STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2012-212555

THE STATE,

Respondent,

v.

BOBBIE ALBERT MCCANN,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General
Bar # 68571

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

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STATEMENT OF ISSUE ON APPEAL

The trial court did not err in overruling Appellant's objection to expert testimony concerning delayed reporting by victims of child sexual abuse and the practice of grooming victims of child sexual abuse, where the expert testimony was helpful to the layperson jury and was not unfairly prejudicial to Appellant; further, the expert was not required to know the facts of the case to testify, and the contention that the expert testimony was based on pseudo junk science is not preserved for review nor is it a correct assertion as evidenced by a quarter century of case law from numerous jurisdictions including South Carolina.

STATEMENT OF THE CASE

Appellant was indicted during the February 2012 term of the Pickens County Grand Jury for Lewd Act upon a Child (2012-GS-39-0497), and two counts of Criminal Sexual Conduct with a Minor in the First Degree (2012-GS-39-0498, 0499). Appellant proceeded to a trial by jury on April 23-24, 2012. The jury convicted Appellant of all three charges. The Honorable Robin Stilwell sentenced Appellant to twenty-five years' concurrent imprisonment for each count of Criminal Sexual Conduct with a Minor in the First Degree and five years' consecutive imprisonment for Lewd Act Upon a Child. Appellant thereafter filed an appeal. This initial brief follows.

STATEMENT OF THE FACTS

The victim's mother, Toni Durnil, testified that Appellant was her mother's boyfriend. ROA. p. 28, l. 19. Durnil testified that on December 29, 2009, the victim (Victim) disclosed to Durnil that she was sexually abused by Appellant. ROA. p. 33, l. 13. Victim was born on December 15, 2004. ROA. p. 54, l. 9. Durnil testified Appellant

and her mother started a relationship in March 2008. ROA. p. 28, l. 21. Appellant and Durnil's mother started living together in May 2008. ROA. p. 29, l. 5. In May 2008, Victim was three years old. ROA. p. 54, l. 9.

Durnil testified that while Victim was recounting the abuse, she was acting "very scared." ROA. p. 34, l. 24. Durnil testified Victim "was scared that she was going to get in trouble and the person that done this to her was going to get in trouble. And [Victim] would just keep on saying it." ROA. p. 35, ll.1-13. Durnil testified that following the initial disclosure, Victim would reinitiate further conversation about the abuse and Durnil would keep notes of the additional conversation. ROA. pp. 38-39. Durnil described the changes in behavior she observed in Victim as a result of this sexual abuse, including Victim wetting the bed, protecting her private area, being afraid of the dark, and grinding her teeth. ROA. p. 39, ll. 11-14.

Durnil testified that Victim told her the abuse occurred at a Dollar General Store parking lot, at Durnil's mother's house in the bedroom, living room, and bathroom, and on the swing Durnil gave Victim for Christmas. ROA. p. 38, lines 14-24.

Durnil testified Appellant and Victim "would like hang out and he'd buy her things. Bought her a lot of things actually." ROA. p. 32, l. 13. In contrast, Appellant would not buy anything for Durnil's son. ROA. p. 32, ll. 4-10. Durnil testified Victim "loved [Appellant]. That was her Papa. She looked up to him like a grandfather." ROA. p. 31, ll. 24-25.

Durnill testified that her mother attempted to persuade her and Victim to drop the charges. Durnill's mother told Victim, "Papa never done it and that blame it on somebody else." ROA. p. 42, ll. 11-16. She told Durnill that if Durnill "don't drop the

charges that she was going to get DSS after me and she was going to have friends that's going to be on her side. And that she has pictures [of them all hanging out]." ROA. p. 42, ll. 20-25 Durnill was scared that her mother would really call DSS. ROA. p. 43.

Victim was seven years old at the time of trial. ROA. p. 72, l. 23. Victim testified Appellant touched her breasts. Appellant also touched her vagina with his mouth and fingers. Appellant touched her butt with his penis. ROA. pp. 76-79. Appellant forced Victim to touch his penis by ordering her to "[h]old it." ROA. p. 84, ll. 7-10. Victim testified these "bad touches" occurred "every time [she] went over [to her grandmother's house]." ROA. p. 80, l. 4. Appellant also took off Victim's clothes and took her photograph. ROA. 84, ll. 13-19. Victim's grandmother put cream on her vagina because it had a red spot on it. Victim also told her grandmother about the abuse. ROA. 87, ll. 5-11.

