THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY

Thomas L. Hughston, Jr., Circuit Court Judge

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SC Court of Appeals

Case No. 2013-000638

The State of South Carolina, Respondent,

v.

George White, Appellant.

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in allowing evidence, over defense objection, of a videotaped forensic interview with the minor pursuant to S.C. Code Ann. § 17-23-175 when the videotape did not satisfy statutory requirements for admissibility?

2. Did the trial court err in allowing evidence, over defense objection, of a videotaped forensic interview with the minor pursuant to S.C. Code Ann. § 17-23-175 when the statute is unconstitutional as applied in this case?

3. Did the trial court err in qualifying the forensic interviewer as an expert and allowing the prosecution to elicit her opinion about the minor's credibility where such testimony invaded the jury's exclusive role of determining credibility, exceeded the time and place limitation on such testimony, and constituted impermissible bolstering?

4. Did the trial court err in qualifying the forensic interviewer as an expert and allowing the prosecution to elicit her opinion that Appellant's conduct could be considered "grooming" where such testimony was beyond the scope of her expertise and was offered as improper character evidence?

5. Did the trial court err by denying Appellant's motion for directed verdict based on the State's failure to introduce sufficient evidence to establish proof of the elements of the crime charged where the prosecution failed to introduce evidence of a sexual battery by sexual intercourse, as charged in the indictment, and as required to sustain a conviction for criminal sexual conduct with a minor in the second degree?

STATEMENT OF THE CASE

Appellant George C. White was convicted on March 21, 2013 of the crimes of committing a lewd act upon a minor, in violation of S.C. Code Ann. § 16-15-140, and criminal sexual conduct with a minor in the second degree, in violation of S.C. Code Ann. § 16-3-655(B). The indictments, issued on August 4, 2008, charged that Appellant committed the alleged unlawful acts between the dates of August 2007 and January 21, 2008, and that the alleged victim was a minor under the age of fourteen at the time of the conduct charged.

Case number 2008-GS-10-6275 (charge of criminal sexual conduct) and case number 2008-GS-10-6277 (charge of lewd act upon a minor) were tried before a jury in the Court of General Sessions, Charleston County, from March 18, 2013 until March 21, 2013, with the Honorable Thomas L. Hughston, Jr., Circuit Court Judge, presiding. In addition, the Honorable Deadra L. Jefferson presided over pre-trial motions and jury selection, conducted on March 18, 2013. Assistant Solicitor Elizabeth Gordon prosecuted the charges on behalf of the State of South Carolina. The defendant was represented by Donald Howe.

The State called eighteen witnesses, including the minor who made the allegations, her neighbor, aunt and grandmother, City of Charleston police officers, a crime lab technician, a forensic DNA analyst, a pediatric nurse practitioner employed by the Medical University of South Carolina, the Appellant's wife, and a forensic interviewer. The Appellant testified in his defense, and denied the charges.

The undisputed evidence showed that the minor and her family knew Appellant. At the time of the events in question, the minor lived in a house with her father, aunt and grandmother. Appellant was sent to the family home by their landlord to perform certain

repairs, discovered that his wife knew the minor's grandmother and, over time, developed a relationship with the family. The minor's family gave Appellant permission to assist the minor with homework and to take her to church and on other outings. On the night of January 21, 2008, Appellant was at the minor's home, when a neighbor, Kristine Kulpepper, came to the home to pick up her son from a play-date. An emotional scene involving Ms. Kulpepper ensued, and the minor's family agreed to question the minor about her relationship with Appellant. The minor initially denied to her aunt and grandmother that Appellant had assaulted her but subsequently that night disclosed an alleged sexual assault to her aunt, grandmother and Ms. Kulpepper. The City of Charleston police were called, and the minor was taken to the Lowcountry Children's Center the following day for an evaluation. At the Lowcountry Children's Center, the minor was physically examined by a Medical University of South Carolina pediatric nurse practitioner. After the physical examination, a social worker conducted a forensic interview, during which the minor repeated the allegations of sexual abuse. The interview was recorded on videotape and offered as evidence in the case pursuant to S.C. Code Ann. § 17-23-175.

After deliberating for less than thirty minutes, the jury returned a verdict of guilty on each of the charges contained in the indictments, and, at Appellant's request, the jury was polled as to its verdict. Appellant was sentenced to a ten year term of imprisonment for the lewd act charge and a twelve year term of imprisonment for the criminal sexual conduct charge, sentences to run concurrently.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING EVIDENCE, OVER DEFENSE OBJECTION, OF A VIDEOTAPED FORENSIC INTERVIEW WITH THE MINOR, PURSUANT TO S.C. CODE ANN. § 17-23-175, WHEN THE VIDEOTAPE DID NOT SATISFY STATUTORY REQUIREMENTS FOR ADMISSIBILITY.

A. Relevant Facts.

On January 22, 2008, the day after disclosing the alleged sexual assault, the minor was taken to the Lowcountry Children's Center where Ms. Tracy Halasz, a pediatric nurse practitioner employed by M.U.S.C., performed a physical examination. (Transcript, p. 223:2-6.) That same day, Ms. Molly Wharton Dadin, a licensed social worker, conducted a forensic interview of the minor at the Lowcountry Children's Center, at the request of the City of Charleston Police Department. (Transcript, p. 346:3-8.)

At trial, the State offered to introduce the videotaped forensic interview pursuant to S.C. Code Ann. § 17-23-175 as well as the testimony of the interviewer, Ms. Dadin. Appellant objected to the admissibility of the videotape as unreliable. (Transcript, p. 13.)

On March 19, 2013, Judge Hughston prepared to conduct a hearing outside the presence of the jury to determine whether the videotape was admissible. However, when attempting to play the videotape for the court, the State was unable to make the audio portion of the recording function properly. A transcript of the videotape was obtained after court recessed for the day, and it was presented to the court on the morning of March 20, 2013, when the court reconvened the in-camera hearing to determine the admissibility of the videotape. (Transcript, pp. 304-305, 306:1-310:13.) At that point, defense counsel notified

the court that he objected to introduction of the transcript that had been prepared, in addition to his previous objection to the videotape as unreliable. (Transcript, p. 306:18-23.)

After playing the videotape again for the trial court, the State called Ms. Dadin to testify outside the presence of the jury for purposes of determining the admissibility of the interview tape. (Transcript, pp. 313-330.) Defense counsel objected that the tape was inadmissible because it did not comply with the statute due to the technical audio malfunction and because it was unreliable under the totality of the circumstances. Defense counsel also objected that introduction of the videotaped interview through Ms. Dadin was impermissible bolstering and violated Appellant's constitutional due process rights. (Transcript, pp. 330-341.)

