RECEIVED
APR 1 8 2014
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Deandra G. Benjamin, Circuit Court Judge
Appellate Case Tracking No. 2012-212905

The State, Respondent,

vs.

Isaac Antonio Anderson, Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

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

DANIEL E. JOHNSON
Solicitor, Fifth Circuit

Post Office Box 192
Columbia, SC 29202
(803) 748-4785

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I. The trial court properly qualified Heather Smith as an expert in child abuse assessment and allowed to testify regarding behavioral characteristics. Additionally, even if it was error to qualify Heather Smith as an expert in forensic interviewing, any error was entirely harmless. (Appellant's Issues 1 and 2).

II. The trial court did not err in admitting the videotape of the forensic interview because there was no violation of Appellant's right to confrontation when the victim testified and was subjected to cross-examination.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court properly qualified Heather Smith as an expert in child abuse assessment and allowed to testify regarding behavioral characteristics. Additionally, even if it was error to qualify Heather Smith as an expert in forensic interviewing, any error was entirely harmless. (Appellant's Issues 1 and 2).

Appellant contends the trial court erred in qualifying Heather Smith as an expert in forensic interviewing and in child abuse assessment. Further, he contends her testimony impermissibly bolstered the victim's testimony. The trial court properly qualified Smith as an expert in child abuse assessment. Her testimony did not impermissibly bolster the victim's testimony; instead, it served to educate the jury and to eliminate likely misconceptions regarding the behaviors of abused children. Finally, even if the qualification of Smith as an expert in forensic interviewing was error, it was entirely harmless in light of her qualification as an expert in child abuse assessment and the fact she offered no impermissible testimony.

Qualification of a witness as an expert and the subsequent admission of that witness's testimony are matters within the sound discretion of the trial court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); State v. Schumpert, 312 S.C. 502, 505, 435 S.E.2d 859, 861 (1993). The expert must possesses the necessary learning, skill, or practical experience to enable [her] to give opinion testimony. State v. Myers, 301 S.C. 251, 255-256, 391 S.E.2d 551, 554 (1990). Absent an abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal. State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999).

First, the trial court properly qualified Smith as an expert in the area of child abuse assessment[1] given her background, experience, and education. In determining whether a witness' knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. State v. Henry, 329 S.C. 266, 274, 495 S.E.2d 463, 467 (Ct. App. 1998). Instead, an expert can become sufficiently skilled or knowledgeable to be able to provide an opinion helpful to the trier of fact in a multitude of ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008). "[D]efects in the amounts and quality of the expert's education or experience go to the weight to be accorded the expert's testimony and not to its admissibility." State v. Henry, 329 S.C. 266, 274 (Ct. App. 1997).

Further, this Court and the South Carolina Supreme Court have acknowledged the benefit and necessity of expert testimony in child sexual abuse cases. "Expert 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 (Ct. App. 1999). "Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault." State v. Weaverling, 337 S.C. 460 (Ct. App. 1999); see also, State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) (acknowledging the importance of rape trauma and behavioral evidence in a sexual abuse case whether the victim is an adult or a child); Schumpert, 312 S.C. 502, 435 S.E.2d 859 (finding both expert testimony and behavioral evidence are admissible as rape trauma evidence).

[1] Appellant argues the title of the field of expertise is inappropriate and somehow bolsters the victim's testimony. This issue was never raised to the trial court and, therefore, is not preserved for review on appeal. See State v. Brockmeyer, 406 S.C. 324, 355, 751 S.E.2d 645, 661 (2013) (a party may not argue one ground at trial and another on appeal).

Smith testified regarding the behavioral characteristics of a child sexual abuse victim based on her training, background, education, and experience. Smith worked for the Assessment and Resource Center (ARC), a Child Advocacy Center in Richland County, for nine years. She operates as a forensic evaluator and helps coordinate treatment services for children. (T.539; R.___). Smith has a bachelor's degree in psychology and a master's degree in counseling. She is also a licensed professional counselor in South Carolina. (T.540; R.___). Smith's background in counseling and her nine years of experience in assisting children through the ARC qualify her to discuss the behaviors of children who have been abused or sexually abused.