Detective Rita Burgess testified Victim disclosed the sexual abuse to her when she began her investigation. ROA. p. 119, l. 13-14. Detective Burgess testified Durnil called her on November 24, 2010 and notified her Victim was recanting her story. ROA. p. 124. Detective Burgess testified Durnil told her during this phone conversation that Appellant did not do it and that her previous boyfriend, Larry, was the perpetrator. ROA. p. 124. But Detective Burgess could hear Victim "hysterically crying" in the background and saying "Larry didn't do it. Papa did." (Victim called Appellant "Papa"). ROA. p. 125, ll. 4-7. Detective Burgess explained Victim "made some changes in what she said had happened, whether it would be adding something or taking something away, but she never said it did not happen." ROA. p. 137, ll. 13-15.

Michelle Gerald, a Child Protective Services Investigator, testified that when she interviewed Victim, Victim said she was touched by Appellant in her vaginal area with his fingers, mouth, and penis. ROA. p. 154, ll. 2-7. Gerald testified Victim "denied anyone else ever touching her." ROA. p. 154, ll. 11-12. Christine Carlberg, a forensic interviewer, testified Victim gave her a "detailed account of the abuse." ROA. pp. 195-197. Loretta Addington, an R.N. who examined Victim, testified Victim told her that Appellant touched her in the bathroom. Victim testified she loved Appellant and did not want Appellant to go to jail. ROA. p. 100.

Dr. Mary Fran Croswell testified about Victim's disclosure to her as follows:

> She said she had been touched in her vaginal area with the perpetrator's fingers, that it was hurting when he touched her. She states that he touched her with his mouth and points to vaginal area when asked where he touched her with his mouth. She said that he had touched her with his winky dinky do, which was what her term was for penis, on her chicky, which was what her term was for vagina. When asked how many times he had touched her chicky, she held up all the fingers on both hands and said, every day. She denied anyone else ever touching her. And she said one time she had had a boo-boo in her chicky area.

ROA. p. 154, ll. 1-13.

Elizabeth Willingham, the Clinical Director at the Julie Valentine Center in Greenville, testified as an expert in counseling children thought to be sexually abused. Willingham testified she has a Bachelor's Degree in Psychology, a Master's Degree in Professional Counseling, an Education Specialist Degree, and a Ph.D. in Counselor Education and Practice. ROA. p. 165, ll. 12-18. Willingham testified she has been practicing in the field of child abuse since 1999. ROA. p. 167, l. 14. She also testified her estimated caseload was seventy-five to a hundred children per year. ROA. p. 168, ll.

2-3. Willingham testified she had very limited knowledge of the case at hand. ROA. p. 168-169. Once Willingham was questioned about delayed disclosures, defense counsel objected to her testimony. ROA. p. 169-170. The trial judge allowed Willingham to proceed to testify because the trial judge found that "the substance of the testimony that's being offered into evidence is within the scope of her prescribed expertise." ROA. p. 172, ll. 22-24.

Willingham's testimony included a discussion of the phenomenon of delayed disclosure by sexually abused children and grooming tactics by abusers. ROA. pp. 175-188.

Red herrings in Appellant's brief

Appellant is mistaken that Victim at any point claimed a third party committed the sexual abuse against Victim (although sexually abused children often are victimized by more than one person -- such a claim is not the least bit exculpatory). Specifically, Appellant claims in his brief: "The child said that Durnil's other boyfriend, Larry, 'did it.' ROA. p. 124, ll. 16-25." In fact, the testimony concerned a phone call from Durnill to Burgess where Durnill claimed Victim said Larry, not Appellant, committed the offense. In that same phone call, Burgess overheard Victim in the background saying, "Larry didn't do it. Papa did." ROA. pp. 124-125.

