

ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

The Honorable Lee S. Alford, Circuit Court Judge

Lower Court Case Nos. 2012-GS-42-2624; -2625; -2626; -2627; -2633; -2634

Appellate Case No. 2012-213228

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

RONASHA TAYLOR,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. **Appellant's issue regarding the forensic interviewers' recommendations is not preserved for appellate review; however, even assuming the issue was properly preserved, the challenged testimony was not improper and did not vouch for the credibility of the victims. In any event, even if the forensic interviewers' testimony was improper, its admission was entirely harmless under the circumstances of this case and considering the overwhelming evidence of Appellant's guilt.**

- II. **Appellant's issue regarding the qualification of McMillan and Weber as experts is not preserved where Appellant raises different arguments on appeal than were raised below. In any event, the trial judge did not commit reversible error by qualifying McMillan and Weber as experts in the field of child abuse assessment because expert testimony regarding the ways in which children disclose sexual abuse was beyond the common knowledge and experience of the jurors, was highly relevant in this case, and was reliable. Furthermore, any error with respect to the expert qualifications was harmless beyond a reasonable doubt.**

- III. **The trial judge properly admitted the forensic interview videos of Victims 1, 2, 3, and 6 where the totality of the circumstances surrounding the making of the video statements provided particularized guarantees of trustworthiness as required by S.C. Code § 17-23-175. In any event, any error in admitting the victims' forensic interview videos was harmless beyond a reasonable doubt.**

- IV. **Victim 3 was properly allowed to testify via closed-circuit television pursuant to S.C. Code § 16-3-1550(E) where the trial judge made case-specific findings that Victim 3 would be traumatized by testifying in front of Appellant in open court and these findings were supported by evidence in the record. In any event, any error in allowing Victim 3 to testify via closed-circuit television was harmless beyond a reasonable doubt.**

STATEMENT OF THE CASE

Appellant was indicted in Spartanburg County in May 2012 for six counts of committing a lewd act upon a minor and five counts of criminal sexual conduct (“CSC”) with a minor in the first degree. On September 10-19, 2012, Appellant proceeded to trial before the Honorable Lee S. Alford and a jury. At the conclusion of the State’s case-in-chief, the State dismissed two of the CSC charges, and the trial judge directed a verdict on a third CSC charge. After presentation of the defense case, the jury found Appellant guilty on the six lewd act charges but found her not guilty on the two remaining CSC charges. Judge Alford sentenced Appellant to fifteen years each on two of the lewd act charges and five years each on the other four lewd act charges. All of the sentences were to run consecutively. Appellant timely filed post-trial motions on September 27, 2012, and the motions were denied by order dated October 3, 2012. A timely notice of appeal was served and filed.

ARGUMENT

Background Facts

Appellant was charged with six counts of committing a lewd act upon a minor and five counts of criminal sexual conduct (“CSC”) with a minor in the first degree. (See R. p. 1128-45). Each charge pertained to one of six victims who attended the daycare center where Appellant worked as a teacher. Victims 1, 2, and 3 are female children and Victims 4, 5, and 6 are male children, and all the victims were around four years old at the time of the offenses.¹ At trial, the State presented a total of thirty-three witnesses in its case-in-chief. In addition to various law enforcement officers, the State called the victims, the victims’ parents, some of Appellant’s former coworkers at the daycare, two forensic interviewers (one of whom interviewed Victims 1, 2, and 3 and one of whom interviewed Victims 4, 5, and 6), a doctor who examined two of the victims, and a counselor who provided therapy for all six of the victims. Victims 3, 4, and 6 were permitted to testify via closed-circuit television pursuant to S.C. Code § 16-3-1550(E), and all of the victims’ forensic interview videos were admitted into evidence pursuant to S.C. Code § 17-23-175 and played for the jury. (R. p. 321; p. 412; p. 568-72; p. 597; p. 658-59; p. 697-98; p. 777-79; p. 814-16; p. 842).

The victims, who were approximately six years old at the time of trial, all indicated that Appellant sexually abused them in the bathroom at the daycare they attended. (R. p. 257-73; p. 387-400; p. 572-90; p. 659-75; p. 754-72; p. 817-37). Victims 1, 2, and 4 testified that Appellant made them touch or lick Appellant’s private parts. (R. p. 261-69; p. 387-98; p. 659-74). Victim 3 testified that she touched

¹ Appellant’s brief refers to each victim as “Child” 1, 2, 3, 4, 5, or 6, while the State’s brief refers to each victim as “Victim” 1, 2, 3, 4, 5, or 6. However, the State’s numbers correspond with Appellant’s numbers, and the numbers match up with the order in which the victims testified at trial.

