ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County
The Honorable Kristi Lea Harrington, Circuit Court Judge

THE STATE,

Respondent,

vs.

MICHAEL C. ANDES,

Appellant.

APPELLATE CASE NO. 2011-204706

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court did not err in allowing an expert to testify about rape trauma and domestic violence where such testimony was presented to disabuse the laymen jury of commonly held misconceptions about rape victims and victims of domestic violence; an expert is not required to possess knowledge about the facts of the case in which she is testifying in order to give the jury helpful background information falling within the expert's area of expertise; and the argument is not preserved for review where counsel never articulated a basis for the objection to the witness being admitted as an expert and withdrew the objection prior to the witness being qualified as an expert.

STATEMENT OF THE CASE

Appellant Andes was tried by jury on November 28, 2011, for first degree criminal sexual conduct. He was found guilty as charged and sentenced by the Honorable Kristi L. Harrington on December 2, 2011, to thirty years' imprisonment suspended to twelve years' imprisonment and five years' probation. By statute, Andes will be required to register on the sex offender registry when he is released from prison.

STATEMENT OF FACTS

Victim began dating Andes in 2006. The relationship became violent within a year. Victim testified the last time she had consensual intercourse with Andes was late 2009. They were living in separate bedrooms in Andes' house. They had broken up but she was unable to afford to move out of his house. On Friday, November 5, 2010, Victim was preparing for her daughter's tenth birthday party the next day. Victim was excited because this was the first time she was able to afford to give her daughter a party. Victim became angry with Andes when he grabbed her hind quarters while Victim was taking

the birthday cake out of the car. An argument ensued and Andes kicked over some chairs on the front porch. Andes left, although Victim and Andes would exchange several angry text messages. ROA. pp. 73-81.

Andes returned later that morning on November 6, 2013, at 3 a.m. and at 3:30 a.m., Andes started sending Victim several text messages asking for sex. Victim went into Andes' room and told him to stop sending texts and that she was not having sex with him. Victim went back to her room. Then Andes came naked into her room. ROA. pp. 81-89.

Andes roughly grabbed Victim's breasts and vaginal area. Victim screamed and asked him to stop. Andes then told Victim, "Fuck that, you want to see what it's like to be forced, I'm going to show you." He pulled Victim's pants off and rubbed his penis against Victim while still grabbing her breasts. Victim told Andes to get off her and tried to hit him. Despite Victim screaming for Andes to stop, Andes shoved his fingers inside Victim and then forced his penis inside her. Andes ejaculated inside Victim. Andes urinated on the floor. ROA. pp. 89-91.

Victim lay crying in her bed. Andes left. After a while, Victim covered the semen stain on the bed with some clothes and then texted her friend Jessica at about 5 a.m. ROA. pp. 91-92.

Victim did not call 911 right away; instead, she went through with her plans for her daughter's birthday party. Victim explained why: "Because my daughter – it wasn't exactly a healthy living situation for her and it was the first time that I'd ever been able to afford and have a birthday party for my daughter in ten years." ROA. p. 92, lines 17-21. The party was being held at Music in Motion. ROA. p. 92. Victim did not let her

daughter know anything was wrong but told the daughter's father what happened so he would watch the daughter for the next few days. ROA. p. 93.

Andes started sending texts that day, starting with a text at about 8 a.m. claiming he was "truly sorry for last night." ROA. p. 94, lines 6-12. Victim responded, after Andes sent a few more similarly themed texts, that she did not accept Andes' apology. Andes later contacted Victim when he became suspicious that she had called the police, because two 911 calls appeared on her phone account (the account for her phone was in Andes' name which allowed him to monitor it online). Victim explained she sent Andes a text shortly before she called the police because she was angry and hurt, and she wanted to know why Andes assaulted her. She admitted being conflicted about calling 911 on Andes because of their past relationship. ROA. pp. 94-100.

