THE STATE OF SOUTH CAROLINA
In The Court of Appeals



APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

Lee S. Alford, Circuit Court Judge

Case Nos. 2012-GS-42-2624, 2012-GS-42-2625, 2012-GS-42-2626, 2012-GS-42-2627, 2012-GS-42-2633, and 2012-GS-42-2634

Appellate Case No. 2012-213228

The State of South Carolina, Respondent,

v.

Ronasha Taylor, Appellant.

# FINAL REPLY BRIEF OF APPELLANT

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## ARGUMENTS

Appellant Ronàsha Taylor stands by the points she made in her opening brief. She also offers the following additional points in reply to the State's brief.

### I. Taylor's Arguments Are Preserved

The State claims some of Taylor's arguments are not preserved. This claim stems from a theory that only arguments articulated on the record with outstanding clarity are preserved for appeal. Our appellate courts have consistently rejected this exacting standard, instead recognizing the reality that in the fray of trial, arguments and objections might not be made perfectly and in some instances are unnecessary or even improper. *See, e.g.*, *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595-96 (2010) ("Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue."); *State v. Hamilton*, 344 S.C. 344, 361, 543 S.E.2d 586, 595 (Ct. App. 2001) (stating Rule 103(a)(1), SCRE, requires the ground for objection to be stated specifically only "where the ground for objection is not apparent from the context of the discussion contained in the record."), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) ("So long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon defense counsel to harass the judge by parading issue before him again." (citation and quotation marks omitted)).

### A. Taylor Adequately Challenged All the Forensic Interviewer Testimony at Issue (Issue I)

The State claims the erroneous admission of McMillan's and Weber's impermissible vouching testimony is not preserved because (1) Taylor's trial counsel's objections during McMillan's testimony about Child 1 and Child 2 were not sufficient to preserve any issues; (2) trial counsel did not make explicit objections in McMillan's testimony about Child 3 or in Weber's testimony about Child 4, Child 5, and Child 6; and (3) the objections trial counsel made did not apply to other testimony. (Br. Resp't 7-9).

#### 1. Taylor's Trial Counsel's Objections Were Appropriate

Trial counsel's objections during McMillan's testimony about Child 1 are preserved because the record makes the basis for those objections sufficiently apparent. *See, e.g.*, *State v. Weik*, 356 S.C. 76, 84 & n.5, 587 S.E.2d 683, 687 & n.5 (2003) (addressing argument on the merits because although the objection was made during a bench conference and the grounds for the objection were not reflected in the record, the Supreme Court could infer the basis for the objection from the transcript).

The trial court qualified McMillan as an expert shortly before she began testifying about Child 1. (*See* R. pp. 291-306). Opposing McMillan's qualification, Taylor's trial counsel stated, "This is an objection that's already been made and—and been rejected by the State Supreme Court just so you know. I don't think forensic interviewing assessment is a—is a valid specialty or an expert field." (R. pp. 291:25-292:3). This statement indicates counsel's objection was based on cases involving the admissibility of forensic interview testimony. By the time of this trial, that issue had become a hot topic in our appellate courts. Some of the leading cases were *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009), *State*

*v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011), and *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012). In *Douglas*, the Supreme Court affirmed the admission of a forensic interviewer's opinion testimony that, based on her interview of the child, the child needed a follow-up appointment and a medical exam. 380 S.C. at 501, 503-04, 671 S.E.2d at 607, 609. In *Jennings*, however, the Supreme Court found error in the admission of a forensic interviewer's reports. As Justice Pleicones wrote, the only way to interpret them was that they meant the interviewer believed the child, and, as Justice Kittredge put it, the reports were "patently inadmissible evidence." 394 S.C. at 480, 483, 716 S.E.2d at 94, 96. Lastly, in *McKerley*, this Court applied *Jennings* to find that a variety of statements a forensic interviewer made in trial constituted inadmissible vouching testimony. *See* 397 S.C. at 463-67, 725 S.E.2d at 142-43.

This jurisprudential backdrop, which Taylor's trial counsel apparently had in mind during McMillan's testimony, provides context for counsel's objections. When considered in conjunction with that backdrop, the questions to which counsel objected make the basis for the objections even clearer. Counsel first objected when the State asked McMillan if anything about Child 1's disclosure would cause McMillan to believe it was the result of third-party influence. (R. p. 321:20-22). After a bench conference, the State asked McMillan what she looks for in a forensic interview to assess whether the child's statements were the result of third-party influence, such as suggestibility or coaching. Trial counsel again objected on the same grounds he asserted in the bench conference. (R. p. 324:1-4). Without allowing any argument on the objection,[1] the trial court overruled it. The questions

[1] *See* Rule 18(b), SCRCrimP ("No argument shall be made on objections to admissibility of evidence . . . unless specifically requested by the court.").

to which counsel objected would have alerted someone thinking about *Douglas*, *Jennings*, or *McKerley* that they would elicit inadmissible vouching testimony.