Second, none of Smith's testimony was impermissible bolstering or vouching. "[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). "For an expert to comment on the veracity of a [victim's] accusations of sexual abuse is improper." State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). This Court recently stated:

> "Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror." State v. Douglas, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009). Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain "the assessment of witness credibility . . . within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012).

State v. Taylor, 404 S.C. 506, 514-515, 745 S.E.2d 124, 128 (Ct. App. 2013). Any time an expert testifies or provides evidence which supports the underlying charge levied by the victim, it does not result in improper or impermissible bolstering or vouching. It is only when the testimony invades the province of the jury and makes a comment on the credibility or veracity of the victim.

Smith never testified she believed the child or that the child was telling the truth. She testified to the structure of the interview conducted with the victim. (T.545-555; R.___). Smith testified the victim disclosed sexual abuse during the interview, and explained the victim stated the abuse occurred from second grade through fifth grade and at two different locations where the victim's family resided. (T.555-556; R.___). Smith indicated the interview was video recorded. The State introduced a copy of the video recording into evidence and played it for the jury.[2] (T.556-560; 573; 577; R.___).

After discussing the video, Smith testified regarding the behavioral characteristics of child sex abuse victims including delayed disclosure and the process of disclosure. This testimony was to educate the jury and was admissible for the purpose of disabusing a jury of misconceptions it might hold about how a child reacts to molestation. Nothing in this testimony indicated she believed the child or that the child's story was credible. It merely explained the behaviors of children which are generally different from the behaviors expected to be seen.

At no time during her testimony did she indicate the child was telling the truth or offer support for the child's credibility. She did not make a finding the interview was "compelling" or "consistent" with child sexual abuse. See e.g., State v. Jennings, 394

[2] The State redacted the video recording to remove portions of the video.

S.C. 473, 716 S.E.2d 91 (2011) (finding statement that the children provided a "compelling disclosure" to be inappropriate and inadmissible bolstering). She did not find the disclosure by the child "believable" or truthful. See e.g., Smith v. State, 386 S.C. 562, 564–65, 689 S.E.2d 629, 631 (2010) (finding a statement by the forensic interviewer that the victim's disclosure was "believable" to be impermissible bolstering). Also, Smith never made any of the statements found improper in State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012) (finding forensic interviewer's testimony that she "give an opinion as to whether we think something happened," "found [both interviews with the victim] to be compelling for sexual abuse," was "looking for accuracy of information" among other comments to be impermissible bolstering).

Further, this Court, as well as the South Carolina Supreme Court, has allowed behavioral testimony to be admitted at trial. In State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), the South Carolina Supreme Court considered expert testimony regarding rape trauma syndrome. The expert testified to behavior and characteristics commonly found in sexual assault victims. Schumpert, 312 S.C. 502. The Supreme Court overturned its holding in State v. Hudnall, 293 S.C. 97, 359 S.E.2d 59 (1987) (finding expert testimony of common behavioral characteristics of a child victim of sexual abuse only admissible to rebut a defense claim the victim's response was inconsistent with such a trauma), and specifically found: "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."

This Court had a chance to address similar behavior testimony in State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). In State v. Weaverling, 337

S.C. 460 (Ct. App. 1999), an expert testified regarding behavior and characteristics of a sexually abused victim. This Court stated: "Expert 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 (Ct. App. 1999)(citing Frenzel v. State, 849 P.2d 741 (Wyo. 1993); State v. Lujan, 192 Ariz. 448, 967 P.2d 123 (1998) (opinion testimony describing behavioral characteristics outside jurors' common experience is permitted as long as it meets other admissibility requirements)). This Court explained:

> Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. Frenzel v. State, 849 P.2d 741 (Wyo. 1993) 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. State v. Lujan, 192 Ariz. 448 (1998) See also State v. Lujan, 192 Ariz. 448 (1998)(when facts of case raise questions of credibility or accuracy that might not be explained by experiences common to jurors—like reactions of child victims of sexual abuse—expert testimony on general behavioral characteristics of such victims should be admitted).

State v. Weaverling, 337 S.C. 460 (Ct. App. 1999).