During the videotaped interview, the minor stated that "there's these two houses that [Appellant's] working at, and he would take me in there and take me in the bathroom and he'd take off my clothes and take off his clothes and start pushing me back and forth." She also stated that "he did it once in his van," in the parking lot of a hotel after he took her to church on a Sunday. (State's Ex. No. 17 at 9:30, 15:35-16:00; Court's Ex. 3, p. 10.) Ms. Dadin then stated that she would show the minor some drawings and asked her questions about the body parts she saw and whether any of them were touching. The minor pointed and identified something as "your private"; however, the drawings she was shown are not visible on the recording, and her response to question "what do you call that part" was inaudible, as reflected in the transcription that was prepared. (State's Ex. No. 17 at 13:17-13:51; Court's Ex. 3, p. 13.) In response to other questions asked about whether, where and how Appellant allegedly

touched her, the minor offered no further details. Instead, she stated that she didn't know; all she knew was that "it hurt." (State's Ex. No. 17 at 14:08-14:15; Court's Ex. 3, p. 14.)

During the in-camera hearing, Ms. Dadin testified about the interviewing protocol she followed, which directed that a proper forensic interview should be conducted in a calm and neutral setting, and should avoid leading questions. (Transcript, p. 327:3-328:11.) Although Ms. Dadin denied knowledge of the emotional scene the night before the interview, she confirmed that she would never make a statement to a minor to the effect that "if there had been penetration, it would have hurt" during a forensic interview. (Transcript, pp. 327:25-328:11, 329:11-15.)

Although Ms. Dadin had not been aware of Ms. Kulpepper's role in the child's disclosure, it was undisputed at trial that the minor's disclosure occurred after an emotionally charged scene precipitated by Ms. Kulpepper, which occurred only two days before the forensic interview with Ms. Dadin. Prior to trial, defense counsel requested a ruling *in limine* to preclude Ms. Kulepper from offering her anticipated testimony that Appellant "fit the profile of a pedophile," which she had stated to the police. The court granted the request and instructed the State that Ms. Kulpepper could testify about what she had observed, but she could not testify that she had concerns about Appellant's behavior. (Transcript, pp. 49-51.) Ms. Kulpepper was then called as the State's first witness at trial. She testified that she had seen Appellant with the family on prior occasions and had a "gut feeling of discomfort about the man" and that she "started to observe some things which struck me as inappropriate." (Transcript, p. 70.) She testified that Appellant "appeared obsessed with [the child]" at her birthday party and brought what Ms. Kulpepper thought was an excessive number of birthday

presents. (Transcript, pp. 70-71.) Then Ms. Kulpepper began to describe the events of the night of January 21, 2008. She testified that when she came to the minor's home to pick up her son from a play-date, she saw Appellant sitting on the floor of the living room, at the minor's side, and "got very angry when I saw him sitting there. I felt like I wanted to be physically aggressive with him, which is not like me. I felt very angry, literally I felt like I had steam coming out of my ears, just wanted him to get away from her. And I bit my tongue though. I left with my son. And then her aunt, [the minor's] aunt, followed me out, said they noticed that I had a funny look on my face and something appeared to be wrong. And I told her that I could not be quiet anymore, I didn't want to offend them because this was a friend of their family's, and that I didn't want to wrongly accuse anyone, but I felt like something was up, something was wrong, something was going on. I felt like he was grooming the family. I felt like he was trying to get to - - ." (Transcript, pp. 72-73.) At that point, defense counsel objected, and the jury was sent out. The trial court sustained the defense's objection and reminded the State that Ms. Kulpepper could not testify about her opinions or beliefs. (Transcript, pp. 73-74.)

On cross-examination, Ms. Kulpepper admitted that she didn't like Appellant and that he "gave her the creeps." (Transcript, p. 77:19-21.) She also testified that, on the night in question, she had left the house but returned later, to find an emotional scene where everybody was upset and crying. (Transcript, pp. 78-80.) At that time, she asked the minor "did he, [Appellant] put his wiener up inside you?" and told the minor that "there is a hole down there where babies come out and, if he had put his wiener up inside there, it would probably hurt." (Transcript, p. 82:14-20, 85:9-13.) She testified that the minor said she wasn't sure if it hurt

but later stated that it did. (Transcript, p. 85:14-18.) She also testified that she asked the minor if she saw any "white, gooey stuff coming out of his penis." (Transcript, p. 85:19-23.) Finally, she testified that the minor was upset and crying profusely throughout the questioning. (Transcript, pp. 86:18-87:1.)

Based on this emotionally charged scene and leading questions by Ms. Kulpepper, which occurred the day before the forensic interview was conducted by Ms. Dadin, defense counsel objected to introduction of evidence regarding the interview because it was tainted and could not satisfy statutorily required guarantees of trustworthiness and on constitutional grounds. Defense counsel also objected to introduction of the written transcript of the forensic interview. After hearing arguments of counsel, the trial court held that the tape, and Ms. Dadin's testimony, were admissible, overruling the defense's objections. (Transcript, p. 341.)

B. Discussion.

Pursuant to Section 17-23-175 of the South Carolina Code, an out-of-court statement of a child under the age of 12 is admissible in a Court of General Sessions proceeding if the following four requirements are satisfied:

(1) the statement was given in response to questioning conducted during an investigative interview of the child;

(2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);

(3) the child testifies at the proceeding and is subject to cross- examination on the elements of the offense and the making of the out-of-court statement; and

(4) the court finds, in a hearing conducted outside the presence of the jury, 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)(1)-(4).

The statute further provides the following non-exhaustive list of factors the court may consider in determining whether a statement possesses particularized guarantees of trustworthiness:

(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.

S.C. Code Ann. § 17-23-175 (B)(1)-(5).

Prior to admitting the videotaped interview, the court held an in-camera hearing to determine whether the statutory requirements had been satisfied, including watching the videotape and hearing sworn testimony from the forensic examiner, Ms. Dadin. (Transcript, pp. 330-341.) The court abused its discretion when it concluded that the statutory requirements for admissibility were satisfied.

First, due to the improper functioning of the audio portion of the videotape, the jury was not able to hear the minor's statements. The trial court allowed each member of the jury to hold a copy of the written transcription that had been prepared at the same time the jury was watching the videotape. There is no provision in the statute authorizing this procedure. Instead, the statute requires that both the audio and visual components be preserved. S.C. Code Ann. § 17-23-175(A)(2). Having recognized that the minor's statements could not be

heard and that the written transcription was not necessarily accurate, the trial court should have found the statutory requirements unmet and excluded the videotape.[1]

Second, the trial court should have excluded all evidence of the statements made by the child during the forensic interview as hearsay because the totality of the circumstances surrounding the making of the statement did not provide particularized guarantees of trustworthiness, as required for the prior statement to be admissible under Section 17-23-175.