Appellant also remonstrates about the prosecutor bringing out Appellant's status as a convicted sex offender in the prosecution's opening statement. In fact, Appellant's sex offender status was an element of the offense for the State to prove and therefore, there is nothing nefarious at all about the prosecution noting Appellant's status as a sex offender during opening arguments. See S.C. Code § 16-3-655(A)(2).

ARGUMENT

The trial court did not err in overruling Appellant's objection to expert testimony about delayed reporting by victims of child sexual abuse and about the practice of grooming victims of child sexual abuse, where the expert testimony was helpful to the layperson jury and was not unfairly prejudicial to Appellant; further, the expert was not required to know the facts of the case to testify, and the contention that the expert testimony was based on pseudo junk science is not preserved for review nor is it a correct assertion as evidenced by a quarter century of case law from numerous jurisdictions including South Carolina.

Appellant contends the trial court should have sustained his objection to Elizabeth Willingham's expert testimony, arguing it was not helpful to the trier of fact as required by Rules 702 and 703, SCRE, and the probative value of the expert testimony was outweighed by its prejudicial effect. The basis of Appellant's argument is the claim that Willingham should not have testified because Willingham admitted having limited knowledge of the facts of the case and that Willingham's expert testimony about delayed disclosure and grooming is pseudo junk science. There is no requirement that an expert have knowledge of the facts of the case when an expert is providing helpful background information to the jury that is not normally within the knowledge of laymen. Further, the phenomena of delayed reporting and grooming has been recognized nationally for decades and expert testimony about delayed disclosure and grooming is admissible in most jurisdictions, including this state. Most of the argument advanced by Appellant is not preserved for review.

Indeed, there is little correlation between the discussion in Appellant's brief and Appellant's trial objection. During trial, Appellant objected just as the prosecution began

to ask Willingham about disclosure and delayed disclosure. Appellant made the following objection:

> Your Honor, at this time, I would object to the testimony. **Certainly, she is an expert in her field. I cannot deny that.** But I think the testimony that is to be presented has to be in some way to assist the trier of fact to understand the evidence or determine the facts at issue.
>
> We're getting ready to talk about disclosures and that sort of thing, and I think it goes beyond the scope of the ruling. She's acknowledged she has very limited, virtually no knowledge of this case in particular. So generally she's – the rule also is going to require her to testify as to any underlying facts or data. I think she needs to do that and she has done it. And then in Rule 703, requires also that the facts or data that is being relied upon may be those perceived or made known to the expert before the hearing, and the type reasonably relied upon by experts in a particular field in forming opinions and inferences on the subject. **Again, she's an expert in her field, but she doesn't have any knowledge or information about this case.** And I think that still would lead us up to 702, that this needs to be knowledge and testimony that will assist the trier of fact. And I don't believe it rises to that standard. So I would oppose her testimony and I would ask you that the testimony be excluded.

ROA. p. 169, l. 24 – p. 170, l. 23 (emphasis added). So it is admitted at trial that Willingham is an expert in her field and Appellant did not contest her qualifications or the soundness of the expert testimony at trial.

Since this objection fails to argue that testimony on delayed disclosure and grooming is unreliable, the argument is not preserved for review. A party cannot argue one ground below then argue another on appeal. State v. Hudgins, 319 S.C. 233, 237, 460 S.E.2d 388, 390-91 (1995) *overruled on other grounds by* State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998); see also Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 64 S.E.2d 253 (1951) (finding mere observations by the trial court do not enlarge the grounds upon which the motion is made).

Indeed, Appellant agreed at trial that Willingham was qualified. An issue conceded in 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 the offended party does not challenge that ruling; failure to challenge a ruling is abandonment of the issue and precludes consideration on appeal; an unchallenged ruling is law of the case and requires affirmance). The only issue proper for this Court's review is the issue of whether an expert witness may testify without specific facts or knowledge of the case at hand.

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)).

In South Carolina, "[t]he 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).