Soon after that, the State asked McMillan what recommendation she made after Child 1 disclosed abuse. Counsel objected. After a bench conference, the State asked the question again, McMillan answered, counsel objected once more, and the trial court said, "Noted for the record and overruled." (R. p. 325:6-22). As before, the State's question and McMillan's answer would spur a person concerned about vouching to object.

Given counsel's earlier reference to forensic interviewer cases, the similarity of the State's questions to the issues discussed in *Douglas*, *Jennings*, and *McKerley*, and the fact that these questions were posed to a forensic interviewer, it is reasonably clear that counsel objected on the basis that the testimony constituted inadmissible vouching.

As to McMillan's testimony about Child 2, when trial counsel objected, he said to the trial court, "You know my position on this." (R. p. 418:22-23). Trial counsel therefore made it clear to the trial court that his objection was on the same basis that he had raised when McMillan testified regarding Child 1. *See State v. Kromah*, 401 S.C. 340, 353, 737 S.E.2d 490, 497 (2013) ("Although the full grounds for the exception were not articulated on the record at the time of the objection, . . . it nevertheless appears from the transcript and the context of the proceedings that Kromah's reference to the parties' earlier discussion sufficiently apprised the trial court of the nature of the objection.").

The basis for trial counsel's objections is clear now and was clear to the trial court then. Taylor's arguments are preserved.

### 2. Continuing to Object Would Have Been Futile

The State next argues that because trial counsel did not continue object during the forensic interviewers' testimony about the last four children, Taylor's arguments on that testimony are not preserved. However, by the time McMillan finished testifying about Child 2, counsel had made the same objection to several pieces of testimony and had lost each time. (R. pp. 323:20-324:5; 325:6-22; 418:20-419:3). Counsel did not need to pester the trial court with additional, futile objections to similar testimony in order to preserve arguments about its admissibility. *See State v. Ross*, 272 S.C. 56, 60-61, 249 S.E.2d 159, 162 (1978) ("Once the court rules on an objection to a line of questioning, it is not necessary that counsel repeat his objection after each question."); *State v. Nelson*, 331 S.C. 1, 6 n.6, 501 S.E.2d 716, 718 n.6 (1998) (citing the quoted proposition from *Ross* and holding that, although the defendant objected only to a portion of the exhibits whose admission he challenged on appeal, his arguments as to all the exhibits were preserved).

### 3. There Is No Bootstrapping Afoot

Finally, the futility of continuing to object to the improper vouching testimony answers the State's bootstrapping argument. (Br. Resp't 8).

## B. Taylor Has Properly Brought Before This Court the Improper Qualifications of McMillan and Weber (Issue II)

The State claims the erroneous qualification of McMillan and Weber as expert witnesses is not preserved because trial counsel never told the trial court that (1) letting McMillan and Weber testify as experts would compound the harm of their impermissible vouching, (2) the subject matter of McMillan's or Weber's testimony was not reliable, or (3)

the court had failed to make the necessary factual findings in admitting expert testimony under Rule 702, SCRE.

### 1. Trial Counsel Did Not Need to Argue the Harm the Trial Court's Qualifications Would Cause

As to the first part of the State's argument, when Taylor wrote in her first brief that qualifying McMillan and Weber as experts compounded the harm of their vouching testimony, Taylor was merely paraphrasing language from *Kromah* that explains why the Supreme Court could "envision no circumstance where [the] qualification [of a forensic interviewer] as an expert at trial would be appropriate," 401 S.C. at 357 n.5, 737 S.E.2d at 499 n.5: because "it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts," 401 S.C. at 357, 737 S.E.2d at 499, allowing a witness to present the improper vouching testimony with the court's designation of "expert" "compound[s]" the impermissible harm of admitting that testimony, 401 S.C. at 358, 737 S.E.2d at 499. This statement just recognizes the reality when an expert witness—be she qualified properly or not—says something to a jury, the jury is likely to give her words more weight than if she had said the same thing as a lay witness. Surely Taylor's trial counsel did not need to point out this inescapable fact to the trial court in order for her appellate counsel to describe the effect of the trial court allowing McMillan and Weber to testify as experts.