Overruling the defense's objection to introduction of the evidence, the trial court acknowledged that the statements were elicited in response to leading questions but concluded that the "leading questions were not enough to make in my opinion the statements made by the person, the child, untrustworthy." (Transcript, p. 339.) With regard to the requirement of a detailed account, the trial court stated, "I wouldn't call it a detailed account, but it's enough of an account, bear [sic] essentials of the account of what happened, and that it does conform with what she testified to in court." (Transcript, p. 339.) Finally, the trial court found the statement was internally coherent because the court could understand what the minor was saying. (Transcript, p. 340.)

However, the forensic interviewer, Ms. Dadin, acknowledged that she would never ask the type of leading questions Ms. Kulpepper had asked the minor. (Transcript, pp. 327-328.) The only specific details the minor gave during the interview were that the Appellant sat her on his lap, without clothes on, and "pushed her back and forth" and, consistent with what Ms. Kulpepper told her, that "it hurt." (State's Ex. No. 17, at 9:16-22, 14:8-14:15.) She denied

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[1] The trial court suggested proceeding under 17-23-175(F), which provides for the possibility of introducing a prior statement that has not been preserved, but the State maintained that the interview had been preserved on videotape, consistent with the statute, and the trial court proceeded on this basis. (Transcript, pp. 309-310.)

knowledge of penetration, denied seeing Appellant's penis, denying seeing or feeling anything "wet," and denied that he touched her genitals with his hands. (Transcript, pp. 381-382.) In addition, there was inconsistency between the few details she gave at the interview and the details she gave at trial. For example, during the interview, she testified that Appellant allegedly assaulted her in the back of his van one time only, in a hotel parking lot. (State's Ex. No. 17, at 9:28-9:32.) At trial, however, she testified that he did this to her in the van "any time [she] would go off with him." (Transcript, p. 98:11-15.) In addition, the forensic interview occurred the day after the emotional scene when Ms. Kulpepper told the minor that, if Appellant had engaged in sexual intercourse with her, it would have hurt. Ms. Dadin acknowledged that the emotional scene and pointed questions by Ms. Kulpepper were exactly the type of situation that should be avoided in order to conduct a forensic interview properly. (Transcript, pp. 320, 327-28, 378-79.) Accordingly, the circumstances surrounding the forensic interview lacked the required guarantees of trustworthiness, and evidence of the videotaped interview, including the videotape, the written transcription and the testimony of the forensic interviewer, should not have been admitted under the statute.

Appellant was prejudiced by the trial court's failure to exclude evidence of the videotaped forensic interview, which was offered to bolster the minor's in-court testimony that a sexual assault had occurred and which provided details about the alleged misconduct that the minor did not testify about at trial. The only direct evidence of any alleged sexual misconduct by Appellant was the minor's testimony. Therefore, the credibility of her testimony was critical to the State's case, and Appellant was prejudiced by the trial court's failure to exclude

evidence of her prior statement. Accordingly, Appellant respectfully requests an order reversing the convictions on both charges and remanding the case for a new trial.

II. THE TRIAL COURT ERRED BY ALLOWING EVIDENCE, OVER DEFENSE OBJECTION, OF A VIDEOTAPED FORENSIC INTERVIEW WITH THE MINOR, PURSUANT TO S.C. CODE ANN. § 17-23-175, WHEN THE STATUTE IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE.

The statute is unconstitutional as applied to this case. As defense counsel objected at trial, introduction of the minor's prior statement, as recorded in the videotape of the forensic interview, violated Appellant's due process rights. (Transcript, pp. 340-341.)

South Carolina appellate courts have addressed few constitutional challenges to Section 17-23-175. *See*, *State v. Whitner*, 399 S.C. 547, 559, 732 S.E.2d 861, 867 (2012) (stating, in dictum, that Section 17–23–175 is a valid legislative enactment); *State v. Stahlnecker*, 386 S.C. 609, 620, 690 S.E.2d 565, 571 (2010) (Section 17-23-175 did not violate the ex poste facto clause of the U.S. Constitution); *State v. Hill*, 394 S.C. 280, 293, 715 S.E.2d 368, 375 (Ct. App. 2011) (holding that Section 17-23-175 did not violate the defendant's Sixth Amendment rights under the Confrontation Clause because the minor testified at trial and was subject to cross-examination); *State v. Bryant*, 382 S.C. 505, 512, 675 S.E.2d 816, 820 (Ct. App. 2009) (Section 17-23-175 did not violate savings clause or ex poste facto clause of U.S. Constitution).

Although the South Carolina Supreme Court held in *Whitner* that Section 17-23-175 is a valid legislative enactment, the Court has not addressed a constitutional challenge to the statute on due process grounds. In fact, in *Whitner*, as noted in Justice Pleicones' concurring opinion, the Supreme Court was not confronted with a challenge to the constitutionality of the statute on any basis. *Whitner*, 399 S.C. at 559, 732 S.E.2d at 868 (Pleicones, J., concurring). Instead,

the issue in the case was whether admission of a minor's recorded statement pursuant to the statute constituted improper bolstering simply because it was cumulative of the minor's testimony at trial. Noting that, absent the statutory basis for admission, the prior statement would have been inadmissible as improper bolstering evidence, the Court rejected the argument that the duplication alone rendered the evidence improper bolstering.[2] Nevertheless, the Court was not presented with a challenge to the constitutionality of the statute on due process grounds, or otherwise, and therefore did not decide that issue. *Whitner,* 399 S.C. at 559, 732 S.E.2d at 867.

The statute provides that the minor must have been under the age of 12 when making the prior statement, but it does not address the age or capacity of the witness when testifying. In this case, the minor was under the age of 12 when she made the statement, but she was sixteen when she testified. Further, she testified at trial that she had taken a sexual education class and was familiar with "the birds and the bees." (Transcript, p. 110.) Therefore, the statutory rationale for creating an exception to the general rule against admitting prior consistent statements in the case of child witnesses does not apply in the circumstances of this case, where the witness was sixteen years old and capable of testifying to the alleged sexual assault. As such, the statute creates a basis for introduction of evidence that would otherwise be inadmissible bolstering evidence without rational justification. Rule 801(d)(1)(B), SCRE (generally a prior consistent statement is not admissible unless a witness is charged with fabrication or improper motive or bias); *Whitner*, 399 S.C. at 559, 732 S.E.2d at 867

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[2] The Court also observed that it would be improper bolstering if the forensic interviewer had vouched for the credibility of the minor, as occurred in this case, discussed below. *Whitner,* 399 S.C. at 559, 732 S.E.2d at 867.