Several of the texts were published to the jury. Victim sent Andes the following text: "You don't think holding me down and forcing yourself on me was sick, if it is not rape, what do you want to call it? Fun?" ROA. p. 101, lines 3-6. Andes replied that he did not have much to say to Victim. ROA. p. 101, line 7.

Victim stayed with her mother after returning from the rape examination at MUSC and never stayed at Andes' residence again. ROA. pp. 101-102. At trial, cross-examination showed how poorly a victim can be treated in the criminal justice system, when the trial court was motivated to send the jury out and reprimand Andes' counsel as follows:

> I have determined that the rest of your cross examination – you're done with cross examination. I feel that what is continuing is harassment. I am concerned for the witness' safety. There is confusion as to the issues and there is extreme prejudice to allow her to continue.

ROA. p. 341, lines 4-10.

Victim's friend, Jessica, testified that Victim was making plans prior to the rape to leave Andes and live with her. Jessica was preparing the house for Victim to move in. Victim sent a text to Jessica after 4 a.m. indicating she was sexually assaulted in her house. The next day, she observed Victim trying to hold it together for the daughter's birthday party, but could tell Victim was shaken and upset. Victim moved in sooner than expected because she left Andes' residence after the rape. ROA. pp. 372-375.

Andes was interviewed by law enforcement and claimed he did not have sex with Victim that night. He told law enforcement Victim had surgery and they could not have intercourse, but they "played around" the night before. ROA. p. 534.

DNA collected from a buccal swab from Victim's vagina matched Andes' DNA. It was a one in 110 quadrillion match. ROA. pp. 390-393; pp. 423-425. Victim had bruises on her thigh and breast and scratches on her wrist. ROA. pp. 428-429; pp. 459-468.

ARGUMENT

The trial court did not err in allowing an expert to testify about rape trauma and domestic violence where such testimony was presented to disabuse the laymen jury of commonly held misconceptions about rape victims and victims of domestic violence; an expert is not required to possess knowledge about the facts of the case in which she is testifying in order to give the jury helpful background information falling within the expert's area of expertise; and the argument is not preserved for review where counsel never articulated a basis for the objection to the witness being admitted as an expert and withdrew the objection prior to the witness being qualified as an expert.

Andes claims the trial court should not have allowed expert testimony from Dr. Alyssa Rheingold. Dr. Rheingold testified as an expert in psychology and the impact of trauma in domestic violence. The expert testimony was proper to refute misconceptions about rape. Andes now advances some of these misconceptions on appeal. On several of the main points Andes advances in his brief, Andes fails to offer authority to support his legal position. Additionally, the issue is not preserved for review.

Error preservation

When the State moved to have Dr. Rheingold qualified as an expert, Andes' defense counsel made the following response: "Your Honor, she sounds like an expert but I don't know that that is what she said that she was an expert in. . . ." ROA. p. 401, lines 16-19.

The trial court suggested defense counsel could pursue voir dire with Dr. Rheingold, but defense counsel declined, claiming: "No, let's go ahead. She sounds like an expert to me." ROA. p 401, lines 20-24.

The issue of the propriety of expert testimony is not preserved. On point is State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) where the appellant claimed error in the admission of rape trauma evidence. The Supreme Court noted no exception was made to the expert's qualifications and found the issue was not properly before it. Id., 312 S.C. at 505, 435 S.E.2d at 861. As will be discussed in more detail later, the Supreme Court found that expert testimony on rape trauma was admissible to prove a rape occurred.

Further, it is apodictic that an issue conceded to the trial court is not preserved for review. State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000); see Lindsay v. Lindsay, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997) (holding an appellate court will affirm a ruling by a trial judge if offended party does not challenge that ruling; failure to challenge ruling is abandonment of the issue and precludes consideration on appeal; unchallenged ruling is law of the case and requires affirmance). "An objection withdrawn at trial constitutes an express waiver of the issue and does not preserve the issue for appellate review." Ligon v. Norris, 371 S.C. 625, 634, 640 S.E.2d 469, 472 (Ct. App. 2006).