### 2. Trial Counsel's Objections Included Reliability Challenges

As to the State's second preservation argument, it is reasonably clear from the transcript that Taylor's trial counsel was arguing that neither McMillan's testimony nor Weber's met all the requirements of *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010), including the reliability requirement.

In the voir dire of McMillan, trial counsel asked questions bearing on the reliability of her testimony. He asked whether there are collegiate degrees in forensic assessment or whether South Carolina has a licensing requirement for forensic assessment. (McMillan answered "no" to both.) (R. p. 288:9-15). Then, when McMillan told him that forensic assessors receive their training over the course of a week, trial counsel asked whether "you'd have to take a test of some kind or do they just hand you your certificate and you're — you're ready to go?" (McMillan answered that it depends.) (R. pp. 288:24-289:17). Although these questions touch somewhat on McMillan's education, they also bear on the question of reliability—how reliable is testimony on a field of practice for which there is no collegiate degree, which is taught over a week, for which competency certificates are sometimes awarded without testing, and which is not subject to independent evaluation or regulation through professional licensing?

After asking these questions and others, trial counsel said he had no objection to McMillan's educational background, and yet he still objected to McMillan testifying as an expert:

> **MR. HENRY:** This is an objection that's already been made and—and been rejected by the State Supreme Court just so you know. I don't think forensic interviewing assessment is a—is a valid specialty or an expert field.
>
> **MS. MILES:** It's child abuse assessment; it's not a forensic assessment.
>
> **MR. HENRY:** Okay. Well—
>
> **MS. MILES:** She's being offered as an expert in child abuse assessment which is how--she does clinic evaluations to conduct child assessments.
>
> **MR. HENRY:** Same objection. I don't think that—I don't think it's a specialty to make it an—an expertise. I mean, she's obviously an expert in social work. *But beyond that I would object.*

**THE COURT:** All right.

**MR. HENRY:** No problem with the education.

(R. p. 291:25-292:14 (emphasis added)). Notably, trial counsel's statement that forensic interviewing and child abuse assessment are not valid expert fields foreshadowed the Supreme Court later stating in *Kromah* that forensic interviewers should never be qualified as expert witnesses. As Taylor explained in her opening brief, this statement was based on the Supreme Court's concerns over the reliability problems inherent in forensic interviewer testimony. But the real takeaway from this exchange is that because trial counsel asked questions that went to both education and reliability, and trial counsel said he had no problem with education, his objection very likely was based at least in part on lack of reliability.

Thus, although trial counsel did not use the word "reliable" in his objection, in context, it is apparent (or, at worst, questionable) that his objection included a challenge under the reliability prong of *Watson*. *See Brannon*, 388 S.C. at 502, 697 S.E.2d at 595-96; *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) (suggesting an appellate court should reach the merits of an issue even when preservation is doubtful); *State v. Hawes*, 399 S.C. 211, 215, 730 S.E.2d 904, 906 (Ct. App. 2012) (addressing issue on merits, even though preservation was questionable, because the issue was not clearly unpreserved), *cert. granted* (Jan. 23, 2014).

Similarly, Taylor's trial counsel did not use the word "reliable" when he objected to Weber's qualification. In that instance, however, it was even clearer that his objection included the argument that Weber's testimony did not satisfy the reliability prong of *Watson*. In the voir dire of Weber, counsel asked only whether there are degrees or licensing requirements for forensic assessment. (R. pp. 684:21-685:12). His last question was, "So

the State doesn't recognize [forensic assessment]?" (Weber answered, "Right.") (R. p. 685:11-12). Immediately after that, counsel stated, "I would still object under Rule 702." (R. p. 685:13-14). The *Watson* requirements, of course, are what our Supreme Court has said must be satisfied for evidence to be admissible under Rule 702. *See Watson*, 389 S.C. at 446, 699 S.E.2d at 175. In light of that fact, and given that trial counsel asked only questions going to the reliability prong of *Watson*, it is reasonably clear that counsel's objection implicitly included an argument on the reliability prong of *Watson*.