(improper bolstering to admit prior consistent statement absent statutory exception). *See also*, *State v. Barrett*, 299 S.C. 485, 486-87, 386 S.E.2d 242, 243 (1989) (evidence of corroboration of details of a sexual assault beyond time and place is hearsay testimony and improper bolstering).

Accordingly, without a provision requiring the trial court to consider the age or capacity of the witness to testify, the statute is unconstitutional, and the improper introduction of the prior recorded statement to bolster the testimony of a sixteen year old witness violated Appellant's due process rights. *See Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.") Accordingly, Appellant respectfully requests an order reversing the convictions on both charges and remanding the case for a new trial.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY QUALIFYING THE FORENSIC INTERVIEWER AS AN EXPERT AND ALLOWING THE PROSECUTION TO ELICIT HER OPINION ABOUT THE MINOR'S CREDIBILITY WHERE SUCH TESTIMONY INVADED THE JURY'S EXCLUSIVE ROLE OF DETERMINING CREDIBILITY, EXCEEDED THE TIME AND PLACE LIMITATION ON SUCH TESTIMONY, AND CONSITUTED IMPERMISSIBLE BOLSTERING.

A. Relevant Facts.

As discussed above, Ms. Dadin, a licensed social worker, conducted a forensic interview with the minor at the Lowcountry Children's Center on January 22, 2008, the day after the minor first disclosed the alleged assault to her family. In addition to offering the videotaped forensic interview, the State offered Ms. Dadin to testify. However, the State did not limit Ms. Dadin's testimony to the "time and place" of the alleged sexual assault and the

requirements for admissibility of the statement under Section 17-23-175. Instead, the State also offered Ms. Dadin as an expert in the "dynamics of child abuse" so that she could offer her opinion as to why the minor disclosed the alleged abuse when she did. (Transcript, pp. 352-354.) Defense counsel objected that Ms. Dadin's proffered testimony about the forensic interview and the minor's disclosure was not a proper subject for expert testimony and constituted improper bolstering. (Transcript, pp. 340-341, 357-359.)

Over defense objection, the trial court qualified Ms. Dadin as an expert and permitted her to testify that "delayed disclosure" is a common occurrence in children who have been abused, including that when a child has been "groomed," it can inhibit a child's willingness to tell. (Transcript, pp. 361-364.) Ms. Dadin also testified that, despite the minor having first denied any abuse but later changing her mind, and despite using Ms. Kulpepper's words when disclosing that "it hurt," Ms. Dadin did not think the minor's testimony was influenced by Ms. Kulpepper's questioning because, in her opinion, the minor was not "suggestible." (Transcript, pp. 384-385.)

B. Discussion.

It is a well-settled principle of South Carolina law that "the 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." *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499-500 (2013). *See also*, *Whitner*, 399 S.C. at 559, 732 S.E.2d at 867 (recognizing that it would be improper for a forensic interviewer to invade the province of the jury by vouching for the credibility of an alleged victim); *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (holding the trial court abused its discretion by allowing the

State to introduce forensic interviewer's reports because they allowed the forensic interviewer to improperly vouch for the children's veracity); *State v. McKerley*, 397 S.C. 461, 467, 725 S.E.2d 139, 143 (Ct. App. 2012), *reh'g denied* (May 21, 2012) (finding court erred in admitting testimony of forensic interviewer, who improperly commented on the credibility of the victim).

In addition, in *State v. Douglas*, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009) the South Carolina Supreme Court held that it was error to qualify a forensic interviewer as an expert witness. In *Kromah*, the Supreme Court again recognized that a forensic interviewer should not be qualified as an expert, particularly because of the danger, as occurred in this case, of the purported expert vouching for the credibility of the alleged victim. "Even though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others. It is undeniable that the primary purpose for calling a "forensic interviewer" as a witness is to lend credibility to the alleged victim's allegations. When this witness is qualified as an expert the impermissible harm is compounded." *Kromah*, 401 S.C. at 358, 737 S.E.2d at 499. In a footnote, the court went on to state that, in its view, "we can envision no circumstances where [a forensic interviewer's] qualification as an expert at trial would be appropriate. . . . 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.

Further to the extent forensic interviewers are permitted to testify about the content of a forensic interview, they are limited under South Carolina law to testimony establishing the foundation for admission of a videotaped forensic interview under Section 17-23-175. *Whitner*, 399 S.C. at 559, 732 S.E.2d at 867 (holding that forensic interviewer's testimony was proper because it was offered for the limited purpose of laying the proper foundation for the admission of the videotape). The statute does not authorize the forensic interviewer to go beyond the "time and place" limitations applicable to testimony offered to corroborate a victim's allegation of sexual abuse. *See Dawkins v. State*, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001); *Jolly v. State*, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994) (evidence from another witness offered to corroborate that the victim complained of a sexual assault must be limited to time and place); *Barrett*, 299 S.C. at 486-87, 386 S.E.2d at 243 (evidence from other witnesses about an allegation of sexual abuse must be limited to the time and place of the assault, and may not include particulars or details).

In this case, the trial court erred when it qualified Ms. Dadin as an expert, over defense objection, and allowed her to offer her opinions about "delayed disclosure," including her testimony that the reason the minor did not tell was because she was being "groomed" by the defendant and that the minor's delayed disclosure was not prompted or influenced by Ms. Kulpepper's leading questions because the minor was not "suggestible."

First, the trial court erred by qualifying Ms. Dadin as an expert based on her experience as a forensic interviewer. *Douglas*, 380 S.C. at 504, 671 S.E.2d at 609; *Kromah*, 401 S.C. at 357, 737 S.E.2d at 499 ("The label of expert should be jealously guarded by the court and never loosely bandied about.") It was not necessary to qualify Ms. Dadin as an

expert for her to establish a foundation for the forensic interview tape, and her experience as a forensic interviewer did not qualify her as an expert in the "dynamics of child abuse." Therefore, she should not have been permitted to testify to her opinions about "delayed disclosure" and "grooming."