No objection was made to the subject matter of the expert testimony, or based on a claim of vouching, or on the basis that Dr. Rheingold was unfamiliar with the facts of the case. Indeed, the only objections were based on relevance.

Andes objected on the grounds of relevance when the prosecution asked Dr. Rheingold: "How common is domestic violence in our society?" ROA. p. 402, lines 8-24. Andes objected to the relevance of the next question about the effect of economic dependence on reporting. ROA. p. 403, lines 5-16. Andes had a leading objection sustained. ROA. p. 412. Then Andes' last objection was to the relevance of the

prosecution's question: "Is it unusual for a perpetrator to contact [the] victim, even after a rape?" ROA. p. 412, lines 14-25. These isolated objections on relevance fail to preserve for review the issues raised in this brief. State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (to preserve for review an alleged error in admitting evidence, the objection must sufficiently bring into focus the precise nature of the alleged error so the error may be understood by the trial judge. The party may not argue one ground at trial and another on appeal). The ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial. State v. Smith, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999).

In the instant case, these isolated relevance objections are insufficient to raise broader issues of the propriety of the subject of expertise or a claim that an expert witness must know facts about the case before the expert testifies, even if the testimony is background information. Accordingly, the issues are not preserved for this Court's review.

Relevance

The actual objections from trial are not meaningfully advanced now on appeal. However, each question sought relevant background information about victims of domestic abuse and rape, as Victim was subjected to prolonged domestic violence and control and was the victim of a brutal rape. Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The

appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives **great deference** to the trial court." (emphasis added)). "The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). Thus, a trial court's decision regarding the comparative probative value and prejudicial effect of relevant evidence will be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Andes concedes that Dr. Rheingold was called as a witness "to explain the curious behavior of [Victim], who was making an accusation of sexual assault." Brief of Appellant, p. 5. Andes remonstrates that "the State had to provide answers to a number of glaring questions in its theory, like how could [Victim] accuse Appellant of sexual assault when the two plainly had a long, intimate history together?" Id. Andes' proposed anachronistic viewpoint -- rapes do not occur in longstanding intimate relationships -- is exactly the reason testimony presented in the instant case is allowable in this state and most of the country.[1]

Minnesota's Supreme Court noted the following about the admissibility of

1 Dr. Rheingold's testimony directly refutes this point, when she notes that most assaults are by someone the victim knows rather than the stereotype of someone being pulled into the bushes. ROA. p. 404.

testimony designed to dispel rape myths and counterintuitive rape-victim behaviors:

> Rape myths are "prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists." Amy M. Buddie & Arthur G. Miller, *Beyond Rape Myths: A More Complex View of Perceptions of Rape Vicitms*, 45 Sex Roles 139-40 (2001) (citation omitted). Typical rape-victim behaviors are common behaviors and mental reactions social scientists repeatedly observe in rape victims, such as delayed reporting, lack of physical injuries, or the failure to fight aggressively against the attacker, that are contrary to society's expectations of how a person who was sexually assaulted would behave. . . .
>
> Unlike the experts in Saldana, the State's experts in this case will not testify about the purported stages of rape trauma syndrome or opine that M.B. suffers from the syndrome. Instead, the State attempted to offer evidence of typical rape-victim behaviors to dispel commonly-held rape myths that the jury might rely on in evaluating the evidence in the case.
>
> Our most recent case law has recognized that such expert opinion testimony on the typical behaviors of victims of similar crimes may be helpful to the jury. Specifically, we have allowed expert witnesses to educate jurors about battered woman syndrome (BWS). In State v. Hennum, we found that expert testimony on BWS "would help to explain a phenomenon not within the understanding of an ordinary lay person." 441 N.W.2d 793, 798 (Minn. 1989). Specifically, we noted that educating the jury about BWS would "dispel the common misconception that a normal or reasonable person would not remain in such an abusive relationship" and "show the reasonableness of the defendant's fear that she was in imminent peril of death or serious bodily injury." In State v. Grecinger, the State sought to admit expert testimony about BWS as an explanation for the complainant's three-year delay in reporting an incident of domestic abuse. 569 N.W.2d 189, 192-93 (Minn. 1997). We again concluded "expert testimony on battered woman syndrome would help the jury to understand the behavior of a woman suffering from the syndrome, which might otherwise be interpreted as a lack of credibility." Id. at 195 (emphasis added). As such, expert testimony on BWS was "necessary to explain the complexity of [complainant]'s behavior and the reasons for her behavior." Id.; see also State v. MacLennan, 702