The only aspect of Appellant's brief that is truly preserved is the assertion that an expert cannot testify, under Rule 703, SCRE[1], without any knowledge of the specific facts of the case. This argument lacks merit and is readily dispensed with. "There is no requirement the sexual assault victim be personally interviewed or examined by the expert before the expert can give behavioral evidence testimony. The fact that the expert does not personally interview the victim bears on the weight of the behavioral evidence 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)). The Kaufman court vented that "the testimony was admissible pursuant to Evid.R. 703, and Kaufman's . . . argument is not well taken." Kaufman, at 170. Appellant's argument is identical to Kaufman's.

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

[1] Rule 703 of the SCRE states the following:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

> 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). The trial court did not err in allowing Willingham to testify without specific facts of the case because no part of Rules 702 or 703 require specific knowledge of the case upon which an expert testifies.

The subject matter of Willingham's testimony was admissible pursuant to Rule 702, SCRE. The South Carolina Supreme Court has found that the admissibility of scientific evidence is dependent on whether the expert relied on scientifically and professionally established techniques. State v. Jones, 273 S.C. 723, 730-31, 259 S.E.2d 120, 124 (1979). The South Carolina Supreme Court has set out four factors a trial court must consider when deciding whether to allow expert testimony for scientific evidence: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality of control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." State v. Council, 335 S.C. 1, 19, 515, S.E.2d 508, 517 (1999).

However, the Supreme Court has found these factors serve no purpose when it comes to non-scientific evidence and therefore only requires the trial court to exercise its gatekeeper role to determine whether the evidence is reliable. White, 382 S.C. at 274, 676 S.E.2d at 688. In order for a witness to be qualified as an expert, the trial court must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011).

Of course, expert testimony on common behavior by victims of sexual abuse is allowed in South Carolina. Weaverling, 337 S.C. at 474, 523 S.E.2d at 794 ("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible."). "Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault." Id., at 475, 523 S.E.2d at 794; see also People v. Carroll, 740 N.E.2d 1084, 1090 (N.Y. 2000) ("We have long held that expert testimony regarding rape trauma syndrome, abused child syndrome or similar conditions may be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand[.]").

The trial court correctly overruled defense counsel's objection because Willingham's testimony was helpful to the trier of fact. Rule 702, SCRE states the following:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Testimony on the behavioral characteristics of sexually abused children is far from "pushing the envelope" as Appellant contends. This kind of testimony has been accepted by courts for approximately a quarter of a century. The Supreme Court of Hawaii observed in 1990 that "sexual abuse of children 'is a particularly mysterious phenomenon.'" State v. Batangan, 799 P.2d 48, 51 (Haw. 1990) (quoting State v. Castro, 756 P.2d 1033, 1044 (Haw. 1988)).

The Hawaii Supreme Court quoted with approval the observations of other courts as follows:

> While jurors may be capable of personalizing the emotions of victims of physical assault generally, and of assessing witness credibility accordingly, tensions unique to trauma experienced by a child sexually abused by a family member have remained largely unknown to the public. . . . [T]he routine indicia of witness credibility – consistency, willingness to aid the prosecution, straight forward rendition of the facts – may, for good reason be lacking. As a result jurors may impose standards of normalcy on child victim/witnesses who consistently respond in distinctly abnormal fashion.

Batangan, at 51 (quoting State v. Moran, 728 P.2d 248, 251 (Ariz. 1986) and State v. Middleton, 657 P.2d 1215, 1222 (Or. 1983) (Roberts, J., concurring)).

The Batangan court further observed:

> Child victims of sexual abuse have exhibited some patterns of behavior which are seemingly inconsistent with behavioral norms of other victims of assault. Two such types of behavior are delayed reporting of the offenses and recantation of allegations of abuse. Normally, such behavior would be attributed to inaccuracy or prevarication. . . . In these situations it is helpful for the jury to know that many child victims of sexual abuse behave in the same manner. Expert testimony exposing jurors to the unique interpersonal dynamics involved in prosecutions for intrafamily child sexual abuse . . . may play a particularly useful role by disabusing the jury of some widely held misconceptions . . . so that it may evaluate the evidence free of the constraints of popular myths.

Batangan, at 51-52 (citations and internal quotation marks omitted). The Minnesota Supreme Court found: "Background data providing a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate in cases of sexual abuse of children." State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984). Note this is close to thirty years before the prosecution's alleged motive to "push the envelope" arose.