Furthermore, other jurisdictions have recognized the value of such testimony. See. e.g., State v. Reser, 767 P.2d 1277, 1282 (Kan. 1989) ("There are numerous cases from other jurisdictions where expert testimony regarding characteristics of sexually abused children has been held properly admitted as providing helpful background information to the jury.").

> Indeed, the majority of states permit expert testimony to explain delayed reporting, recantation, and inconsistency, as well as to explain why some abused children are angry, why some children want to live with the person who abused

> them, why a victim might appear 'emotionally flat' following sexual assault, why a child might run away from home, and for other purposes.

People v. Spicola, 947 N.E.2d 620, 635 (N.Y. 2011) (internal quotations and citations omitted).

In State v. Carpenter, 556 S.E.2d 316 (N.C. Ct. App. 2001), the North Carolina Court of Appeals found no error in allowing expert testimony regarding the fact delayed and incomplete disclosure is not unusual in cases of child abuse. In responding to the defendant's argument the state failed to show any scientific foundation for the opinion testimony, the North Carolina Court of Appeals noted the expert "was adequately qualified in the area of child sex abuse evaluations and interviews based on her extensive experience, training, and education, which included interviewing two thousand children in her career." Id., at 321. The court opined her testimony "was 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." Id. (internal quotations and citations omitted).

The Nebraska Supreme Court observed the following:

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

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

In State v. Cardany, 646 A.2d 291 (Conn. App. Ct. 1994), the Appellate Court of Connecticut held expert testimony on delayed disclosure was admissible in the prosecution's case-in-chief, noting: "It is natural for a jury to discount the credibility of a victim who did not immediately report alleged incidents of abuse whether or not the defense emphasizes the delay in cross-examination. Thus, testimony that explains to the jury why a minor victim of sexual abuse might delay in reporting the incidents of abuse should be allowed as part of the state's case-in-chief." Id. at 294.

In Kilby v. Commonwealth, 663 S.E.2d 540 (Va. Ct. App. 2008), the Virginia Court of Appeals found the trial court did not err in allowing a witness to provide expert testimony on delayed disclosure. Id., at 546-547. She was admitted as an expert in "forensic interviewing, child sex abuse disclosure by children of sexual assault and recantation." Id., at 543. In finding the admission of her testimony proper, the Virginia Court of Appeals noted she attended numerous forensic training programs and was qualified as an expert in state court and the military courts. She was the lead forensic interviewer at the children's hospital. Id., at 547.

In State v. Perry, 218 P.3d 95 (Or. 2009), the Oregon Supreme Court found expert testimony on the phenomenon of delayed disclosure by victims of child sexual abuse admissible. The expert testified examiners and interviewers in her organization received extensive specialized training, and there were specialized journals and other peer reviewed literature devoted to the area of child sexual abuse. The expert also testified that the phenomenon was common and well understood, with a body of literature concerning the issue. Id. at 97.

In responding to a claim of trial court error in allowing the prosecution's expert to testify about sexual abuse of children and characteristics of perpetrators, the Louisiana Court of Appeals noted the following:

> [The expert] testified very broadly about the general characteristics of sexual abuse victims, namely how such victims delay disclosure and some of the reasons why disclosure may be delayed, such as fear or shame. As discussed, part of [the expert's] training and experience included counseling children who were victims of sexual abuse. It would not have been beyond her expertise to explain, based on her own practice and experience, the basics of delayed disclosure.

State v. Friday, 73 So.3d 913, 931-32 (La. Ct. App. 2011).

In finding an expert's testimony on delayed disclosure admissible under its supreme court's authority, the Massachusetts Court of Appeals opined: "Expert testimony that abused children often delay reporting the abuse, a familiar and permitted proposition at least since [Commonwealth v. Dockham, 542 N.E.2d 591 (Mass. 1989)], 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. Ct. App. 2003) (emphasis added). The Court clearly acknowledges the educational aspect of the testimony, the disabusing of the misconceptions, and provides the jury with information they would not have otherwise possessed without bolstering or vouching for the child victim.