Second, Ms. Dadin's testimony was classic improper bolstering because Ms. Dadin, imbued with the authoritative aura of an expert, in essence told the jury that it should disregard the fact that the minor did not disclose the alleged abuse earlier, it should disregard the fact that the minor first denied any assault and later changed her mind, and that it should disregard the possibility that the minor may have been influenced to say that "it hurt" by Ms. Kulpepper's statement to her that "it would have hurt" if Appellant had engaged in intercourse with her because she was not "suggestible." These decisions were for the jury to make, and Ms. Dadin should not have been permitted to testify, as an expert or otherwise, to her opinions about the minor's credibility. *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 (holding the trial court abused its discretion on allowing the State to introduce forensic interviewer's reports because they allowed the forensic interviewer to improperly vouch for the children's veracity); *Smith v. State*, 386 S.C. 562, 564, 689 S.E.2d 629, 631 (2010) (improper bolstering for forensic interviewer to testify that she found the victim's statement "believable" and stated that the victim had no reason "not to be truthful."); *Barrett*, 299 S.C. at 487, 386 S.E.2d at 243 (improper bolstering for social worker to testify to details of sexual abuse reported by alleged victim); *State v. Dawkins*, 297 S.C. 386, 394, 377 S.E.2d 298, 302 (1989) (improper vouching for psychiatrist to testify the victim's symptoms were genuine); *State v. Dempsey*, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000) (sexual abuse counselor improperly

vouched for victim's credibility by testifying to methods used to assess a child's credibility and offering opinion on likelihood that a child alleging sexual abuse is being truthful).

Appellant was substantially prejudiced by the trial court's error in qualifying Ms. Dadin as an expert in "the dynamics of child abuse" and allowing her to vouch for the minor's credibility. As discussed more fully below, there is no physical evidence or substantial circumstantial evidence to support the charges. The State's entire case against Appellant depended on the jury's believing the minor's allegations against Appellant, and the prosecution emphasized the importance of Ms. Dadin's improper bolstering testimony in closing argument. (Transcript, p. 472:10-11 ("Why can you believe her? She could make it up, but we heard she's not suggestible."); Transcript, p. 474:7-10 ("She wasn't suggestible. She wasn't suggestible on the stand. She wasn't suggestible in that interview. She wasn't suggestible when Kristin Kulpepper said, could it have been this, did you see this?").) The only evidence of "suggestibility" in the case came from the State's purported expert, Ms. Dadin, who improperly commented on the veracity of the minor.

Under these circumstances, the testimony of a witness qualified by the trial court as an expert commenting on the likelihood that the minor's testimony had been influenced by Ms. Kulpepper's statements resulted in substantial prejudice that permeated the entire trial. *See Jolly*, 314 S.C. at 21, 443 S.E.2d at 569 (improper corroboration testimony that is cumulative to the victim's testimony cannot be harmless because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration). Accordingly, Appellant respectfully requests an order reversing the convictions on both charges and remanding the case for a new trial.

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY QUALIFYING THE FORENSIC INTERVIEWER AS AN EXPERT AND ALLOWING THE PROSECUTION TO ELICIT HER OPINION THAT APPELLANT'S CONDUCT COULD BE CONSIDERED "GROOMING" WHERE SUCH TESTIMONY WAS BEYOND THE SCOPE OF HER EXPERTISE AND WAS OFFERED AS IMPROPER CHARACTER EVIDENCE.

A. Relevant Facts.

At the very beginning of the prosecution's opening statement, the prosecutor said, "[t]his is a case of criminal sexual conduct with a minor and lewd act on a minor. But what this also is is a case of a wolf in sheep's clothing." (Transcript, p. 60.) Defense counsel immediately objected, and the jury was sent out. (Transcript, pp. 60-61.) Outside the presence of the jury, defense counsel moved for a mistrial, based on the State's improper characterization of Appellant as a predator. The trial court sustained the objection but denied the request for a mistrial. (Transcript, pp. 60-62.)

The prosecutor then continued with the opening statement, during which she told the jury they would hear evidence about "something called grooming . . . when the perpetrator infiltrates himself into [the child's] life, they gain the trust of the people around them, and make the child feel like it would be their fault." (Transcript, p. 65.)

Then, Ms. Kulpepper blurted out during her testimony that she "felt like [Appellant] was grooming the family." (Transcript, p. 73.) Defense counsel immediately objected, and the trial court sustained the objection. (Transcript, pp. 73-74.)

Finally, the State offered the testimony of Ms. Dadin, the forensic interviewer. As discussed above, in addition to providing a foundation for the videotaped forensic interview, the State offered Ms. Dadin to testify as an expert in the "dynamics of child abuse" so that she could offer her opinion that the minor delayed disclosing the alleged abuse because she was

being "groomed" by the defendant. (Transcript, pp. 352-354.) Defense counsel objected to this proffered testimony, both on the basis that the testimony was beyond her expertise and because the testimony was offered as improper commentary on the character of the Appellant. (Transcript, pp. 342, 358, 363.) Over defense objection, the trial court qualified Ms. Dadin as an expert and permitted her to testify that grooming is a term commonly used in the area of child abuse. At the conclusion of the trial, defense counsel renewed his request for a mistrial based on the trial court having admitted improper character evidence, which was denied. (Transcript, p. 500.)

B. Discussion.

Generally, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Rule 404(a), SCRE; *State v. Nelson*, 331 S.C. 1, 6 n. 7, 501 S.E.2d 716, 718 n. 7 (1998). In *Nelson*, the Supreme Court held it was error to admit physical evidence showing the defendant had a collection of children's stories and photographs based on the testimony of the State's expert that "pedophiles" often have a "pretty good stash" of childlike items. The Court reasoned that evidence offered to show that a defendant is a pedophile impermissibly seeks to convict a person based on his character, rather than his actions, citing with approval cases from other jurisdictions excluding expert testimony on the characteristics of a pedophile. Here, the State sought to show, by relying on Ms. Dadin's expert testimony, that Appellant's conduct, in developing a relationship with the minor and her family, buying her gifts, and taking her places, fit the profile of a pedophile, or "a wolf in sheep's clothing." As in *Nelson*, this was improper character evidence.

First, it was error for the trial court to admit Ms. Dadin as an expert in the "dynamics of child abuse." As discussed above, it was not necessary to qualify Ms. Dadin as an expert for her to establish a foundation for the forensic interview tape, and her experience as a forensic interviewer did not qualify her as an expert in the "dynamics of child abuse." Therefore, she should not have been permitted to testify as an expert to her opinions about "delayed disclosure" and "grooming." (Transcript, pp. 361-364.)

Second, Ms. Dadin's testimony about "grooming" was classic improper character evidence because Ms. Dadin essentially informed the jury that by developing a relationship with the child and her family, Appellant was behaving like a child molester. This is improper character evidence and should not have been admitted, both because Ms. Dadin, a social worker who conducted a forensic interview to assist a police investigation, was unqualified and because character evidence is inadmissible to prove Appellant was guilty of sexual misconduct.