### 3. The Trial Court's Failures to Perform Its Gatekeeping Function Are Preserved for Review

Finally, as to the trial court's failure to make the factual findings, *State v. Tapp* demonstrates that this argument is preserved. In that case, the defendant made several arguments against admitting testimony from the State's proposed expert but did not specifically object to the trial court's failure to make the findings required by *Watson* when it admitted the expert's testimony. 398 S.C. 376, 385, 728 S.E.2d 468, 473 (2012). When the defendant made that argument on appeal, the State claimed the argument was not preserved because the defendant did not make it below. *Id.* The Supreme Court disagreed, stating, "While our preservation rules require that objections to the admissibility of evidence be specific, they most certainly do not require clairvoyance." 398 S.C. at 385-86, 728 S.E.2d at 473.

*Tapp* is directly on point, and its logic applies here. Taylor's counsel had no reason to argue that the trial court failed to make the required findings until after the court made its rulings. And once the court made its rulings, the issues were closed for discussion. *See* Rule

18(a), SCRCrimP ("Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced.").

In support of its position that this argument is not preserved, the State cites this Court's holding in *State v. Portillo*, 408 S.C. 66, 757 S.E.2d 721 (Ct. App. 2014). However, *Portillo* does not control this case. First, in *Portillo*, trial counsel for the appellant objected to the expert's qualification without ever referencing Rule 702. *See* App.'s Pet. for Reh'g in *State v. Portillo*, Case No. 2012-196447, at 10 (filed Apr. 24, 2014). In this case, Taylor's trial counsel explicitly mentioned Rule 702 in objecting to Weber's qualification, and as mentioned above, *Watson* requires that a trial court make certain findings for testimony to be admitted under Rule 702. As also discussed above, trial counsel's objection to McMillan's qualification implicitly raised the requirements of *Watson*, which includes the fact-finding requirement.[2]

But even if this case is not distinguishable from *Portillo*, *Portillo* does not control for an additional reason. Respectfully, the preservation holding in *Portillo* conflicts directly with *Tapp*, and therefore *Tapp* controls over *Portillo*. *See* S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). Taylor recognizes that one panel of this Court cannot overrule another. *State v. Hoyle*, 397 S.C. 622, 629, 725 S.E.2d 720, 724 (Ct. App. 2012). However, she is not asking the panel considering her appeal to overrule *Portillo*. Rather, she just asks the panel to follow *Tapp*. *See id.*

[2] The State suggests Taylor is trying to use her trial counsel's reference to Rule 702 in reference to Weber in an attempt to retroactively expand the scope of the objection he raised as to McMillan. But Taylor is using that reference to explain her earlier objection, not to improve it. Trial counsel's statement—"I would *still* object under Rule 702"—clarifies that he was making the same argument he made in the last expert witness qualification. Thus as with McMillan, his objection to Weber still included an argument that Rule 702's requirements could not be satisfied.

(acknowledging that although the Court was making a decision in tension with one of its prior opinions, its decision followed controlling Supreme Court precedent).

### C. The Trial Court's Misapplication of Section 17-23-175 is Preserved (Issue III)

In a footnote, the State suggests that because Taylor never argued at trial that the trial court misapplied the internal coherence factor, the argument is not preserved. (Br. of Resp't 34 n.17). This claim suffers from the same weakness as State's previous argument. It assumes that a lawyer either has the ability to predict that the judge will misread the law or is allowed to argue with the judge about the misinterpretation after the fact. *Tapp* and Rule of Criminal Procedure 18(a) disprove those assumptions. Taylor should not be penalized for her trial counsel's inability to know ahead of time that the trial court would misapply the internal coherence factor or for counsel obeying the rule barring him from raising the point afterwards.

### D. The Trial Court's Failure to Make the Case-Specific Findings Required for Closed-Circuit Television Testimony Is Preserved (Issue IV)

Finally, in another footnote, the State suggests that because Taylor's trial counsel did not argue that the trial court failed to make the case-specific findings of fact, her argument on that point is not preserved. (Br. of Resp't 44 n. 21). *Tapp* and Rule 18(a) again demonstrate this claim has no merit. Taylor's argument is properly before this Court.

### E. Conclusion as to Preservation

To make a long argument short, preservation does not require perfection. The issues on appeal are preserved.

## II. The State's Arguments Notwithstanding, the Trial Court Committed Several Errors

In many respects, Taylor's and the State's merits arguments meet head-on. Taylor offers a few points, however, in reply to some of the State's arguments.