The Georgia Court of Appeals found testimony about child sexual abuse syndrome, including testimony about delayed disclosure, admissible. McCoy v. State, 629 S.E.2d 493, 494 (Ga. Ct. App. 2006); see also, Keri v. State, 347 S.E.2d 236, 238

(Ga. App. 1986) (finding expert testimony assisted jury in understanding why sexually abused children are secretive, why they were frightened, why they act out and become disciplinary problems, and why the children could not give specific dates for the acts they say were committed by the defendant). Relying on its longstanding supreme court precedent, the Court found:

> The expert witness testified as to common characteristics of child sexual abuse syndrome, such as secrecy, delayed disclosure, helplessness, and accommodation. He offered no opinion, however, as to whether the victims in this case were being truthful. He left that determination for the jury. Since "[l]aymen would not understand this syndrome without expert testimony, nor would they be likely to believe that a child who denied a sexual assault, or who was reluctant to discuss an assault, in fact had been assaulted."

McCoy, 629 S.E.2d at 494 (quoting Allison v. State, 535 S.E.2d 805 (Ga. 1987)). Similar testimony was offered in the instant case, leaving the decision for the jury on whether the victim was being truthful.

The Montana Supreme Court recently stated:

> We have consistently upheld the use of experts to explain the complexities of child sexual abuse. Child sexual abuse is a topic that many or most jurors have no common experience with. This is particularly so when the alleged victim and perpetrator are family members. Child sexual abuse victims often respond to the abuse with seemingly puzzling and contradictory behavior. The expert's testimony educates and enlightens the jury. The jury can then make a more informed decision when it assesses the victim's credibility.

State v. Robins, 297 P.3d 1213, 1217 (Mont. 2013) (emphasis added). The information provided by the expert enables the jury to make an informed decision; it does not in any way remove the determination from the jury of whether the child is being truthful.

The Delaware Supreme Court elucidated:

> We agree that where a complainant's behavior or testimony is, to the average layperson, superficially inconsistent with the occurrence of a rape, and is otherwise inadequately explained, thus requiring an expert's explanation of its emotional antecedents, expert testimony can assist a jury in this regard. Exposing jurors to the unique interpersonal dynamics involved in prosecutions for intrafamily child sexual abuse can provide jurors with possible alternative explanations for complainant actions and statements that are, to average laypeople, "superficially bizarre," "seemingly unusual," "seemingly inconsistent," or normally attributable to "inaccuracy or prevarication." Thus informed, the jury will be better able to perform its fact finding duty.

Wheat v. State, 527 A.2d 269, 273 (Del. 1987).

Appellant cites to several cases for the proposition the testimony was a direct comment on the credibility of the victim or impermissibly bolstered the victim's testimony. Numerous cases cited by Appellant allowed the testimony of the expert witness in order to educate the jury and to eliminate the likely misconceptions held that a child would immediately report the abuse and if they did not it impacts their credibility. The fact the expert's testimony was favorable to the victim and had the impact of supporting the child because the general fact presented by the expert was consistent with the behavior of the victim in this case does not render it impermissible bolstering. Otherwise, all medical testimony favorable to a victim would be impermissible because it is expert testimony supporting the victim's claim. As this Court has explained: "Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth." Taylor, 404 S.C. at 514-515, 745 S.E.2d at 128 (citation omitted). None of the cases cited by Appellant stand for the

proposition the expert's testimony, similar to the testimony of Smith in this case, was impermissible bolstering.

The testimony by Smith in this case does not bolster the child's credibility or vouch for their believability. Instead, it educates the jury on the reality of child behavior and enlightens the jury regarding behavior that appears contradictory to reason. Otherwise, the defense would be able to exploit the misconceptions held by the jury, and argue they jury should not accept the child's testimony because of the child's behavior after the abuse even though that behavior, in reality, is the expected behavior in the situation.

Finally, in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), the Supreme Court found it improper to qualify a person as an expert in forensic interviewing. Thus, although it was unnecessary for Smith to be qualified as an expert in the field of forensic interviewing, the trial judge did not abuse her discretion in qualifying Smith as an expert in the area of child abuse assessment and permitted her to offer helpful testimony to the jury on matters outside of the jurors' own common knowledge and experience. Any error in the qualification is entirely harmless in light of Smith's proper qualification in child abuse assessment and the fact she never impermissibly bolstered or vouched for the victim's testimony. See State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.").

