited by leading questions, or both, but then made findings that the statements were detailed and were not elicited by leading questions.

Section 17-23-175 is a limited exception to the longstanding rule, embodied in Rule 801(d)(1)(B), SCRE, that a complaining witness's prior consistent statement incriminating the defendant is not admissible unless the witness has been charged with fabrication or improper motive or bias. *Whitner*, 399 S.C. at 558, 732 S.E.2d at 867. That rule, in turn, reflects the basic tenet of evidence law that such statements generally are unreliable. Thus, the statute's "particularized guarantees of trustworthiness" requirement addresses the reliability problem inherent in these types of statements. It is designed to ensure that only statements "guarantee[d]" to be reliable reach a jury. The factors in subsection (B) therefore illustrate that the General Assembly believed detail, internal coherence, and lack of leading were central characteristics of the statements it intended to qualify for this statutory

exception to inadmissibility.

The trial court's decisions do not comply with that legislative intent. As to internal coherence, the trial court's interpretation and application of that factor do not fulfill the statute's purpose. The fact that the in-court testimony and the prior statement are consistent is precisely what makes the latter inadmissible in the first place. Treating consistency as indicia of trustworthiness turns the statute—and the reliability principle on which the statute is based—on their heads.

As to leading and detail, the court cited the children's young age as an excuse for the absence of detail and the presence of leading questions. However, discounting these circumstances does not mean the statements were reliable, were detailed, or were not elicited by leading questions. On the contrary, it acknowledges that the statements have indicia of unreliability. In that sense, the trial court's findings are at odds both with the statute and with the court's own observations.

Moreover, the court's reasoning does not follow the language of the statute. The factors do not speak in terms of degrees or amounts of leading or detail. By asking only "whether the statement was elicited by leading questions" and "whether the statement represents a detailed account of the alleged offense," § 17-23-15(B)(1) & (3), the factors call for only for yes-or-no answers. Had the General Assembly believed that a statement could be reliable if it just had an understandably small level of detail or was the result of a necessary amount of leading, it could have passed a statute reflecting that belief. It did not.

The statute gives a trial court some discretion in what factors it considers in its trustworthiness determination. *See* § 17-23-175(B) (stating the court "may consider, but is not limited to" the enumerated factors). However, the statute does not allow a court

considering those enumerated factors to misapply them through misinterpretation or by making findings contrary to the court's own assessment of the evidence.

The trial court did not explain how heavily internal coherence, detail, or lack of leading factored into its trustworthiness findings. More importantly, it did not say anything indicating that it would have admitted any of the DVDs even if it had found these factors had favored exclusion. On the contrary, the court's detailed discussion of the factors indicates that they played a significant role in the court's trustworthiness determinations. Therefore, these errors contributed to the court's admission of the DVDs, which means that those rulings were based on errors of law. Thus, the trial court abused its discretion in admitting the DVDs. *See Jennings*, 394 S.C. at 477-78, 716 S.E.2d at 93 (stating trial court can abuse its discretion by making a decision based on an error of law).

These errors prejudiced Taylor because they enabled the jury to hear and see prior, out-of-court statements by the children in which they claimed Taylor touched them inappropriately, made them touch her inappropriately, or both.

Moreover, the errors cannot be deemed harmless. The statements in the DVDs corroborated the children's testimony at trial, and the children's credibility was essential to the State's case. *See Jennings*, 394 S.C. at 479, 716 S.E.2d at 94 (holding erroneous admission of reports recounting one child's statement that defendant molested her and "specific things the victims told the forensic interviewer during the interviews" was not harmless; "where credibility is the ultimate issue in a case, improper corroboration evidence that is merely cumulative to the victim's testimony is not harmless"); *see also* 394 S.C. at 478, 716 S.E.2d at 94 (stating "'it is precisely this cumulative effect which enhances the devastating impact of improper corroboration'" (quoting *Jolly v. State*, 314 S.C. 17, 21, 443

S.E.2d 566, 569 (1994))). This Court should reverse Taylor's convictions as to Child 1, Child 2, Child 3, and Child 6, and remand for a new trial on those charges.