> N.W.2d 219, 234 (Minn. 2005) (holding that expert testimony on battered child syndrome "may help to explain a phenomenon not within the understanding of an ordinary lay person" and "would be helpful to jurors struggling to discern whether elements of charged crimes have been met").

State v. Obeta, 796 N.W.2d 282, 290-91 (Minn. 2011).

The Minnesota Supreme Court acknowledged its opinion was effectively removing it from an extreme minority that would not allow such testimony when it observed the following:

> [W]e note that a majority of state appellate courts that have considered this issue have allowed some form of expert-opinion evidence that describes typical counterintuitive behaviors exhibited by adult victims of sexual assault. Our research reveals that only Minnesota and Pennsylvania categorically prohibit expert testimony of this nature.

Id. at 292-93 (footnotes omitted). Accordingly, the expert testimony was relevant and the trial court did not err in allowing the testimony.

Expert witnesses may provide helpful background information without knowledge or testimony about the facts of the case.

Andes complains that Dr. Rheingold should not have been allowed to testify because she did not know the facts of the case. However, there is no requirement for an expert to know the facts of a case when she is providing helpful background behavioral testimony. "The fact that the expert does not personally interview the victim bears on the weight of the behavioral evidence and not on its admissibility." State v. Weaverling, 337 S.C. 460, 475, 523 S.E.2d 787, 794 (Ct. App. 1999) (citation omitted) see State v. Kaufman, 931 N.E.2d 143, 170 (Ohio Ct. App. 2010) ("[Rule 703] does not require that [an expert] testify on the facts specific to the case. . . . [A]n expert witness is allowed to

testify about general background information that might assist the fact-finder. . . . The Rules of Evidence do not require that an expert witness provide a factual link between his general testimony and the specific facts of a case." (citations omitted)); Coble v. State, 330 S.W.3d 253 (Tx. Crim. App. 2010) (finding expert testimony about Texas prison classification system and violence in prison was admissible despite claim that the testimony did not relate to appellant personally; testimony was relevant as admissible rebuttal "educator-expert" evidence); State v. White, 943 P.2d 544, 546 (N.M. Ct. App. 1997) (noting that although expert had not examined child, an expert opinion may be helpful and admissible by conveying general knowledge without reference to alleged specific facts of the case). The Nebraska Supreme Court observed the following:

> The reasoning for a rule allowing an expert to testify about sexual abuse in generalities, **without being familiar with the alleged victim**, is that few jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually abusive relationship, and the behavior exhibited by sexually abused children is often contrary to what most adults would expect.

State v. Roenfeldt, 486 N.W.2d 197, 204 (Neb. 1992) (emphasis added, citation and internal quotation marks omitted).

Further, Andes falsely complains the charged conduct was the only instance of domestic violence, so the behavioral evidence concerning victims of domestic violence is irrelevant.[2] Andes overlooks Victim's testimony that is replete with the abusive and controlling nature of the relationship between Andes and Victim. Victim noted the relationship turned physical within the first year of the relationship. ROA. p. 61. She

2 Andes mistakenly claims: "The State adduced no other witness or other evidence or even alleged that appellant and [Victim's] relationship was physically violent outside of the crime charged in the case, and that issue was never material or in dispute." Brief of Appellant, p. 13.

explained that she ended the romantic relationship, but could not move out because she was unemployed at the time. ROA. p. 69. Victim explained the difficult financial situation she was in and testified that Andes helped her buy a car because she had bad credit at the time. ROA. pp. 70-71. Victim gave most of her unemployment benefits to Andes as rent. Her cell phone was in Andes' name. ROA. p. 72. She was in the process of trying to leave when the brutal rape occurred. Victim testified that when she discussed leaving with Andes, the conversation turned violent. ROA. p. 73-74. Andes' controlling nature is exposed by his threats to take the birthday cake Victim bought for her daughter's tenth birthday. ROA. p. 81.