Further, the trial court charged the jury regarding expert testimony. The court explained the jury was to give the expert's testimony "the weight you think it deserves."

The trial court also told the jury they could disregard the opinion of the expert entirely and were not required to accept the expert's opinion even if it is not contradicted. Finally, the trial court explained: "An expert witness's testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert." (T.814; R.___).

Accordingly, the trial court properly qualified Smith as an expert in child abuse assessment given her background, experience, and education as well as the fact her testimony as an expert would assist the trier of fact. Smith's testimony did not impermissibly bolster the victim's testimony because she never indicated she believed the victim, never stated the victim was telling the truth, and never indicated the jury should believe the victim or find her credible. Smith's testimony educated the jury regarding the "normal" behaviors of child sex abuse victims and disabused the jury of any misconceptions regarding "normal" behavior. Finally, it may have been error to qualify Smith as an expert in forensic interviewing, but her testimony was merely instructional and did not bolster or vouch for the victim and she was properly qualified as an expert in child abuse assessment so the error was entirely harmless.

II. The trial court did not err in admitting the videotape of the forensic interview because there was no violation of Appellant's right to confrontation when the victim testified and was subjected to cross-examination.

Appellant contends the trial court erred in admitting the forensic video of the minor victim because the admission violates the Confrontation Clause of the Sixth Amendment to the United States Constitution. He maintains the video was inadmissible under Crawford v. Washington, 541 U.S. 36 (2004) and Maryland v. Craig, 497 U.S. 836 (1990), even though the minor victim testified and was subject to cross-examination regarding the video recordings. It is because the victim was available, testified, and subjected to cross-examination at trial that there is no violation of the Confrontation Clause.

Further, Appellant had the right to fully cross-examine the minor victim regarding the video and any inconsistencies in her testimony at trial. Additionally, nothing prevented him from recalling the child to testify if he had additional questions he sought to explore once the video was played. To the extent Craig is even applicable, any cross-examination of the child would be contemporaneous within the meaning of Craig because it occurred in the usual method and during the trial.

Finally, Appellant seems to contend he had a right to confrontation at the time of the interview and video recording. These interviews usually take place before the defendant is arrested and before they have counsel. Further, the right to confrontation under the Confrontation Clause is a trial right and not one that exists prior to the person's arrest.

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. State v. Saltz, 346

S.C. 114, 551 S.E.2d 240 (2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The constitutional right to confront and cross examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial. State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987) (citing California v. Green, 399 U.S. 149 (1970); State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980)).

The South Carolina Supreme Court and the United States Supreme Court have recognized that the Confrontation Clause is concerned with ensuring the truth-finding function works as it is supposed to work through the process of cross-examination. It is when cross-examination and the adversary process fails to occur that the truth-finding function is jeopardized and the Confrontation Clause steps in to exclude the evidence from admission without challenge. See Martin, 292 S.C. at 439, 357 S.E.2d at 22 (citing Bruton v. United States, 391 U.S. 123 (1968)).

The United States Supreme Court has explained the "purposes of confrontation" in California v. Green. The Court explained, confrontation:

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury;
> (2) forces the witness to submit to cross examination, the "greatest legal engine ever invented for the discovery of truth"; [and]

> (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

State v. Stokes, 381 S.C. 390, 401, 673 S.E.2d 434, 439 (2009) (quoting California v. Green, 399 U.S. 149 (1970) (footnote omitted)).

In Crawford, the United States Supreme Court held the admission of testimonial hearsay statements against an accused violates the Confrontation Clause when: (1) the declarant is unavailable to testify at trial, and (2) the accused had no prior opportunity to cross examine the declarant. Crawford, 541 U.S. at 54. The Crawford Court, however, continued by noting: "Finally, we reiterate that, when the declarant appears for cross examination at trial, the Confrontation Clause places **no constraints at all** on the use of his prior testimonial statements." Id. at 59, n.9 (citing Green, 399 U.S. at 162) (emphasis added). The Court stated: "The Clause **does not bar admission** of a statement so long as the declarant is present at trial to defend or explain it." Id. (emphasis added).