IV. THE TRIAL COURT ERRED IN ALLOWING A COMPLAINING WITNESS TO TESTIFY BY CLOSED CIRCUIT TELEVISION WITHOUT MAKING THE REQUIRED FINDINGS FOR THE PROCEDURE AND WITHOUT EVIDENCE SHOWING THE PROCEDURE WAS A NECESSARY INTRUSION ON TAYLOR'S CONSTITUTIONAL RIGHT TO CONFRONTATION

Finally, the trial court should not have violated Taylor's constitutional right to confrontation by ordering Child 3 to testify by closed circuit television.

A defendant in a criminal case has the right "to be confronted with the witnesses against him." U.S. Const. amend. 6; *accord* S.C. Const. art. I, § 14. This requirement of face-to-face confrontation does not absolutely prevent a child witness in a child abuse case from testifying outside the defendant's presence by CCTV. *State v. Lewis*, 324 S.C. 539, 544, 478 S.E.2d 861, 864 (Ct. App. 1996). However, "it can be dispensed with only if 'necessary to further an important public policy,'" such as the state's interest in the psychological well-being of the child witness. *Lewis*, 324 S.C. at 544-45, 478 S.E.2d at 864 (quoting *Maryland v. Craig*, 497 U.S. 836, 850, 110 S. Ct. 3157, 3166 (1990)).

The CCTV procedure is a product of subsection 16-5-1550(E) of the South Carolina Code (2003), which provides that trial courts are to treat "sensitively . . . very young" witnesses by "using closed or taped sessions where appropriate." Our courts have squared this statute with the Confrontation Clause by requiring that before a child may testify via CCTV, the trial court must first make a "case-specific finding that the use of an alternative procedure is necessary to prevent a particular child from the trauma of testifying in the

defendant's presence."[6] *Lewis*, 324 S.C. at 545, 478 S.E.2d at 864; *see also id.* (stating that only when this finding is made can a state's interest outweigh a defendant's constitutional guarantee of confrontation). In *Lewis*, this Court explained that under the United States Supreme Court's opinion in *Craig*, the trial court must make three findings before it may determine that testimony by CCTV is necessary:

> The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than mere nervousness or excitement or some reluctance to testify.

Id. (quoting *Craig*, 497 U.S. at 856-57, 110 S. Ct. at 3169-70); *see also Bray*, 342 S.C. at 32, 535 S.E.2d at 641 (stressing these "case-specific findings must be set forth" by the trial court).

The State has the burden of proving necessity. *See Lewis*, 324 S.C. at 545, 478 S.E.2d at 864.

A trial court can make two errors in ordering a CCTV procedure: it can fail to make the required factual findings, and it can order the procedure even though the State has not adequately proved that the procedure is necessary. *See Bray*, 342 S.C. at 29, 535 S.E.2d at 659-60 (finding evidence in the record to support trial court's decision to use CCTV but reversing because the trial court failed to make the required factual findings); *Lewis*, 324 S.C. at 546-47, 478 S.E.2d at 865 (finding trial court made adequate findings, but findings were

[6] In addition, the court should place the child in as a close to a courtroom setting as possible, and the defendant should be able to see and hear the child, have counsel present in both rooms, and be able to communicate with counsel. *State v. Murrrell*, 302 S.C. 77, 81, 393 S.E.2d 919, 921 (1990). Taylor admits those requirements were met in this case.

not supported by evidence). In this case, the trial court made both errors.

A. The Trial Court Failed to Make the Required Case-Specific Findings that the Procedure Was Necessary

In considering the State's motion to have Child 3 testify by CCTV, the trial court heard testimony from Child 3, her mother, and Meredith Thompson-Loftis, Child 3's therapist. (Trial Tr. 77:4-87:21; 88:9-92:16; 210:21-213:1). Child 3 testified that she was not afraid of Taylor, that Taylor's presence would not affect her, and that she would be able to testify in Taylor's presence. (Trial Tr. 212:8-213:2). Child 3's mother testified she was not sure whether Taylor's presence would have any effect on Child 3. (Trial Tr. 90:23-25). Thompson-Loftis testified that Child 3 would be traumatized by testifying in Taylor's line of sight, but she also testified that Child 3 was anxious about testifying in court. (Trial Tr. 86:5-9; 87:16-21). Based on this testimony, the trial court decided Child 3 must testify in court. (Trial Tr. 230:9-12).