The Alabama Criminal Court of Appeals found that an expert's testimony on delayed disclosure based on her specialized knowledge was admissible and "clearly assisted the jury to understand the evidence presented" regarding the victim's ten year delay in disclosing abuse. W.R.C. v. State, 69 So.3d 933, 939 (Ala. Crim. App. 2010) (noting "other jurisdictions have held similar testimony to be admissible in child-sexual-abuse cases").

A law review article contradicts Appellant's conclusory assertions about the soundness of the expert testimony on delayed disclosure, as follows:

> Psychological research demonstrates that delayed reporting is common among sexually abused children. Frequently when children finally disclose, they give slightly different versions of the abuse to different interviewers. Finally, although there is debate about how many sexually abused children recant, it is undisputed that some children recant and some recant their recantation. Thus, from a psychological point of view, expert testimony about delay, inconsistency, and recantation is not controversial. From the legal perspective, such testimony is not worrisome.

John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y, 45-46 (2010) (footnotes omitted); see Westbrooks v. State, 710 S.E.2d 594, 597-98 (Ga. Ct. App. 2011) (finding forensic interviewer's testimony regarding things such as partial disclosure and delayed disclosure was relevant and did not directly address the victim's credibility or express a direct opinion that the victim had been sexually abused; the fact that such testimony may also indirectly, though necessarily, involve the child's credibility does not mean that it improperly bolsters the victim).

The New Jersey Supreme Court declared the following: "There does not appear to be a dispute about acceptance within the scientific community of the clinical theory

that CSAAS [Child Sexual Abuse Accommodation Syndrome] identifies or describes behavioral traits commonly found in child abuse victims." State v. J.Q., 617 A.2d 1196, 1206 (N.J. 1993) (finding testimony about CSAAS is admissible to show victim displayed symptoms of child abuse or to explain delayed disclosure or recantation, but not to establish guilt or innocence).

The State called Willingham as an expert because the victim disclosed the sexual abuse to others quite some time after it first occurred. Generally, "[e]xpert testimony that abused children often delay reporting the abuse . . . informs the jury that the victim's failure to disclose in a timely fashion does not necessarily exonerate the defendant without suggesting that the particular child witness in the case was or was not abused." Commonwealth v. Bougas, 795 N.E.2d 1230, 1236 (Mass. App. Ct. 2003). Further, "[D]isclosure in child abuse cases is generally delayed because of coercion, guilt, or some other reason, [and thus] there will be no physical evidence to corroborate the victim's allegations. Therefore . . . expert testimony will . . . assist the jury in understanding the evidence." People v. Beckley, 456 N.W.2d 391, 402 (Mich. 1990).

Willingham testified as follows:

> disclosure of abuse, we typically say it's a process, it's not an event...disclosure is delayed, meaning that children will wait to say something...Sometimes they will disclose something and wait to see what the response will be from the person that they disclosed to, to kind of test the waters...And so that disclosure sometimes can be tentative or they may disclose some details of the abuse at one point in time, and some at another point in time during the process of disclosure.

ROA. p. 175, ll. 22-25. Willingham's testimony focused primarily on the occurrence and reasons for delayed disclosures in victims of child sexual abuse, information typically beyond the knowledge of a lay juror. See State v. Carpenter, 556 S.E.2d 316, 321 (N.C.

Ct. App. 2001) (finding expert testimony on delayed disclosure is "clearly instructive and helpful to the jury in understanding the evidence since the nature of the sexual abuse of children places lay jurors at a disadvantage").

"Indeed, the majority of states permit expert testimony to explain delayed reporting, recantation, and inconsistency . . . ." People v. Spicola, 947 N.E.2d 620, 635 (N.Y. 2011). The trial court did not abuse its discretion in admitting this testimony as it is clearly admissible under Weaverling and case law from the majority of jurisdictions that goes back decades. The testimony is not based on pseudo junk science, and the State was not pushing the envelope as Appellant unfairly claims.