### A. The Vouching Testimony Was Improper (Issue I)

Several flaws in the State's defense of the admission McMillan's and Weber's improper vouching testimony warrant a reply. First, is no merit to State's contention that the absence of the phrase "compelling finding" from the trial transcript in this case warrants a different conclusion on the merits than the appellate courts reached in *Jennings*, *Kromah*, or *McKerley*. Indeed, the merits portion of *Portillo* disproves this contention. In that case, the forensic interviewer testified that the child was not being coached and that she had described symptoms consistent with PTSD. 408 S.C. at __, 757 S.E.2d at 726. After stating this testimony was not as egregious as the "compelling" statements in *Jennings* and *Kromah*, this Court found the testimony was impermissible under *Kromah* and thus the trial court erred in admitting it. *Id.*

The State also contends neither McMillan nor Weber ever made any statement indicating to the jury that they believed the children's accusations. (Br. Resp't 11). The bullet-point lists in Taylor's first brief show the transcript is riddled with such statements. Even if one ignores most of the testimony and focuses exclusively on McMillan's and Weber's recommendations, as the State does, those statements do "indicate . . . that the interviewer[s] believe[] the child[ren]'s allegations." *Kromah*, 401 S.C. at 360, 737 S.E.2d at 500. And if, as the State suggests, McMillan or Weber might have thought the children were making up the allegations, the State would not have called them to testify repeatedly for

its case.

Finally, the State notes that the Supreme Court decided *Kromah* after Taylor's trial. (Br. of Resp't 10 n.6). If the State is implying that this timing means the trial court's decisions were not erroneous when made, *Portillo* disproves that. The trial in that case took place years before the Supreme Court decided *Kromah*.

### B. Qualifying McMillan and Weber as Experts Was Error (Issue II)

The State spends ten pages trying to defend the trial court's qualifying McMillan and Weber as experts,[3] but just a single word, which is noticeably absent from the State's argument, confirms that the trial court clearly erred: *Portillo*. This Court's decision in that case removes any doubt that the trial court in this case abused its discretion, that *Kromah*'s broad condemnation of qualifying forensic interviewers as experts may be ignored, or that *Kromah* applies retroactively. (*See* Br. Resp't 23 n.12). *Portillo* (and through it, *Kromah*) settles this issue. Nonetheless, Taylor offers the following direct replies to the State's arguments on this issue.

First, the State contends that because Taylor sought to undermine the children's credibility by pointing out their delays in claiming abuse and the lack of detail in their accusations, the State needed expert testimony on delayed and partial disclosure to explain that such behavior is not indicative of a credibility problem. (Br. Resp't 23). In saying this, the State seems to admit its purpose in having McMillan and Weber testify was to show that the characteristics of the children's accusations indicated they were credible. *See Kromah*, 401 S.C. at 360, 737 S.E.2d at 500.

The State also contends that because McMillan and Weber testified as experts in

[3] And yet, the State never directly addresses the trial court's failure to make the required factual findings.

"child abuse assessment," rather than in forensic interviewing, *Kromah* and *Douglas* do not apply.[4] (Br. Resp't 32). However, their testimony demonstrates that, whatever the label, the substance of what they told the jury they do is forensic interviewing. Indeed, in every other section of its brief, the State refers to McMillan and Weber as forensic interviewers and to what they did with the children as forensic interviews. (*See* Br. of Resp't 1, 3, 5, 6, 7, 8, 9, 11, 12, 13, 15, 16, 20, 36, 37, 38, 47). But even if there were a meaningful difference between those labels, "child abuse assessment" would be the more problematic of the two. It more directly—and accurately—indicates that the witness's expertise is in analyzing a child's statements to decide whether he or she was abused.

### C. The State Has Not Shown the Trial Court Properly Admitted the Forensic Interview Videos (Issue III)

The State contends that McMillan's and Weber's questions in the forensic interviews were not leading but instead merely focused the children on the task at hand. (Br. Resp't 36). Taylor submits the character of the questions speak for themselves. And while Taylor and the State disagree as to whether the questions were leading, the important point is that the trial court recognized that the statements were elicited by leading questions and then made findings of fact that contradicted its own observations.

The State also finds it important that one of the factors in the trustworthiness analysis is whether the statement was elicited by leading questions, not simply whether leading questions were asked. (Br. Resp't 36). *See* S.C. Code Ann. § 17-23-175(B)(1) (Supp. 2013). Taylor does not share the State's view of the importance of this distinction. After all, the

[4] The State attempted to make a similar distinction in *Portillo*, and this Court rejected it. *See* Br. of Resp't in *State v. Portillo*, Case No. 2012-196447, at 18 (filed July 11, 2013).