Further, this Court addressed the issue in State v. Hill, 394 S.C. 280, 715 S.E.2d 368, (Ct. App. 2011). This Court in Hill fully analyzed the applicability of Crawford to a situation involving the forensic interview video. This Court found: "the Confrontation Clause places no constraints at all on the use of the declarant's prior testimonial statements when the declarant appears for cross-examination at trial." Hill, 394 S.C. at 291, 715 S.E.2d at 374-375. The Court then properly concludes when the declarant, in that case as in this case the minor victim of a sexual assault, testifies and the defendant has the opportunity to cross-examine the declarant, then the requirements of the Confrontation Clause have been met and there is no constitutional restriction on the use of the declarant's prior statements. Id. at 292, 715 S.E. 2d at 375. The holding in Hill is

directly on point to the issue of whether the admission of the video violated Appellant's rights under the Confrontation Clause.

In the instant case, just as in the South Carolina Supreme Court case of Stokes and the Court of Appeals case of Hill, the declarant was available to testify at trial. Appellant had an opportunity to cross-examine the minor victim regarding her interview with Smith. Appellant had the "opportunity for effective cross-examination" as guaranteed under the Confrontation Clause. See United States v. Owens, 484 U.S. 554, 559, (1988). Accordingly, the admission of the minor victim's prior statement during the forensic interview did not implicate or violate the Confrontation Clause of the Sixth Amendment.

Section 17-23-175 provides:

> A) In a general sessions court proceeding or a delinquency proceeding in family court, an out of court statement of a child is admissible if:
> (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 (Supp. 2010) (emphasis added).

The statute explicitly requires the victim to testify and be subjected to cross-examination prior to the forensic video being admitted into evidence. As a result, the Confrontation Clause restrictions imposed by Crawford are never reached and the admission of the evidence is left to statute, rule, judicial discretion, or the like. Nothing

in the Confrontation Clause or its interpretation by the United States Supreme Court bears on the admissibility of a statement if the declarant is available for cross-examination by the accused.

Additionally, nothing in Maryland v. Craig changes the admissibility of the video.[3] In Craig, the United States Supreme Court considered Maryland's statutory procedure allowing a child to testify against a defendant at the defendant's trial without having to be face to face to the defendant. Craig, 497 U.S. at 840-842. Nothing in Craig concerned the admission of prior out of court statements by the witness. Accordingly, it is inapposite to the case at hand.

To the extent Craig can be relied on in this case, it requires nothing more than that required by Crawford—the witness testify at trial and the defendant have the ability to cross-examine them. The United States Supreme Court stated:

> We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies.

Craig, 497 U.S. at 851. The "contemporaneous cross-examination" discussed in Craig, and highlighted by Appellant in his brief, simply means the defendant had the opportunity during trial to cross-examine the witness. He did not have to wait to do the examination of the child witness at some other time using the closed circuit television

[3] At trial, Appellant cited Craig for the proposition the State had to demonstrate a necessity prior to admitting the video and not for the proposition he was entitled to contemporaneous cross-examination of the type argued on appeal.

method authorized. He was able, in the regular course of the trial, to cross-examine the witness.

Appellant's main argument related to Craig appears to be he was not able to cross-examine the minor victim after the DVD was entered into evidence and played for the jury. As also noted in Hill:

> However, as noted, the Confrontation Clause guarantees only the opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish. In addition, we note Hill does not assert he was in any way prohibited from recalling Victim to the stand to examine the child after introduction of the DVD through the forensic investigator.

Hill, 394 S.C. at 292-293, 715 S.E.2d at 375. The same applies in this case when Appellant has failed to present any valid reason for why he could not cross-examine the minor victim on the contents of the video when she was on the stand, nor has he explained why he could not call her to the stand to answer questions regarding the video after it was played for the jury. Instead, he simply makes conclusory arguments that "the child was again not subject to cross examination" and the "testimony was presented without [Appellant] having the right to contemporaneously cross-examine the child." He never explains how either are true in light of the minor victim testifying and being subject to cross-examination at trial and Appellant's ability to recall, if he chose, the child to answer further questions regarding the video after it was played for the jury.