When Child 3 took to the witness stand, she did not initially respond to several of the State's questions. (Trial Tr. 645:18-650:3). The State renewed its motion for Child 3 to testify via CCTV. (Trial Tr. 651:2-652:16). Notably, the State did not argue that Taylor's presence was traumatizing Child 3. Rather, the State argued Child 3 "clearly was fearful of either getting the Defendant in trouble, testifying in front of the jury, or overall was having some type of excessive fear going on that was preventing her from being able to testify." (Trial Tr. 652:8-10). Taylor opposed the motion, arguing that although Child 3 had difficulty testifying, she eventually answered the State's questions. (Trial Tr. 652:17-653:6). Moreover, Taylor, argued, the cause of Child 3's hesitation was not known. (Trial Tr. 653:7-13).

The trial court granted the motion. (Trial Tr. 656:5-6). Noting that it observed Child 3 would stop talking after she looked at Taylor or at the jury, the court made only the following findings:

> I just think that she's not able to—to testify in this setting. . . .
>
> . . . .
>
> I think that she was *somewhat traumatized* by Ms. Taylor and also by the jury because, when she would look over at the jury, when asked—she might answer some minimal amount of questioning from the Assistant Attorney General, but, *when she would look over at the jury, I noticed she froze.*
>
> . . . .
>
> And, so, [it] is the Court's determination that she has special needs based on what the counselor said and what the court has observed on its own. I find that she has special needs and that she would not be able to—to be able to testify in—in court *for whatever reason* after looking at Ms. Taylor or looking at—directly at the jury she shut down.

(Trial Tr. 654:16; 655:4-8; 655:24-656:4) (emphasis added).

These statements do not identify Taylor's presence as the cause of significant trauma. The first statement says nothing about trauma or causation. The second identifies Taylor as part of the cause of "some[]" trauma but also identifies the jury as what caused Child 3 to freeze. The third claims an unidentified source—"whatever reason"—as the cause of Child 3 "shut[ting] down." The court never found, as required, that Taylor's presence was the cause of more than *de minimis* trauma. Moreover, the phrases "somewhat traumatized" and "whatever reason" show the court believed that Child 3 was merely nervous or reluctant to testify—the definition of *de minimis* trauma. *See Lewis*, 324 S.C. at 545, 478 S.E.2d at 864 (quoting *Craig*, 497 U.S. at 856-57, 110 S. Ct. at 3169-70).

Further, even interpreting the court's statements as a finding of more than *de minimis* trauma, it is not at all clear whether the court believed that Taylor's presence, rather than the jury's presence, was the cause of such trauma. It could be that the court felt the jury was causing significant trauma, while Taylor was causing mere nervousness; or, the court could have felt the opposite was true. What matters here is that one can reach a conclusion about the court's findings only by guessing.

In this respect, this case is no different than *Bray*. In that case, there was evidence that the child witness was afraid of testifying before the defendant, but there was also evidence that she was afraid of being in court and of family members present in the courtroom. 342 S.C. at 30-31, 535 S.E.2d at 640. In ordering that the child testify by CCTV, the trial court made findings that could be interpreted either as a finding that the defendant's presence would harm the child or as a finding that the child's young age and fear of family members warranted the procedure. 342 S.C. at 30, 535 S.E.2d at 640. On review, the Supreme Court concluded it was "unable to ascertain precisely the basis of the trial court's ruling," which simply highlighted the purpose of requiring courts to make the case-specific findings. *Id.* Because the trial court committed an error of law by failing to make the mandated case-specific findings needed to justify testimony by CCTV, the Supreme Court reversed and remanded for a new trial. 342 S.C. at 331, 535 S.E.2d at 641.