Appellant's private parts and Appellant touched her private parts. (R. p. 578-90). Victim 5 testified that Appellant made him touch her private parts and testified that Appellant taught him about "butt juice" which came out of his "pee pee" if his "pee pee" was "squeezed" more than one time. (R. p. 754-72). Victim 6 testified that Appellant touched his private parts, made him "squeeze" Victim 5's "pee pee," and that Appellant displayed her private parts to him. (R. p. 817-37). The victims' forensic interview statements regarding the abuse were largely consistent with the victims' trial testimony, although the trial testimony was elicited in a more organized fashion. (See State's Exhibits 1, 2, 6, 9, 10, 19, & 22). The testimony of the victims' parents corroborated the victims' disclosures as to time and place; confirmed the victims had no prior exposure to sexual matters; informed the jury that before the allegations surfaced, none of the parents were close to any of the other parents; and explained that prior to the allegations, the parents believed Appellant was a nice person and a caring teacher who seemed to love their children. (R. p. 154-85; p. 246-56; p. 338-84; p. 427-73; p. 616-57; p. 724-51; p. 788-810).

At the conclusion of the State's case-in-chief, the State dismissed two of the CSC charges because Victims 5 and 6 did not testify at trial regarding a sexual battery.² (R. p. 906). The trial judge also directed a verdict of acquittal on the CSC charge pertaining to

² It is readily apparent from the forensic interview videos that most of the young victims were extremely uncomfortable discussing the abuse by Appellant and went to great lengths to avoid talking about it, to include crawling under the table, getting up from the table and wandering around the room, and stating that they were done talking and were ready to leave. (See State's Exhibits 1, 2, 6, 9, 10, 19, & 22). These victims still seemed to be uncomfortable discussing the abuse at trial; for example, when asked on direct examination about seeing Appellant's private parts, Victim 6 stated, "I don't want to talk about it" and later stated "I don't want to talk about this part" because "I don't like this part." (R. p. 830, lines 3-8; p. 833, lines 1-7). Near the end of direct examination Victim 6 informed the prosecutor "I don't want to talk about this no more" because "I don't like it." (R. p. 835, lines 20-22).

Victim 2, finding that the evidence regarding a sexual battery was too tenuous. (R. p. 914-17).

In her defense, Appellant presented a total of nine witnesses. Appellant's first eight witnesses were basically character witnesses and the final witness was Appellant herself. Appellant admitted to having regular contact with the six victims at the daycare where she worked as a teacher but denied any inappropriate touching. (R. p. 989-1054). Appellant also testified that she had a surgery scar from age seven going across her stomach and a birthmark under her left breast. (R. p. 1020; lines 14-20). Appellant entered into evidence photographs of her scar and birthmark. (R. p. 1020-21). On cross-examination Appellant acknowledged that the photographs were taken in "very good light" with a good camera and that the photographs depicted the way her scar and birthmark looked when she was lying down and not the way they looked when she was sitting up or standing. (R. p. 1044). Appellant admitted that she weighed about 200 pounds around the time the allegations arose, but denied that her fat tissue might have covered up her scar if she was sitting up and insisted that her birthmark was always highly visible. (R. p. 1045-48). She asserted that if any the six victims had seen underneath her shirt, at least one of them would have noticed her birthmark. (R. p. 1048, lines 13-15).

In reply, the State re-called Victim 6's forensic interviewer, Tabitha Weber, to the stand. (R. p. 1056). Weber testified that in one of Victim 6's forensic interviews, Victim 6 began to describe what he called a "bruise" on Appellant. (R. p. 1057). Weber was not sure what Victim 6 was talking about so she asked him to draw it. (R. p. 1057-58). Victim 6 then located a dark brown crayon and colored an area under the left breast in a

drawing that depicted Appellant's body. (R. p. 1057, lines 10-11). Victim 6's drawing was entered into evidence without objection as State's Exhibit 40.³ (R. p. 1059-60; see State's Exhibit # 40).