State has not even claimed that any leading questions McMillan and Weber asked in the interviews did not elicit inculpatory statements.

Last, as to internal coherence, the State's arguments on this factor avoid Taylor's argument by focusing on "coherence" rather than "internal." In fact, the State avoids the merits of Taylor's argument altogether.

### D. The Trial Court Improperly Infringed Upon Taylor's Constitutional Right to Confront Her Accuser (Issue IV)

As part of its argument on whether the trial court made the required case-specific findings, the State claims the fact that the trial court found testifying in front of the jury was also traumatizing Child 3 supports the court's ordering Child 3 to testify by CCTV. (Br. Resp't 49 n.22). Taylor explained in her opening brief why the opposite is true and she will not belabor the point with repetition. However, she does want to point out that the State's reliance on *In re Cisco K.*, 332 S.C. 649, 506 S.E.2d 536 (Ct. App. 1998), is misplaced. The only CCTV issue in that case was whether the child's therapist's testimony, without more, supported the use of the CCTV procedure. *See* 332 S.C. at 653-54, 506 S.E.2d at 538. The opinion does not address whether the court made the required findings and does not involve a finding by the court that something in addition to the defendant would traumatize the witness.

The State also contends case law on the CCTV procedure does not require a finding that the trauma "would be significant or momentous"—only that it would be more than *de minimis*. (Br. Resp't 46). This argument posits some sort of gradation in which an *insignificant* amount of trauma would, although not significant, would nonetheless be sufficient to warrant testimony by CCTV. Taylor is not so sure the cases contemplate such a

nuance. She is even less confident that our courts have sanctioned the infringement of a constitutional right in order to protect witnesses from the insignificant. *See State v. Lewis*, 324 S.C. 539, 544-45, 478 S.E.2d 861, 864 (Ct. App. 1996) (stating the right to confrontation "can be dispensed with only if 'necessary to further an important public policy,'" (quoting *Maryland v. Craig*, 497 U.S. 836, 850, 110 S. Ct. 3157, 3166 (1990))).

## III. The Errors in This Trial Were Not Harmless

The State built its case against Taylor upon the children's accusations and upon other testimony directly derivative of those accusations. The keystone, therefore, was that the jury believed the children's accusations. The errors Taylor challenges on appeal all led to the admission of evidence that bore upon the children's credibility: admitting improper bolstering testimony, letting witnesses present such testimony under the imprimatur of "expert" status, admitting footage of suggestive interviews conducted by those same expert witnesses, and shielding a nervous complaining witness from the accused and the jury. *Cf. Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 (finding erroneous admission of bolstering testimony was not harmless where "the children's credibility was the most critical determination" in the case). And yet, the State contends that, beyond a reasonable doubt, none of these errors contributed to the verdict. There is no merit to this contention.

### A. The Other Evidence of Guilt Is Not Overwhelming

The State's primary argument, which it asserts for each issue on appeal, is that each error Taylor identifies is harmless because there was other, overwhelming evidence of Taylor's guilt. There are several pieces to this argument.

First, the State argues that the children's forensic interview videos, and the children's parents' testimony, corroborated the children's testimony. (Br. Resp't 15). But if this Court

agrees with Taylor that any of the videos were erroneously admitted, then that evidence should play no role in a harmless-error analysis. *See Jennings*, 394 S.C. at 476, 716 S.E.2d at 93 ("[W]here credibility is the ultimate issue in a case, improper corroboration evidence that is merely cumulative to the victim's testimony is not harmless."). Further, because the videos show the children's accusations, and the parents testified to what their children told them, this evidence has corroborative value only to the extent to the jury believed its ultimate source. The erroneously admitted vouching testimony therefore affected the value of this evidence, making it impossible to conclude beyond a reasonable doubt that the errors in Issue I or Issue II were harmless. *See Jennings*, 394 S.C. at 480, 716 S.E.2d at 94-95 (refusing to hold error harmless where the State's case consisted of the children's accounts of what occurred and other hearsay evidence of the children's accounts).

