STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Honorable Diane Schafer Goodstein, Circuit Court Judge
Appellate Case No. 2011-196447

THE STATE,

Respondent,

vs.

CESAR ORLANDO PORTILLO,

Appellant.

RESPONDENT'S PETITION FOR REHEARING

On April 9, 2014, this Court issued a published opinion in which it affirmed Appellant Cesar Orlando Portillo's conviction for first-degree criminal sexual conduct with a minor. State v. Portillo, Op. No. 5216 (S.C. Ct. App. filed April 9, 2014). In that opinion, this Court found that the trial judge clearly erred in qualifying the State's expert witness, Dr. Donald Elsey, as an expert in forensic interviewing. Furthermore, after noting that the question of whether the expert's testimony constituted improper vouching was "not as clear," this Court found that Dr. Elsey's testimony regarding coaching, the hand gestures used by the victims, and the symptoms of post-traumatic stress disorder exhibited by the victim "may" have inappropriately vouched for the victim. To the extent that this Court's opinion in this case could be construed as a determination that such testimony constituted improper vouching, the State respectfully submits this Court overlooked or misapprehended its argument regarding the admissibility of the testimony of the expert – who was also testifying in Appellant's case in his capacity as an expert

in the field of child sexual assault – on those particular matters and petitions this Court for rehearing pursuant to Rule 221(a), SCACR.

Importantly, in a case like Appellant's where there is an allegation of sexual abuse involving a child, "[e]xpert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible." State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999). That is true because "[s]uch 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 State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) ("The purpose of rape trauma evidence is to prove the elements of criminal sexual conduct since such evidence may make it more or less probable the offense occurred."). Critically, rape trauma or behavioral characteristic evidence is often crucial in child sexual abuse cases because "[t]he inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior." White, 361 S.C. at 414-415, 605 S.E.2d at 544; see Weaverling, 337 S.C. at 475, 523 S.E.2d at 794 ("It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor."). As a result, "both expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect." State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993).

In regard to Dr. Elsey's testimony concerning coaching and the hand gestures used by the victim, the trial judge committed no error in admitting that testimony because it was proper expert testimony regarding the common behavioral characteristics exhibited by juvenile victims

of sexual abuse. Specifically, based on his educational background and the experience that he acquired though conducting thousands of forensic interviews of children, Dr. Elsey was able to offer an opinion to the jury in regard to the age-appropriate nature of the victim's statements during the forensic interview and the fact that the victim's use of childlike language was not unusual. Such an opinion was highly relevant and instructive in Appellant's case because it enabled the jurors to properly consider and evaluate the statements and testimony of the victim, who was nine years old at the time of the incident, by providing important information to the jury regarding the vocabulary possessed by a normal nine-year-old child, which was beyond the common knowledge of an ordinary juror. See 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."); see also United States v. Lukashov, 694 F.3d 1107, 1117 (9th Cir. 2012) ("[The expert witness'] testimony was helpful to the jury because some jurors would not have a general understanding of an eight-year-old's sexual knowledge and vocabulary and the level of sensory detail to look for in a child's allegations of sexual abuse."); see, e.g., United States v. Betcher, 534 F.3d 820, 826 (8th Cir. 2008) (finding the testimony of an expert qualified in the area of child abuse was properly admitted where the expert's testimony on age-appropriate sexual knowledge and conduct assisted the jury in evaluating the evidence and the victims' testimony). For that reason, the trial judge properly qualified Dr. Elsey as an expert in the area of child sexual abuse and permitted him to offer helpful testimony to the jury on matters outside of the jurors' own common knowledge and experience, and that testimony did not constitute improper vouching. See State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App. 1997) ("There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of

the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge."); see also Schumpert, 312 S.C. at 506, 435 S.E.2d at 862 (holding that the testimony of an expert qualified in the field of sexual abuse was properly admitted during trial).

Additionally, in regard to Dr. Elsey's testimony concerning the symptoms of post-traumatic stress disorder exhibited by the victim, the trial judge committed no error in permitting the introduction of that testimony because it was admissible behavioral and rape trauma evidence. Critically, as our Supreme Court has previously recognized, "[e]vidence of behavioral and personality changes tends to establish or make more or less probable that the offense occurred." State v. Alexander, 303 S.C. 377, 381, 401 S.E.2d 146, 149 (1991). For that reason, our Supreme Court has instructed that "both expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect." Schumpert, 312 S.C. at 506, 435 S.E.2d at 862. As a result, Dr. Elsey's testimony regarding the behavioral changes and characteristics that the victim and her parents reported to him after the incident was admissible in Appellant's case, including as substantive evidence that the sexual assault had occurred, and the trial judge committed no error in allowing the introduction of that testimony. See 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."); see also Henry, 329 S.C. at 278, 495 S.E.2d at 469 (finding a witness was sufficiently qualified to render an expert opinion in regard to post-traumatic stress disorder).