Appellant was substantially prejudiced by this error. The only direct evidence of alleged sexual misconduct in this case was the testimony of the minor, who did not disclose the alleged sexual misconduct until she and her family were confronted by an outraged and emotional neighbor, and even then, she initially denied that any sexual misconduct or lewd act had occurred. The physical examination by the pediatric nurse practitioner was negative for physical or emotional signs of sexual abuse. Although the State attempted to offer circumstantial evidence of sexual intercourse between Appellant and the child, including a comforter and paper towels that had been found in the back of Appellant's van, the testimony suggested only the possibility that one of many stains on the blanket was semen, although it could also have been urine, there was no DNA evidence connecting the stain with the

Appellant, and there was no evidence to show when or how the single stain had gotten on the blanket. (Transcript, pp. 268-270.) Accordingly, given the paucity of direct or circumstantial evidence to support the charges, the prosecution relied on the improper character evidence that was introduced over defense objection to support its theory that Appellant fit the profile of a child molester, commenting repeatedly on the character of the Appellant in closing arguments. For example, with regard to the bench in the Appellant's van, the prosecution stated, "[t]he bed is a little weird to me, that you put a sleeping bag on it and sheets." (Transcript, p. 475:1-2). "I don't care if there's one spot of semen, a thousand spots of semen, he had that sleeping bag in the back of the van for a reason." (Transcript, p. 477.) In addition, the prosecution again suggested that Appellant must have been guilty because, in essence, he was acting like a child molester. (Transcript, pp. 468-469 ("You've heard that word grooming. You may have heard it on the street. This man took a methodical approach to grooming this family and grooming [the minor]."); Transcript, p. 474 ("He was grooming the family, that's what he was doing."; Transcript, p. 476 (Appellant "groomed" the minor by bringing her 20 birthday gifts).)

Given the lack of direct or substantial circumstantial evidence of sexual misconduct, the jury's verdict was likely influenced by the improper character evidence. Accordingly, Appellant respectfully requests an order reversing the convictions on both charges and remanding the case for a new trial.

V. THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT BASED ON THE STATE'S FAILURE TO INTRODUCE SUFFICIENT EVIDENCE TO ESTABLISH PROOF OF THE ELEMENTS OF THE CRIME CHARGED BECAUSE THE PROSECUTION FAILED TO INTRODUCE EVIDENCE OF A SEXUAL BATTERY, BY SEXUAL INTERCOURSE BETWEEN APPELLANT AND THE CHILD, AS CHARGED IN THE INDICTMENT, AND AS REQUIRED TO SUSTAIN A CONVICTION FOR CRIMINAL SEXUAL CONDUCT UNDER S.C. CODE ANN. SECTION 16-3-655(B).

A. Relevant Facts.

It was undisputed at trial that the minor was eleven years old at the time of the conduct charged. At the time of trial, she was sixteen years old. She testified that she had taken a sexual education course and was familiar with "the birds and the bees." (Transcript, p. 110.)

The minor testified that Appellant assaulted her on multiple occasions, either in the back of his van or in an empty house where he was doing construction work. The details she disclosed of the alleged sexual assaults were that, each time, Appellant would take his clothes off, take her clothes off, sit her on his lap facing him, put his hands on her back, and "push her back and forth." (Transcript, pp. 96-98.) She testified that Appellant did this sitting on a converted work bench/bed in the back of his van, or sitting on the toilet seat in the empty house. (Transcript, p. 97, 100.)

When asked at trial whether "any part of him was inside you," she testified that she did not remember. (Transcript, p. 101.) Immediately following this question, which was allowed over defense objection that it was leading, she was asked "how it felt" and responded, "It hurt. . . . It would hurt for a little bit, then it would stop." (Transcript, p. 101.) However, when asked for any further details about what his body felt like when she was sitting on his lap, she said she didn't know. (Transcript, p. 104.)

The State also called as witnesses the three people to whom the minor originally disclosed the alleged sexual assault. Each confirmed that the minor never said Appellant had put his penis, or any part of his body, into her genital opening. Instead, the testimony reflected that the alleged sexual assault was first reported after the minor's neighbor, Ms. Kulpepper, who came to the house to pick up her son from a play-date, observed Appellant sitting on the living room floor next to the minor during a math tutoring session, and left the house steaming with anger. (Transcript, pp. 72-73.) When questioned by the minor's family about what was bothering her, Ms. Kulpepper told them that she thought something was wrong with the situation, and the minor's family agreed to discuss it with her. (Transcript, pp. 72, 76.) Ms. Kulpepper then left the home and returned later in the evening, to a scene where everyone was emotional and crying. The minor had first told her aunt and grandmother that nothing had happened, but then later disclosed that Appellant had allegedly assaulted her. Ms. Kulpepper then asked the minor some pointed questions, including asking the minor whether Appellant had "put his wiener in the hole where babies come out" and telling the minor that "there is a hole down there where babies come out, and if he had had put his wiener in, it would hurt."

Despite the emotionally charged atmosphere, and pointed questions by Ms. Kulpepper, each of the witnesses present confirmed that the minor denied penetration when she disclosed the alleged assault that night. Ms. Kulpepper testified that the minor didn't know whether there had been penetration. (Transcript, pp. 83-84.) Ms. Graham, the minor's grandmother, testified that the minor denied penetration. (Transcript, p. 127 ("I asked her did he ever insert anything in a place where she peed and she said no.").) Ms. Doyle, the minor's aunt, again

confirmed that the minor had said she didn't know whether there had been penetration or whether anything had come out of Appellant's penis. (Transcript, p. 148.)

The day after the minor disclosed the alleged assault, she was taken to the Lowcountry Children's Center for an evaluation. Ms. Tracy Halasz, an M.U.S.C. pediatric nurse practitioner who examined the minor, testified that the physical examination was normal and that there was no indication of any behavioral changes often seen with sexual abuse. (Transcript, pp. 227, 236-239.) She also confirmed that, in response to direct questioning, the minor denied that anyone had touched or hurt her in her genital area. (Transcript, pp. 240-241.)

The State also introduced a videotape of a forensic interview conducted by Ms. Molly Wharton Dadin, at the Lowcountry Children's Center, the same day Ms. Halasz physically examined her. As reflected in the videotaped interview, which should have been excluded for the reasons described above, the minor did not offer any details supporting the conclusion that there had been sexual intercourse, or penetration. At most, the videotaped statement reflected that the minor had said Appellant's "private" was touching her "private." (State's Ex. No. 17, at 12:57-13:59.) However, it is unclear from the video what she meant by his "private" because she was pointing to a picture which was not visible on the videotape. (*Id.*) In addition, when asked "did something ever go in that part," her answer was, "I don't really know. All I know is when he would do it it would hurt." (State's Ex. No. 17, at 14:08-14:15; Court's Ex. No. 3, at p. 14.) At trial, Ms. Dadin's testimony confirmed that, during the forensic interview, the minor never said she saw a penis, never described seeing or feeling any semen or evidence of ejaculation, denied that Appellant ever touched her genital area with his hands,

and denied that Appellant ever moved or lifted up her legs to gain access to her genital area while she was seated on his lap. (Transcript, pp. 381-383.)