Most, if not all, aspects of Dr. Rheingold's testimony were relevant toward explaining what Andes suggested was counterintuitive conduct by Victim during and after the incident. For instance, Victim did not report the abuse until the evening of the following day. Additionally, Victim and Andes exchanged text communications with each other. Finally, Andes seems to assert some antiquated concept about whether rape is likely to occur within an intimate relationship.[3]

Dr. Rheingold testified it was not uncommon for victims of domestic assaults to not report the assault to law enforcement immediately. She explained the victims may need time to process what has happened. They may also be in contact with the perpetrator to make sense of what the perpetrator did to them. ROA. pp. 406-413. This testimony relates directly to the facts of this case and is useful to the jury to explain what may initially appear to be counterintuitive behavior by Victim.

Trial judges have considerable discretion in ruling on the admission or exclusion

3 Disturbingly, Andes makes this same assertion twice in his brief. Brief of Appellant, p. 5, pp. 13-14.

of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives **great deference** to the trial court." (emphasis added)).

"The admission or exclusion of expert testimony is a matter within the sound discretion of the trial court." Burroughs v. Worsham, 352 S.C. 382, 390, 574 S.E.2d 215, 219 (Ct. App. 2002). "A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). A trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

Accordingly, the trial court did not err in admitting the expert testimony merely because the expert did not have specific knowledge of the facts of the case. The testimony was useful background information used to dispel misconceptions about rape and domestic violence victims and has been accepted in nearly all jurisdictions for decades.

The expert witness did not conflate her understanding of consent and sexual assault with the legal standard and the issue was never remotely mentioned at trial.

Andes further complains that Dr. Rheingold "conflated her psychological understanding of consent and assault with those legal concepts at issue in trial." Brief of Appellant, p. 14 (Issue II). No argument approaching this logic was presented to the trial

court below. The issue is not remotely preserved. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003).

Respondent finds this argument difficult to follow. Dr. Rheingold did not offer an opinion on whether the assault actually occurred or whether there was non-consensual, as opposed to consensual, sexual conduct. Indeed, Andes complains that Dr. Rheingold was admitted as an expert without knowing the facts of the case. Dr. Rheingold also did not offer any sort of definition of sexual assault or consent, so Respondent fails to understand Andes' argument that Dr. Rheingold's testimony misinformed the jury of the legal standard to apply to the charged crime. As previously mentioned, the testimony is allowable expert testimony providing general background information offered to counter stereotypes and myths about sexual assaults and to explain seemingly counterintuitive actions of victims of sexual assault. It is information considered beyond the ken of laymen.

The subject of expert testimony is beyond the ken of most laymen.

Andes' next complaint (Issue III) is that the expert testimony was not helpful to the jury because the information is within the common knowledge and common sense of the jury. This argument is rebutted by the anachronistic views advanced by Andes, as previously discussed in this brief. Furthermore, Andes fails to cite any authority that such testimony is considered inadmissible because it is within the common knowledge and common sense of the jury. The argument is conclusory and should not be considered. State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001).

However, the New York Court of Appeals considered the issue, noting "rape is a crime that is permeated by misconceptions." People v. Taylor, 552 N.E.2d 131, 136 (N.Y. 1990). "Society and law are finally realizing that it is an act of violence and not a sexual act." Id. The New York Court of Appeals further found the following:

> Because cultural myths still affect common understanding of rape and rape victims and because experts have been studying the effects of rape upon its victims only since the 1970's, we believe that patterns of response among rape victims are not within the ordinary understanding of the lay juror. For that reason, we conclude that introduction of expert testimony describing rape trauma syndrome may under certain circumstances assist a lay jury in deciding issues in a rape trial.