Critically, in Appellant's case, Dr. Elsey's testimony did **not** constitute improper bolstering or vouching for the victim's veracity or credibility and could **not** have been

mistakenly construed as improperly vouching for the victim's credibility in light of his testimony taken as a whole. Specifically, during his testimony, Dr. Elsey did not testify that he believed the victim's statements regarding the abuse or that the victim's revelations were compelling indicators of abuse. Cf. State v. McKerley, 397 S.C. 461, 465-466, 725 S.E.2d 139, 142 (Ct. App. 2012) (finding a forensic interviewer's testimony to be improper where the interviewer testified about giving an opinion as to whether something happened and about consistent information and compelling findings); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (Ct. App. 2011) (finding that a forensic interviewer's testimony constituted improper vouching where the interviewer testified that the victims provided compelling disclosures of abuse by Jennings and provided details consistent with the background information provided by the victims' mother, the police report, and other children). Instead, Dr. Elsey simply explained to the jury that the victim used language appropriate for her age in describing the abuse, which he indicated was not unusual, and used hand gestures to aid in describing what she reported to him. Significantly, in offering that limited testimony, Dr. Elsey emphasized that the language and gestures that the victim used related to what "[the victim] said she saw" and not what definitively occurred or what he personally believed occurred. (R. p. 236). Thus, through his testimony, Dr. Elsey offered relevant and helpful information for the jurors to consider in evaluating the victim's statements and testimony **without** commenting – directly or indirectly – on whether he believed or disbelieved the victim's statements or testimony. See Lukashov, 694 F.3d at 1117 ("[The expert witness'] testimony was helpful to the jury because some jurors would not have a general understanding of an eight-year-old's sexual knowledge and vocabulary and the level of sensory detail to look for in a child's allegations of sexual abuse."); see also State v. Kennedy, 320 N.C. 20, 32, 357 S.E.2d 359, 367 (N.C. 1987) ("The fact that this evidence may support the

credibility of the victim does not alone render it inadmissible. Most testimony, expert or otherwise, tends to support the credibility of some witness."). Moreover, Dr. Elsey specifically made it clear to the jury that he was not testifying in regard to the victim's credibility or veracity or rendering an opinion on whether or not he personally believed the victim by unequivocally stating to the jury that he could not personally state what actually occurred and that he had not made a determination in regard to the information reported to him. (R. p. 247). Accordingly, Dr. Elsey's testimony did not constitute improper vouching for the victim's truthfulness or believability, and the trial judge committed no error in admitting that testimony. See State v. Hill, 394 S.C. 280, 295, 715 S.E.2d 368, 376-377 (Ct. App. 2011) ("[T]he forensic interviewer never addressed the veracity of Victim. He testified only that he saw the types of details in Victim's interview that he would look for to determine whether a child had been coached. He gave no opinion on whether Victim was being truthful, or even that Victim had not, in fact, been coached. Accordingly, we find no reversible error in the admission of this testimony." (footnote omitted)). For those reasons, this Court's opinion should be vacated to the extent that it could be construed as indicating that Dr. Elsey's testimony improperly vouched for the victim's credibility.[1]

[1] Notwithstanding this Court's holding regarding the admissibility of various portions of Dr. Elsey's testimony, the State believes that this Court correctly determined any error would have been harmless when considered in relation to the other competent evidence of Appellant's guilt presented during trial, which included the victim's testimony, the victim's recorded statement during the forensic interview, the victim's aunt's testimony, and the testimony regarding the signs of sexual abuse discovered during the physical examination of the victim. See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result."); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (finding that the erroneous admission of evidence was harmless where its impact was minimal in the context of the entire record); see, e.g., State v. Forney, 321 S.C. 353, 358, 468 S.E.2d 641, 644 (1996) ("Evidence of the expressed threat to kill Beth Ann is of minimal impact in the context of the properly admitted evidence of appellant's use of a deadly weapon during the North Carolina armed robbery. Accordingly, even if evidence of the expressed threat was improper, its impact was minimal in the context of the entire record and any error is harmless beyond a reasonable doubt."). Furthermore, the State also believes that this Court correctly declined to consider Appellant's contentions that Dr. Elsey was not qualified to testify in regard to the victim's post-traumatic stress disorder symptoms and that the trial judge erred in failing to make specific findings pursuant to Rule 702, SCRE, because those contentions were not properly preserved for appellate review and were abandoned on appeal. See State v. Freiburger, 366 S.C. 125,

Conclusion

Based on the foregoing reasons coupled with the arguments raised in the Final Brief of Respondent and during oral argument, Respondent respectfully requests that the panel reconsider this matter, vacate a portion of its opinion, and affirm Appellant's conviction and sentence after finding that the trial judge properly committed no error in admitting the expert testimony regarding coaching, the hand gestures used by the victims, and the symptoms of post-traumatic stress disorder exhibited by the victim and that such testimony did not improperly vouch for the victim's credibility.

Respectfully submitted,

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April 24, 2014

135, 620 S.E.2d 737, 742 (2005) ("The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal."); State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("[A] party may not argue one ground at trial and an alternate ground on appeal."); State v. Attardo, 263 S.C. 546, 551, n. 1, 211 S.E.2d 868, 869 (1975) (" 'The burden of proof is on the appellant to convince this Court that the lower court was in error.' " (citation omitted)); State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) (holding that a conclusory, unsupported argument was abandoned on appeal); State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); State v. Crocker, 366 S.C. 394, 399, n. 1, 621 S.E.2d 890, 893 (Ct. App. 2005) ("[C]onclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review.").

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Respondent's Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 24th day of April, 2014.

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ALAN WILSON
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April 24, 2014

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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RE: State v. Cesar Orlando Portillo – Appellate Case No. 2011-196447

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of Respondent's Petition for Rehearing, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Kathrine H. Hudgins, Esquire
Victim Services