At the conclusion of the trial, which lasted approximately eight days, the jurors began deliberations and subsequently requested that the testimony of Victims 2, 3, 4, and 6 be re-played for them.⁴ (R. p. 1103, lines 2-4). The jury thereafter found Appellant guilty on the six lewd act charges but found her not guilty on the two CSC charges. (R. p. 1108-11). After hearing from the victims' parents as well as from Appellant's pastor, Judge Alford noted that the lewd act charges were parolable offenses and then sentenced Appellant to fifteen years on two of the lewd act charges and five years each on the other four lewd act charges. (R. p. 1122-27). All of the sentences were to run consecutively. (R. p. 1126-27).

I. Appellant's issue regarding the forensic interviewers' recommendations is not preserved for appellate review; however, even assuming the issue was properly preserved, the challenged testimony was not improper and did not vouch for the credibility of the victims. In any event, even if the forensic interviewers' testimony was improper, its admission was entirely harmless under the circumstances of this case and considering the overwhelming evidence of Appellant's guilt.

In her first issue, Appellant argues that the trial judge erred in allowing McMillan and Weber, both forensic interviewers, to testify that, as a result of the victims' disclosures of abuse, they recommended therapy. Appellant also contends that the trial judge erred by permitting Weber to testify that she recommended that Victims 4, 5, and 6 have no contact with Appellant. First, Appellant failed to preserve these issues for

³ Note that Victim 6 was the only child that was of the same race as Appellant. (See State's Exhibit 22; see R. p. 1130; see also R. p. 1096-97).

⁴ The jury reached a verdict before re-hearing Victim 6's testimony. (R. p. 1108, lines 14-16).

appellate review because he failed to properly object at trial. Second, even assuming the issue was preserved, the recommendation testimony was not improper where the forensic interviewers never testified regarding making a compelling finding of sexual abuse and this testimony did not vouch for the credibility of the victims. Third, even if the testimony regarding the recommendations of therapy was improper, its admission was entirely harmless where this testimony was merely cumulative to other un-objected-to testimony in the record. Moreover, considering the overwhelming evidence of guilt, any error on this ground was harmless. Accordingly, Appellant is not entitled to a new trial.

Issue Preservation

Lynn McMillan, a licensed social worker and forensic interviewer, testified that she recommended therapy for Victims 1, 2, and 3 following their disclosures of abuse during their forensic interviews. (R. p. 325; p. 418-19; p. 599). Appellant objected only to McMillan's testimony regarding Victims 1 and 2. (R. p. 325, lines 8-22; p. 418, line 22 – p. 419, line 3). However, Appellant's objections both times failed to state any specific ground on the record, and while it appears Appellant's counsel may have explained his objection regarding McMillan's recommendation pertaining to Victim 1 during an off-the-record bench conference, his reasoning was never placed on the record. (See R. p. 325, lines 6-22). Tabitha Weber, also a social worker and forensic interviewer, testified that she recommended therapy for Victim 4, 5, and 6 following their disclosures of abuse and recommended that they have no contact with Appellant. (R. p. 700; p. 781; p. 845). Appellant failed to object to any of this testimony. (See R. p. 700, lines 18-23; p. 781, lines 20-24; p. 845, lines 3-7).

Because Appellant failed to object to the challenged testimony regarding the recommendations made for Victims 3, 4, 5, and 6, and failed to place upon the record any grounds for his objection to the testimony regarding the recommendations for Victims 1 and 2, the issue raised on appeal is not preserved for appellate review. See State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (a party must make a contemporaneous and specific objection to preserve an issue for appellate review); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997) (a general objection which fails to specify the particular ground on which the objection is based is insufficient to preserve an issue for review); Busillo v. City of North Charleston, 404 S.C. 604, 608, 745 S.E.2d 142, 145 (Ct. App. 2013) (“The mere statement “objection” during a witness's testimony does not preserve any argument for appeal because such a general statement does not bring the specific grounds for the objection to the attention of the trial court.” (citations omitted)); State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001) (“An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review.” (citing York v. Conway Ford, Inc., 325 S.C. 170, 480 S.E.2d 726 (1997))), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Moreover, to the extent Appellant on appeal attempts to bootstrap other unobjected-to statements made by the forensic interviewers which he now asserts constituted improper vouching (see Brief of Appellant, p. 15-17; p. 19-21), the issue of whether or not these other statements were improper is likewise not preserved for appellate review. See e.g., State v. Burton, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct.App.1997) (“Failure to object when the evidence is offered constitutes a waiver of the

right to object.”); cf. State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) (failure to contemporaneously object to a question advanced on appeal as prejudicial cannot be bootstrapped to a subsequent motion for a mistrial; any objection to the testimony was waived) (citations omitted). Accordingly, Appellant’s Issue I should be dismissed in its entirety on error preservation grounds.