As in *Bray*, in this case the trial court made unclear findings upon a body of evidence indicating that Child 3 was generally afraid of testifying.[7] The trial court itself stated it

[7] This case *is* distinguishable from *Bray*, in that the evidence in this case—as discussed below—cannot support the trial court's decision to order the CCTV procedure. However, on the specific issue of whether the trial court made the required findings, this case and *Bray* are not distinguishable, as they both involve evidence pointing to something other than the defendant as the impediment to the child testifying in court.

believed the jury's presence was causing Child 3 to "shut down." (Trial Tr. 656:4). Further, although Thompson-Loftis that testified she thought testifying before Taylor would traumatize Child 3, she also testified that merely showing Child 3 pictures of courtroom settings during therapy sessions made Child 3 "very nervous." (Trial Tr. 86:3-7). Thompson-Loftis also testified she talked with Child 3 "about ways to alleviate anxiety in session in relation to court." (Trial Tr. 81:22-25). Finally, Thompson-Loftis indicated children are more uncomfortable testifying in court, which is why she shows them pictures of courtrooms and talks with them about relieving anxiety. (Trial Tr. 85:4-22). Thus, it is plausible that when the trial court said it was basing its decision on its observations and on Thompson-Loftis's testimony, it was referring to its observations about Child 3's reaction to the jury and to Thompson-Loftis's testimony showing that Child 3 was just generally nervous.

The trial court's failure to make the required findings is an error of law and a violation of Taylor's constitutional right to confrontation. As in *Bray*, the trial court's failure to make the required findings requires reversal because the record contains evidence that does not support the court's decision, inhibiting intelligent appellate review. Thus, in accordance with *Bray*, this Court should reverse Taylor's conviction as to Child 3 and remand for a new trial on that charge.

B. The Trial Court's Decision Lacked Evidentiary Support

Even assuming the trial court's findings could be interpreted as satisfying *Craig* and *Lewis*, they are not supported by the evidence.

As mentioned above, the court based its decision on Thompson-Loftis's testimony and on its observations. In addition to the Thompson-Loftis testimony discussed above that

does not support the court's ruling, Thompson-Loftis did testify she thought that testifying in Taylor's presence would traumatize Child 3. However, Thompson-Loftis's stated basis for her opinions about Child 3 undercuts this testimony and any weight the trial court may have given it. Earlier in her examination, Thompson-Loftis explained that testifying in court would be "extremely overwhelming" for Child 3 because she "has difficulty one-on-one, so in a courtroom setting, it would be extremely difficult for her." (Trial Tr. 80:20-23). In other words, Thompson-Loftis based her opinion on extrapolation: if it was "difficult[]" for Child 3 to talk with one person in private, it would be "extremely difficult" for her to talk in front of many people in public. This reasoning sheds no light on whether Taylor in particular would cause Child 3 trauma; on the contrary, it suggests Taylor's presence would be difficult for Child 3 simply because it would mean one more person was in the courtroom. Thus, when studied closely, Thompson-Loftis's testimony is evidence that Child 3 was generally anxious about testifying, not that Taylor's presence would cause more than *de minimis* trauma to Child 3.

The trial court's observations do not support the court's ruling either. The court observed that as long as Child 3 focused on the assistant attorney general, she could testify; however, if she looked at the jury or at Taylor, she "shut down." (Trial Tr. 654:8-15). The court, however, never explained why this behavior meant Child 3 was being traumatized, rather than merely acting nervous or reluctant. Indeed, the court appeared not to know the cause of this behavior, saying that Child 3 would shut down for "whatever reason." (Trial Tr. 656:2). Because the trial court's observations are as vague as its findings, they cannot support the trial court's ruling.

The question for this court is "whether a sufficient factual basis supported the ruling." *Lewis*, 324 S.C. at 550, 478 S.E.2d at 867. Because the answer is no, the trial court abused its discretion in ordering Child 3 to testify by CCTV.

C. The Trial Court's Errors Prejudiced Taylor and Were Not Harmless

These errors prejudiced Taylor, as Child 3 testified by CCTV that Taylor touched her "coochie" and "butt" and made Child 3 her touch Taylor's "coochie." (Trial Tr. 667:5-669:16). In addition, these errors were not harmless. Whether a violation of the Confrontation Clause is harmless error turns on several factors, including

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on the material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case.