Willingham further testified, without objection, about the phenomena of grooming in the context of child sexual abuse. Grooming is "the process of eroding a victim's boundaries to physical touch and desensitizing them to sexual issues." State v. Berosik, 214 P.3d 776, 782 (Mont. 2009) (finding generalized testimony about grooming by expert witness was proper and not prejudicial profiling evidence). Other states have recognized the importance of testimony on the practice of grooming and held that it is admissible. See Morris v. State, 361 S.W.3d 649 (Tex. Crim. App. 2011); State v. Norlander, 701 N.W. 2d 652 (Wis. Ct. App. Table Op. 2005); People v. Diaz, 988 N.E.2d 473 (N.Y. 2013) (finding expert testimony about grooming proper as it is "beyond the ken of the typical juror" and favorably noting that the expert testified she was not aware of the facts of the particular case). "[T]he D.C. Circuit, among other courts, has upheld the admission of [the expert's] testimony on the grooming techniques of child molesters precisely because the average layperson lacks knowledge regarding the manner in which preferential sex offenders operate." Jones v. United States, 990 A.2d 970, 978 (D.C. Ct. App. 2010). "The testimony [helps] to explain not only how a child molester could

accomplish his crimes without violence, but also why a child victim would acquiesce and be reluctant to turn against her abuser." Id.

This Court, in finding prior bad acts evidence admissible, noted that "[t]he six to seven year pattern of escalating abuse of Victim by [appellant] is the **essence of grooming** and continuous illicit activity." State v. Kirton, 381 S.C. 7, 36, 671 S.E.2d 107, 121 (Ct. App. 2008) (emphasis added). Indeed, it is simply baffling how Appellant could refer to the phenomena of grooming as pseudo junk science when the techniques of grooming child victims by abusers is so well known among those involved in the criminal justice system.

Willingham testified grooming "is a term that we use for describing offenders' behavior to try to entice the child or gain trust and gain access to a child." ROA. 180, ll. 7-9. Willingham's testimony about the grooming process was relevant because of evidence presented that tended to show Appellant grooming Victim. Testimony showed Appellant would buy gifts for Victim, Appellant and Victim had a close relationship, and Victim was afraid of getting Appellant in trouble by disclosing this information.

In this case, the trial court ruled that Willingham was qualified as a witness and that her testimony would assist the trier of fact. Willingham had multiple degrees in counseling as well as extensive training and experience in child abuse. Willingham holds a doctorate in Counseling. She is a licensed professional counselor in South Carolina and Georgia. She is a nationally certified counselor and a victim service provider in South Carolina. Willingham has been trained at Cornerhouse and Child First in South Carolina. She has been trained in trauma focus play therapy and trauma focus cognitive behavioral treatment. Willingham testified she has been counseling children who had suffered from abuse since 1999. ROA. pp. 164-168.

Willingham also explained, "what I shared with you all and the court about symptoms and disclosure, that is what we know from the research and from clinical experience of how the dynamics of child sexual abuse affect children." ROA. pp. 189-190, ll. 22-25. Willingham's qualifications and experience in child abuse assessment falls within the confines of Rule 703, SCRE, and further Rule 703 does not require an expert have firsthand knowledge of the case at hand in order to testify; the Rule simply requires that an expert acquire knowledge prior to trial and that the information be of the type that professionals rely on in the field. These requirements are met by Willingham's experience, training, and clinical observations. Accordingly, there was no error in admitting the testimony.

Lastly, Appellant argues Willingham's testimony was prejudicial to him because the effect of this testimony on the jury was that Victim acted in the same manner as other children had acted who had been sexually abused. Appellant's argument lacks merit because Willingham's testimony was not prejudicial to Appellant in the manner that Appellant argues.

Under Rule 403, SCRE, in order for evidence to be excluded as prejudicial, the probative value of the evidence must be substantially outweighed by the danger of unfair prejudice. "To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence." State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012). Further, Rule 403, SCRE, requires there to be unfair prejudice before the evidence will be excluded. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest a decision on an improper basis." Id. at 529, 732 S.E.2d at 229.

"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, 378, 580 S.E.2d 785, 794 (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).