At the conclusion of the State's case-in-chief, defense counsel moved for directed verdict on the basis of insufficient evidence to support the crime charged. (Transcript, pp. 392-398.) Defense counsel argued that the minor, who was the only eyewitness, testified that she didn't know whether there had been penetration and that, in light of the minor's age and the fact that she had taken sexual education classes and understood the "birds and the bees," her general statement that "it hurt" was legally insufficient to establish proof of penetration. In response, the State argued that, under *State v. Mathis*,[3] its burden of showing penetration was satisfied by the evidence that the minor had testified that "she was sitting naked, her pants off, his pants off, with her private part to his private part, and that he was moving her back and forth. She not only said that it hurt, but then asked how her private part felt afterwards, she said, it hurt for a little bit and then it got better." (Transcript, p. 397:15-24.) Based on this argument, and without identifying any specific evidence of penetration, the trial court denied the defense motion for directed verdict. (Transcript, p. 398:6-7.) Defense counsel renewed the motion at the conclusion of all the evidence, (Transcript, p. 435) and moved for judgment notwithstanding the verdict after the jury found Appellant guilty on both charges. (Transcript, p. 500) The trial court denied the motions.

B. Discussion.

"The State has the burden of proof as to all the essential elements of the crime." *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 596 (2010). Further, "[t]he accused is

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[3] *State v. Mathis*, 287 S.C. 589, 340 S.E.2d 538 (Ct. App. 1986).

entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged." *Id.* To meet its burden of proof, the State must introduce either direct evidence, or substantial circumstantial evidence reasonably tending to prove the guilt of the accused. *State v. James*, 362 S.C. 557, 565, 608 S.E.2d 455, 469 (Ct. App. 2004). The South Carolina Supreme Court has repeatedly affirmed the principle that when the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict. *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011); *State v. Bostick*, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011) (where the State's evidence raises only a suspicion of guilt, directed verdict should be granted in favor of the defendant).

Under 16-3-355(B)(1), a person is guilty of criminal sexual conduct in the second degree if "the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age." S.C. Code. Ann. § 16-3-655(B)(1). A "sexual battery" is defined to mean "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h). In this case, there was no allegation of cunnilingus, fellatio or anal intercourse. Instead, the State charged that Appellant had engaged in a sexual battery with the minor by engaging in "sexual intercourse." (Indictment Case No. 2008GS1006275.)

It was undisputed at trial that the minor was eleven years old at the time of the alleged assault. However, the State failed to meet its burden of proving that Appellant engaged in a

"sexual battery" with the minor. Therefore, the trial court erred in denying Appellant's motion for directed verdict and motion for judgment notwithstanding the verdict. *See State v. Brown*, 360 S.C. 581, 590, 602 S.E.2d 392, 397 (2004) (insufficient evidence to sustain a charge of criminal sexual conduct in the first degree because there was no direct evidence of aggravated assault as required to sustain the charge).

The trial court correctly charged the jury that a sexual battery requires proof of sexual intercourse. "Sexual battery in this case means intercourse. And by that, it means any intrusion, however slight, of any part of his body into the genital opening of [the minor]." (Transcript, p. 487-488.) *See State v. Marshall*, 273 S.C. 552, 554, 257 S.E.2d 740, 742 (1979) (definition of sexual battery necessary to sustain CSC). However, the trial court erred in applying the law to the facts of the case, because there was no direct evidence of sexual intercourse in this case, and insufficient circumstantial evidence to sustain the conviction.

First, the only direct evidence of the alleged sexual assault was the testimony of the minor. With regard to the question whether there was penetration, the minor testified, very simply, that she didn't remember. (Transcript, p. 101.) When asked how it felt, she stated only that "It hurt . . . It would hurt for a little bit, then it would stop." (Transcript, p. 101.) At the time of her testimony, the minor was sixteen years old and had taken a sexual education course. (Transcript, p. 110.) Further, in the forensic interview, when asked whether anything went in "that part", she testified that she didn't know. (State's Ex. No. 17 at 14;08-14:15; Court's Ex. 3, at p. 14.) Finally, the fact that she denied intercourse or penetration at the time she reported the alleged sexual assault was confirmed by the three State witnesses, the minor's

neighbor, aunt and grandmother, to whom the minor originally disclosed the alleged sexual assault after initially denying any assault.

Second, the State's expert who examined the minor after she reported the alleged sexual assault, Ms. Tracy Halasz, denied there was any physical evidence of intercourse based on her examination of the minor, and she denied that the minor exhibited any behavioral changes consistent with sexual abuse. (Transcript, pp. 227, 236-239.) Ms. Halasz also confirmed that, in response to direct questioning, the minor denied that anyone had touched or hurt her in her genital area. (Transcript, pp. 240-241.)

Third, the videotaped forensic interview, which should have been excluded for the reasons discussed above, does not establish penetration. At most, the videotaped statement reflected that the minor had said Appellant's "private" was touching her "private." (State's Ex. No. 17, at 12:57-13:51; Court's Ex. No. 3, at p. 13.) However, it is unclear from the video what she meant by "his private" because she was pointing to a picture which was not visible on the videotape. In addition, when asked "did something ever go in that part," her answer was, "I don't really know. All I know is when he would do it it would hurt." (State's Ex. No. 17, at 14:08-14:15; Court's Ex. No. 3, at p. 14.)

Moreover, the testimony of the State's witness, Ms. Molly Wharton Dadin, who performed the videotaped forensic interview, likewise confirmed that the minor never said she saw a penis, never described seeing or feeling anything that might be considered semen from an ejaculation, denied any digital penetration, and denied that Appellant took any action to gain access to her genital area other than sitting her on his lap and pushing her back and forth. (Transcript pp. 381-383.)

Finally, there was no physical evidence to support a finding of intercourse or penetration. As noted above, the pediatric nurse practitioner who examined the minor reported no physical findings indicating there had been penetration. In addition, the State introduced evidence that a comforter and paper towels had been found in the back of Appellant's van. Appellant and his wife testified that the blanket was in the van for purposes of an overnight road trip to Arizona to visit the Appellant's sister. (Transcript, pp. 252-253, 391, 421-422.) Despite the State's attempt to connect the blanket to the alleged assault, the physical evidence suggested only the possibility that one of many stains on the blanket was semen, although it could also have been urine, there was no DNA evidence connecting the stain with the Appellant, and there was no evidence to show when or how the stain had gotten on the blanket. (Transcript, pp. 268-270.) Thus, this evidence was irrelevant to the crimes charged and cannot support the conclusion that Appellant engaged in an act of sexual intercourse with the minor, involving penetration, in the back of the van, or anywhere else.