In the present case, the minor victim was called to testify. The State conducted its direct examination of the minor victim. Immediately following, Appellant had the right to conduct his cross-examination of the minor victim. The trial court, or any procedure

utilized by the trial court, never prevented Appellant from cross-examining the victim regarding her testimony or the content of the video statement she gave pre-trial.

Finally, Appellant seems to argue he was not able to cross-examine the minor victim during the time she was interviewed by Smith. The right to confront the witness is a trial right and not a right that exists during the investigation. The Sixth Amendment to the United States Constitution guarantees: "In all **criminal prosecutions**, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI (emphasis added). "This constitutional right, which applies to the states through the Fourteenth Amendment, guarantees a defendant **in a criminal trial** the right to cross-examine the witnesses against him." State v. Henson, Op. No. 27354 (S.C. Sup. Ct. Filed January 22, 2014) (emphasis added) (citing Pointer v. Texas, 380 U.S. 400, 403–04 (1965)). "The right to confrontation has been referred to as a '**trial right**.'" Starnes v. State, 307 S.C. 247, 249, 414 S.E.2d 582, 583 (1991) (emphasis added) (quoting Barber v. Page, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968)).

The right clearly only applies at the time of trial. As Crawford made perfectly clear, and has been articulated in Stokes and Hill, if a witness testifies at trial and is subject to cross-examination, there can be no Confrontation Clause issue. Accordingly, Appellant had no right to be present or have his counsel present, just as he would have no right when any witness is giving a statement during the investigatory phase prior to a person's arrest.

Appellant certainly did not have a Confrontation Clause right to be involved in the forensic interview, as that does not apply until the time of trial. And in this case, there is no Confrontation Clause violation because the minor victim testified and

Appellant was offered the opportunity to cross-examine her regarding her prior statements and testimony at trial. Further, nothing in the statute violates the Confrontation Clause so as to render the section 17-23-175 unconstitutional under the Sixth Amendment and its interpretation in Crawford. Accordingly, the trial court properly found the statute constitutional and properly admitted the recordings of the forensic interviews into evidence.

CONCLUSION

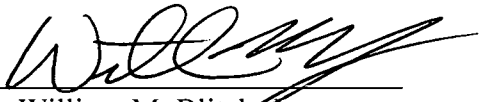
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

DANIEL E. JOHNSON
Solicitor, Fifth Circuit

BY: 
William M. Blitch, Jr.

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

ATTORNEYS FOR RESPONDENT

April 18, 2014

RECEIVED
APR 1 8 2014
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Deandra G. Benjamin, Circuit Court Judge
Appellate Case Tracking No. 2012-212905

The State, Respondent,

vs.

Isaac Antonio Anderson, Appellant.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

(1) True-billed Indictment(s);

(2) Trial Transcript pages 1; 160-265; 269-394; 409-414; 539-594; 755-807; 831; and

(3) State's Exhibits 1 & 4 (DVD).

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

BY: _____
William M. Blitch, Jr.

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

ATTORNEYS FOR RESPONDENT

April 18, 2014

RECEIVED
APR 1 8 2014
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Deandra G. Benjamin, Circuit Court Judge
Appellate Case Tracking No. 2012-212905

The State, Respondent,

vs.

Isaac Antonio Anderson, Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing one copy of the same in the United States mail, postage prepaid, addressed to:

Joshua S. Nasrollahi, Esquire
Law Office of Joshua S. Nasrollahi
209 Waller Avenue
Greenwood, South Carolina 29646

Robert M. Dudek, Esquire
Chief Appellate Defender
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 18th day of April, 2014.

SALLY ELLISON
Legal Assistant

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

ALAN WILSON
ATTORNEY GENERAL

April 18, 2014

Joshua S. Nasrollahi, Esquire
Law Office of Joshua S. Nasrollahi
209 Waller Avenue
Greenwood, South Carolina 29646

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Isaac A. Anderson
Appellate Case Tracking No. 2012-212905

Dear Mr. Nasrollahi and Mr. Dudek:

I am sending one copy of the Initial Brief of Respondent and Designation of Matter in the above-referenced case to each of you.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services