In the instant case, for the reasons discussed above, the testimony had tremendous probative value. As is obvious to those involved in the criminal justice system, the phenomenon of delayed disclosure by sexually abused children really does exist, as does the tactic of grooming by sexual offenders. Absent unsupported rhetoric, Appellant fails to show otherwise. However, this information is not within the knowledge of laymen and is proper general information to provide in the form of expert testimony.

On the other hand, Willingham's testimony cannot be found to have been unfairly prejudicial to Appellant's case. As explained above, Willingham's testimony was admissible and proper in this case. Willingham did not compare Victim to other child victims during her testimony. In fact, Willingham never even mentioned Victim while testifying. The Supreme Court recently explained: "[I]t is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." State v. Kromah, 401 S.C. 340, 358-59, 737 S.E.2d 490, 500 (2013). In this case Willingham did not opine on Victim's veracity. Accordingly, this case is readily

distinguishable from Kromah and other cases where the expert testimony was found to be unfairly prejudicial to the defendant. See State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding the admission of the forensic interviewer's written report into testimony to be error because the reports stated that each child "provided a compelling disclosure of abuse by appellant."); State v. McKerley, 397 S.C. 461, 465, 725 S.E.2d 139, 142 (Ct. App. 2012) (finding the forensic interviewer's "opinion as to whether she thinks something happened [was] nothing other than her inadmissible opinion as to whether the victim was telling the truth").

And contrary to Appellant's assertions, Willingham's testimony was not "calculated to have the jury conclude" that Victim was probably just another abused child since the proof of the abuse had already been presented at trial through the testimony of Victim herself and the many others who testified about the abuse. Willingham testified "each child's response can be unique, and that certainly cases differ." ROA. p. 189, ll. 21-22. Willingham also testified: "[E]very child's response is unique [b]ut when you look at studies that look at children and adult survivors then—as a whole, then you have these common patterns." ROA. p. 190, ll. 4-7. Willingham's testimony did not directly involve Victim and therefore it is hard to see how this testimony was unfairly prejudicial, especially since Willingham did not claim to have any firsthand knowledge of the case.

Accordingly, Willingham's expert testimony was proper in this case because it aided the trier of fact in understanding Victim's behavior in the case. Willingham was not required to know or testify to any facts of this case in order to testify as an expert. The testimony also was not unfairly prejudicial to Appellant because the testimony was presented in a general manner and never touched upon Victim's truthfulness or even discussed Victim's version of events.

Further, there was already overwhelming evidence of guilt in the record without the expert testimony. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

Appellant terms this case troubling. Indeed it is a troubling case, but not because Appellant did not receive a fair trial. Appellant did receive a fair trial. What is troubling is the vulnerable situation Victim was left in by her mother and grandmother. It is entirely possible that Victim was sexually abused by someone else; however, if that is the case, ample evidence supports that Appellant is the second person to sexually abuse Victim. Children from dysfunctional families are no less deserving of protection from predators like Appellant than any other children. The conviction and sentence should be affirmed.

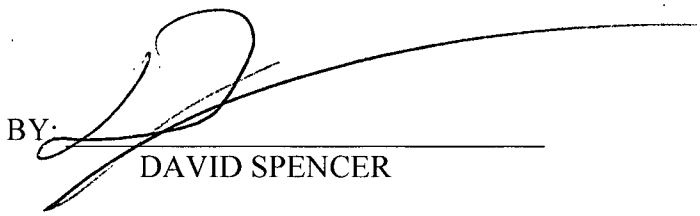
CONCLUSION

For all the foregoing reasons, the State submits that Appellant's conviction and sentence be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

BY: 
DAVID SPENCER

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

ATTORNEYS FOR RESPONDENT

January 17, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Pickens County
Robin B. Stilwell, Circuit Court Judge

THE STATE, Respondent,

vs.

BOBBIE ALBERT MCCANN Appellant.

CERTIFICATE OF COUNSEL

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

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

By: _____
DAVID SPENCER

Office of Attorney General
Post Office Box 11549
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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, Robert M. Dudek, 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

NORMA BIGBEE
Legal Assistant

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