In closing, the State argued that sexual battery means an intrusion "in any part of her genital area." (Transcript, p. 467.)[4] Relying on *State v. Mathis*, 287 S.C. 589, 593, 340 S.E.2d 538, 541 (1986), the State argued in response to Appellant's directed verdict motion that the jury was entitled to assume that there had been such an intrusion, based on the testimony of the minor that Appellant sat her on his lap, facing her, with no clothes on, and that "it hurt." (Transcript, pp. 395-396.) Contrary to the State's position at trial, however, the State may not sustain its burden of proof by asking the jury to assume that penetration had

[4] One of the State's witnesses, Ms. Tracy Halasz, the pediatric nurse practitioner who physically examined the minor, testified that penetration did not have to mean a penis going into the vaginal ball, but rather that spreading of the labia was sufficient. This was not a correct statement of the law, but the State relied on this testimony in its argument to the jury. (Transcript, pp. 443, 467.)

occurred based on the evidence discussed above. *Mathis* is distinguishable because, there, a six year old child testified that the defendant had touched her with his penis, but could not remember if he had put it inside her body. When asked if it hurt, she replied that it had. Here, by contrast, the minor was sixteen at the time of her testimony, and testified that she had taken sexual education courses and understood the "birds and the bees." In addition, unlike *Mathis* where a six-year-old child testified that the defendant touched her with his penis, here, the sixteen-year-old witness denied ever seeing Appellant's penis, and testified that she didn't know whether there had been penetration. In addition, the State's own witnesses confirmed that when the minor first disclosed the alleged sexual assault, she repeatedly denied intercourse, denied seeing Appellant's penis, and denied feeling any evidence of ejaculation.

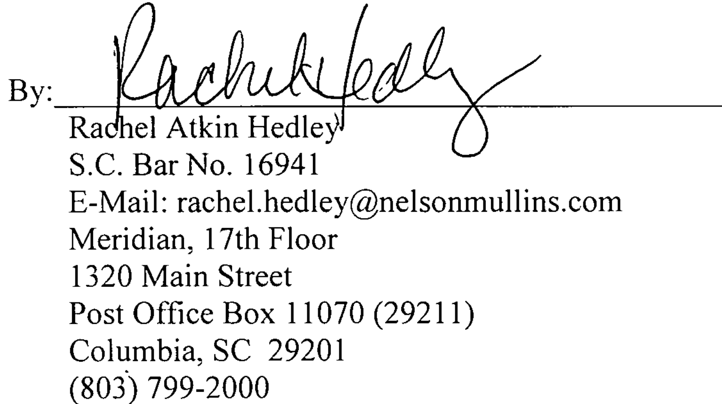
Accordingly, the State failed to meet its burden of proving that sexual intercourse occurred. Therefore, Appellant respectfully requests that this Court hold that the trial court erred by denying Appellant's motion for directed verdict as to the charge of criminal sexual conduct with a minor in the second degree, vacate the conviction, and enter a judgment of acquittal on the charge of criminal sexual conduct with a minor in the second degree.

CONCLUSION

By reason of the foregoing arguments, this Court should enter an Order directing a verdict of acquittal as to the charge of criminal sexual conduct with a minor in the second degree. In the alternative, this Court should reverse Appellant's conviction on the charge of criminal sexual conduct with a minor in the second degree, and remand that charge to the Court of General Sessions in Charleston County for a new trial. In addition, this Court should reverse Appellant's conviction on the charge of lewd act upon a minor and remand that charge to the Court of General Sessions in Charleston County for a new trial.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP



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February 28, 2014

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Thomas L. Hughston, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

GEORGE WHITE,

APPELLANT

Appellate Case No. 2013-000638

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

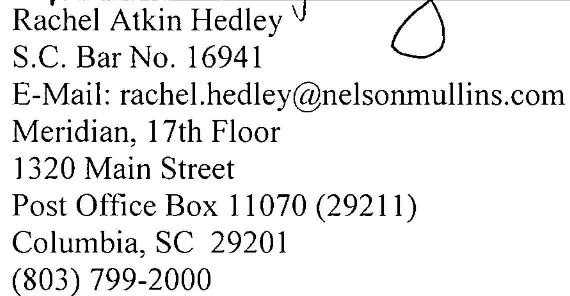
Pursuant to Rule 209, SCACR, Appellant George W. White proposes the following to be included in the Record on Appeal:

1. Transcript of Record of March 18–21, 2013 jury trial, pages 1-7, 13-14, 45-51, 60-132, 134-157, 181-207, 219-256, 263-270, 304-435, 440-491, 500.
2. State's Exhibit No. 17
3. Court's Exhibit No. 3
4. Indictment Case No. 2008GS1006275

Pursuant to Rule 209(c), SCACR, I certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP



By:________________________________

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Attorneys for Appellant

February 28, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

GEORGE WHITE,

APPELLANT

Appellate Case No. 2013-000638

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal

Counsel Served:

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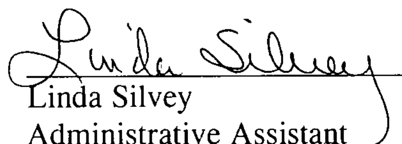
State of South Carolina, Office of the Attorney General
1000 Assembly Street, Room 519
Columbia, SC 29201

George White
SCDC ID: 354797
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669



Linda Silvey
Administrative Assistant

February 28, 2014

Nelson Mullins

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February 28, 2014

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SC Court of Appeals

Via Hand Delivery

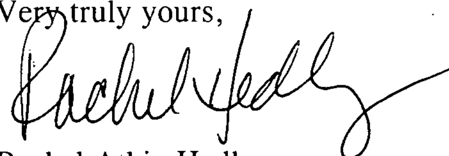
The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

RE: The State v. George White
Appellate Case No. 2013-000638
Our File No. 38769/01517

Dear Ms. Kitchings:

Please find attached an original and two copies of Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal in the above-referenced matter along with a certificate of service. Please file the originals and one copy of each and return a clocked-in copy of each to us via our courier.

Very truly yours,



Rachel Atkin Hedley

RAH:ljs
Attachments
cc: Robert Michael Dudek, Esquire
Salley W. Elliott, Esquire
George White