Lewis, 324 S.C. at 551, 478 S.E.2d at 867 (quoting *State v. Graham*, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994)).

Child 3's testimony was central to the State's case against Taylor on the charge relating to Child 3. Through this testimony, the jury heard and saw the alleged victim state what she claimed Taylor did to her. Although the testimony reflected in some respects what Child 3 said in her DVD, it was not cumulative to any evidence that was admitted properly or without objection. There was no other evidence independently establishing guilt; on the contrary, most of the evidence from other witnesses relating to this charge was either a direct recitation of what Child 3 told the witness or was based on it. Meanwhile, Taylor denied in her testimony that she committed any of the acts Child 3 alleged. (Trial Tr. 1149:5-1150:1). Taylor was permitted to cross-examine Child 3, but that does not negate the fact that the State did not present other overwhelming, concrete evidence of guilt. The State's case was

based entirely on Child 3's testimony and testimony from others that was based on her allegations. The factors from *Lewis* therefore support a conclusion that the trial court's errors were not harmless. Therefore, this Court should reverse Taylor's conviction regarding Child 3 and remand for a new trial on that charge.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and remand for a new trial.

Respectfully submitted this 30th day of December, 2013.

By: 

Andrew R. de Holl
Womble Carlyle Sandridge & Rice, LLP
Post Office Box 999
Charleston, South Carolina 29402
843-720-4634

Robert M. Dudek
Chief Appellate Defender
Post Office Box 11433
Columbia, South Carolina 29211
803-734-1343

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

Lee S. Alford, Circuit Court Judge

Case Nos. 2012-GS-42-2624, 2012-GS-42-2625, 2012-GS-42-2626, 2012-GS-42-2627, 2012-GS-42-2633, and 2012-GS-42-2634

Appellate Case No. 2012-213228

The State of South Carolina, Respondent,

v.

Ronasha Taylor, Appellant.

APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

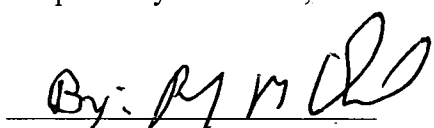
Appellant proposes the following materials be included in the Record on Appeal:

1. Transcript of Trial, pp. 1-7; 74-119; 171-178; 203-230; 235; 252-253; 290; 293-296; 300-301; 327; 333-334; 338-393; 396-407; 411-416; 418-423; 460-461; 471-510; 632-642; 644-701; 743-808; 833; 838-872; 890-891; 899-941; 944-962; 972-975; 1013-1022; 1026-1029; 1088; 1095; 1115-1182; 1194-1231; and 1253-1272;
2. State's Exhibits 1, 2, 6, 9, 10, 19, and 22 (forensic interview DVDs);
3. Post-Trial Motion dated September 27, 2012;
4. Order dated October 3, 2012;
5. Six indictments for lewd act dated May 3, 2012, each bearing one of the above-referenced general sessions case numbers;
6. Six sentence sheets dated September 19, 2012, each bearing one of the above-referenced general sessions case numbers; and
7. Notice of Appeal dated October 16, 2012.

I certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,

This 30th day of December, 2013

By: 

Andrew R. de Holl
Womble Carlyle Sandridge & Rice, LLP
Post Office Box 999
Charleston, South Carolina 29402
843-720-4634

Robert M. Dudek
Chief Appellate Defender
Post Office Box 11433
Columbia, South Carolina 29211
803-734-1343

Attorneys for Appellant

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CERTIFICATE OF SERVICE

I certify that the Initial Brief of Appellant and Appellant's Designation of Matter to Be Included in the Record on Appeal were served upon counsel for Respondent by mailing a copy of them to the following address:

Office of the South Carolina Attorney General
ATTN: Salley W. Elliott
Rembert Dennis Building
1000 Assembly Street
Columbia, SC 29201

This 30th day of December, 2013

By: _____
Robert M. Dudek