Id.

The Supreme Judicial Court of Massachusetts, in reviewing whether there was still a need for its "fresh complaint" doctrine, noted the following about juror perceptions of rape:

> Though we have located little recent research on juror perceptions of rape complainants, the research and scholarship of which we are aware suggests that damaging stereotypes persist. Some jurors may continue to believe that "real" victims will *promptly* disclose a sexual attack. Some jurors may continue to harbor prejudicial misperceptions about the nature of rape and rape allegations, including that complainants who wear revealing clothing, consume drugs or alcohol, or have unorthodox or promiscuous lifestyles cannot be "real" victims of rape; that forced sex by a spouse or a past partner does not constitute "real" rape; and that false accusations of sexual assault are more frequent than those of other violent crimes.

Commonwealth v. King, 834 N.E.2d 1175, 1194-95 (Mass. 2005).

Thus this testimony is admissible because it is beyond the ken of lay jurors. "Expert testimony concerning common behavioral characteristics of sexual assault

victims and the range of responses to sexual assault encountered by experts is admissible." See State v. Weaverling, 337 S.C. 460, 474-475, 523 S.E.2d 787, 794 (Ct. App. 1999) (citing with approval State v. Lujan, 967 P.2d 123 (Ariz. 1998) (opinion testimony describing behavioral characteristics outside jurors' common experience is admissible)).

Expert witness's testimony did not bolster Victim's testimony.

Lastly, Andes complains that the expert testimony was admitted only to bolster Victim's credibility (Issue IV). Andes complains: "Here, the expert's testimony did nothing more than rehabilitate [Victim's] credibility. She exhibited questionable behavior prior to and after a sexual encounter she was alleging to be rape. For the jury to trust her and believe her story, the jurors needed some reconciliation of these behaviors." Brief of Appellant, pp. 18-19.

The State agrees the purpose of this expert testimony is to provide reconciliation of seemingly counterintuitive behaviors. That is the very point of such behavioral testimony. However, Dr. Rheingold never testified about the veracity of Victim or even discussed the evidence regarding Victim in the instant case. Her testimony does not constitute bolstering. State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (rejecting appellant's claim that forensic interviewer vouched for the victim's credibility where the expert gave no indication about the victim's veracity). Note Andes also complains that Dr. Rheingold was not familiar with the facts of the case, yet claims she still managed to bolster Victim's testimony. These claims are inconsistent with each other.

Andes seems to suggest defendants should be allowed to perpetuate stereotypes and myths and that the State should not be allowed to refute them with expert testimony.

But Andes fails to discuss the cases holding that this testimony is allowable. State v. White, 361 S.C. 407, 605 S.E.2d 540 (2004) (finding rape trauma testimony is admissible "to prove the elements of criminal sexual conduct since such evidence may make it more or less probable the offense occurred"); Weaverling; supra.; Shumpert, 312 S.C. at 806, 435 S.E.2d at 862 (expert testimony and behavioral evidence may be admitted as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs it prejudicial effect).

Shumpert overruled the holding of State v. Hudnall, 293 S.C. 97, 359 S.E.2d 59 (1987). In Hudnnall, the Supreme Court found expert testimony about rape trauma evidence was inadmissible because it was admitted to prove the offense occurred **instead** of explaining "any seemingly inconsistent response to the trauma." Hudnall, 293 S.C. at 100, 359 S.E.2d at 62. In this case, the testimony was admissible to explain an arguably inconsistent response to a rape and, therefore, is testimony that has been admissible in South Carolina for better than a quarter century.

In the instant case, Dr. Rheingold's expert testimony was admissible to cure the misconceptions about rape that clearly still exist. Accordingly, the trial court did not err and the conviction should be affirmed.

CONCLUSION

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

Respectfully submitted,

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January 17, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Berkeley County
Kristi Lea Harrington, Circuit Court Judge

THE STATE, Respondent,

vs.

MICHAEL C. ANDES Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Benjamin J. Tripp, Esquire, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 17th day of January, 2014

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