The State next contends there was "physical evidence" of Taylor committing a lewd act on Child 6—a drawing he made of a birthmark on Taylor's chest. It is not at all clear that a complaining witness's drawing of his accusations is the sort of "physical evidence" that makes an error harmless. *Compare Jennings*, 394 S.C. at 480, 716 S.E.2d at 94-95 (error reversible where only other evidence was the children's accounts and other hearsay evidence of the children's statements), *with Kromah*, 401 S.C. at 351-52, 737 S.E.2d at 501 (error harmless where, among other things, there was evidence of numerous injuries to the child), *and Portillo*, 408 S.C. at __, 757 S.E.2d at 726 (error harmless where, among other things, there was evidence of redness and irritation in the area the child claimed the defendant touched). In any event, the drawing does not prove Taylor "willfully and lewdly commit[ted] or attempt[ed] a lewd or lascivious act upon or with the body, or its parts, of" Child 6, S.C. Code Ann. § 16-15-140 (2003) (repealed 2012); at best, it supports an accusation of indecent

exposure. *See* S.C. Code Ann. § 16-15-130(a)(1) (Supp. 2013). And even if the drawing could make all of the trial court's many errors harmless as to Taylor's conviction for lewd act on Child 6, the drawing cannot extend that conclusion to the other convictions.

The State also attempts to excuse the absence of physical evidence, claiming "it would be a rare occurrence for there to be physical evidence of a lewd act." (Br. Resp't 15). Perhaps for that very reason, Justice Kittredge said in *Jennings*, a lewd act case, that "it may be a rare occurrence for the State to prove harmless error beyond a reasonable doubt in these circumstances." 394 S.C. at 482, 716 S.E.2d at 96 (concurring opinion); *see also Douglas*, 380 S.C. at 506, 671 S.E.2d at 610 (Pleicones, J., dissenting) ("As in many CSC cases, this case turned primarily on the veracity of the victim."). The fact that this type of crime tends to lack physical evidence of its commission does not excuse the erroneous admission of improper testimony. It makes the error worse.

The State contends the jury's acquitting Taylor on the two charges of criminal sexual conduct with a minor demonstrates they were not swayed by any vouching testimony, for if that testimony had led the jury to believe the victims, it would have found Taylor guilty of all charges. However, the State's admission that Child 3's and Child 4's "testimony regarding a sexual battery was very vague," (Br. Resp't 17 n. 9), disproves its argument. McMillan and Weber may well have convinced the jury to believe what the children said, but the jury nevertheless could not convict on the CSC charges because the testimony regarding sexual battery was too vague to prove that element beyond a reasonable doubt.

### B. The Vouching Testimony Was Not Cumulative (Issue I)

The State claims McMillan's and Weber's recommendation testimony was cumulative to testimony from other witnesses who testified to the therapy referrals. (Br.

Resp't 13). This argument misses the significance of McMillan's and Weber's testimony.[5] The cold fact that the children were referred to therapy is not what matters. What matters is that after McMillan and Weber were qualified as experts and then testified at length about their goal of seeking the truth in interviews, the methods they used with the children to ensure reliable disclosures, and the children's ability to understand the truth, McMillan and Weber testified *they* made the recommendations, *based on what the children had told them.* All this gave McMillan's and Weber's testimony a character—the quality of vouching—not possessed by the other testimony the State cites in support of its cumulative-evidence argument. As such, the former was not cumulative to the latter. *See State v. Patterson*, 290 S.C. 523, 531-32, 351 S.E.2d 853, 858 (1986) (holding erroneously-excluded expert testimony was not cumulative to admitted testimony of other witnesses because the excluded testimony possessed characteristics making it "qualitatively different from the lay witnesses' testimony of factual observations").

### C. *Portillo* Does Not Make the Erroneous Qualification of McMillan or Weber Harmless (Issue II)

Taylor acknowledges that in *Portillo*, this Court's harmless-error finding was based in part on the fact that the trial court instructed the jury it was required to give "no greater weight" to an expert witness's testimony "simply because the witness is an expert." 408 S.C. at __, 757 S.E.2d at 726. However, the jury instruction was one of many factors in the Court's decision, and several of the other factors in that case are not present here.

Taylor also wishes to clarify that, contrary to the suggestion in the State's citation to *Portillo* on page 33 of its brief, this Court in *Portillo* did not mention the absence of expert

[5] Further, Taylor disagrees with the State's assertion that the testimony it cites shows the children's parents testifying specifically that the children were referred to therapy *as a result of abuse by Taylor.*

testimony about a "compelling finding" as one of the factors in its harmless error analysis.

Finally, *Portillo* raises a question that the appellant in *Portillo* appears not to have asked: what effect the Supreme Court's statement in *Kromah*—that "although an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts", 401 S.C. at 357, 737 S.E.2d at 499—has on the significance of a "no greater weight" jury instruction in the analysis of whether a forensic interviewer's erroneous qualification as an expert witness is harmless. Taylor submits *Kromah* suggests such an instruction—the giving of which is the premise for the theory that a jury will weigh the testimony properly—should not be part of the harmless-error analysis in such a case.[6]

### D. Admitting The Videos Was Not Harmless Error (Issue III)

The State argues that because the jury asked to review the children's trial testimony, but not their forensic interviews, the forensic interviews were not the most important evidence in the case and therefore their admission was harmless. (Br. of Resp't 38). Harmless-error analysis is not a function of the appellate court guessing whether the jury thought one piece of evidence was more important than another. While the importance of the erroneously admitted evidence is relevant, since evidence with very little significance would

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[6] Indeed, it seems unlikely that when the Court made this statement in *Kromah*, it had not considered that earlier, in *Douglas*, there was a debate among the justices as to whether qualifying the forensic interviewer was harmless error. Justice Pleicones, in dissent, believed it was not harmless, but the majority disagreed because, in its view,

> [t]he same tests which are commonly applied in the evaluation of ordinary evidence are to be used in judging the weight and sufficiency of expert testimony. As with any witness, the jury is free to accept or reject the testimony of an expert witness. The fact that [the forensic interviewer] was qualified as an expert did not require the jury to accord her testimony any greater weight than that given to any other witness.

380 S.C. at 503, 671 S.E.2d at 609.

support a finding of harmless error, it is only one factor among many that the appellate court considers in answering the ultimate question of whether it can say, beyond a reasonable doubt, that "the error had little, if any, likelihood of having changed the result of the trial." *State v. Watts*, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996); *see also State v. Fossick*, 333 S.C. 66, 70, 508 S.E.2d 32, 34 (1998) ("In determining harmless error regarding any issue of witness credibility, we will consider the importance of the witness's testimony to the prosecution's case, whether the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case.").

Taylor maintains the admission of the videos cannot be deemed harmless error because they are improper corroboration evidence that is merely cumulative to the children's testimony. *See Jennings*, 394 S.C. at 478, 716 S.E.2d at 94 (stating "'it is precisely this cumulative effect which enhances the devastating impact of improper corroboration'" (quoting *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994))).

### E. Denying Taylor Her Right to Confront Her Accuser Was Reversible Error (Issue IV)

The State contends the trial court's erroneous decision to let Child 3 testify via CCTV was harmless because (1) Child 3's testimony was cumulative to what Child 3 said in her forensic interview; (2) Child 3's testimony was corroborated by other evidence; and (3) Taylor's trial counsel was able to cross-examine Child 3. (Br. of Resp't 47).

As to the first prong of this argument, Child 3's forensic interview cannot be the basis for a cumulative-evidence argument because it was not properly admitted. And as to the second prong, the State contends testimony from McMillan (R. pp. 595-96) and from Child

3's parents (R. p. 429-48, 460-63) corroborates Child 3's testimony. The former category is improper corroboration evidence, *see Jennings*, 394 S.C. at 476, 716 S.E.2d at 93, and in any event, all this testimony directly corroborates Child 3's testimony only in that it is hearsay testimony of what Child 3 communicated to these witnesses, *see Jennings*, 394 S.C. at 480, 716 S.E.2d at 94-95.

As to the third prong of the State's argument, the fact that a defendant's counsel had the ability to cross-examine the witness as if she were in the courtroom does not make a judge's decision to allow CCTV testimony harmless. On the contrary, the ability to meaningfully cross-examine the witness is merely a prerequisite to allowing this procedure in the first place. *See State v. Murrrell*, 302 S.C. 77, 81, 393 S.E.2d 919, 921 (1990) (stating that in ordering the CCTV procedure, "the court should place the child in as a close to a courtroom setting as possible," and the defendant should be able to see and hear the child, have counsel present in both rooms, and be able to communicate with counsel"). Under the State's argument, a trial court's decision to allow CCTV testimony would never be reversible so long as defense counsel had the ability to cross-examine the witness. *State v. Bray*, 342 S.C. 23, 535 S.E.2d 636 (2000), and *State v. Lewis* demonstrate that is not true.

## CONCLUSION

For the reasons stated above and in Taylor's opening brief, this Court should reverse the judgment of the circuit court and remand for a new trial.

[Signature of counsel and submission date appear on the next page.]

Respectfully submitted this 19th day of June, 2014.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Spartanburg County

Lee S. Alford, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

RONASHA TAYLOR,

APPELLANT

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Christina J. Catoe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19th day of June, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of June, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022 .