The Testimony was not Improper

Further, even assuming the issue had been preserved, the testimony regarding the forensic interviewers’ recommendations was not improper and did not vouch for the credibility of the victims. Appellant points to State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012), and State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) in support of his argument that the forensic interviewers’ recommendations in this case impermissibly vouched for the credibility of the victims in this case. However, these cases are all distinguishable and do not prohibit the “recommendation” testimony at issue in Appellant’s case.

The Jennings case dealt with a “compelling finding for sexual abuse by [the defendant]” combined with statements indicating the victims’ provided details consistent with other information provided to the forensic interviewer. Jennings, 394 S.C. at 477, 716 S.E.2d at 93. In McKerley, this Court found that the forensic interviewer’s “compelling finding” of sexual abuse violated Jennings because it indicated the interviewer believed the victim was telling the truth. McKerley, 397 S.C. at 463-64, 725 S.E.2d at 141. In concluding the Jennings violation was not harmless error, the McKerley court pointed to several other statements which, in conjunction with the compelling finding of sexual abuse, indicated the forensic interviewer believed the victim

was being truthful. See id. at 465-66, 725 S.E.2d at 142. In Kromah, our Supreme Court again condemned a forensic interviewer’s “compelling finding” of child physical abuse. Kromah, 401 S.C. at 350-51; 737 S.E.2d at 495-96. However, the Kromah court went further and provided a list of the kind of statements a forensic interviewer should avoid at trial:⁵

- that the child was told to be truthful;
- a direct opinion as to a child's veracity or tendency to tell the truth;
- any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a “compelling finding” of abuse;
- any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or
- an opinion that the child's behavior indicated the child was telling the truth.

Kromah, at 360, 500.⁶

Significantly, Jennings, McKerley, and Kromah all have one feature in common – in each of these cases, the jury was given information that the forensic interviewers made “compelling findings” regarding the abuse alleged by the victims. See Jennings at 477, 716 S.E.2d at 93 (compelling disclosure of abuse by appellant); McKerley at 463, 725 S.E.2d at 141 (compelling for sexual abuse); Kromah at 351, 737 S.E.2d at 496 (compelling for child physical abuse). The interviewers’ “compelling findings of abuse” in those cases constituted indirect vouching for the credibility of the victim. See Kromah at 360, 737 S.E.2d at 500 (indicating that an interviewer’s “compelling finding” of abuse indirectly vouches for the child’s believability). Against the backdrop of a “compelling

⁵ The Supreme Court indicated it was providing this list “[b]ecause the admissibility of forensic interviews and the testimony based thereon at trial has been the subject of several recent appeals” and because “we believe it would be helpful” to provide such a list. Kromah at 360, 737 S.E.2d at 500.

⁶ Note that the Kromah opinion was issued in January 2013, while Appellant’s trial took place in September 2012.

finding of abuse,” other statements made by the forensic interviewers, such as statements about what factors the interviewer considered in forming an opinion regarding whether “something happened,” could be interpreted in no other way but that the interviewers believed the victims were telling the truth about their allegations. See McKerley, 397 S.C. at 465-67, 725 S.E.2d at 142.

Critically, in Appellant’s case, neither of the forensic interviewers testified that they made a compelling finding regarding any of the victims’ allegations of abuse. Furthermore, the forensic interviewers also never provided a direct opinion as to the victims’ veracity or tendency to tell the truth and never made any statement indicating to the jury that they in fact believed the victims’ allegations in the current case. The interviewers’ recommendations of therapy, and Weber’s additional recommendations that Victims 4, 5, and 6 have no contact with Appellant, did not directly or indirectly vouch for the credibility of the victims. Instead, as a rational jury would surely understand, therapy and no contact with the alleged perpetrator would be the logical course of action when a young child has reported sexual abuse to a licensed social worker. Regardless of the truth or falsity of the allegations, therapy and avoiding contact with the person the child is claiming abused him is an appropriate and even intuitive response to such reported allegations. The child could be telling the truth about the allegations; however, the child could also be - for reasons that need to be explored in therapy - making up stories about sexual abuse by that particular person, in which case it is obviously a prudent idea for the child to avoid contact with that person in the future. Therefore, since the forensic interviewers’ recommendations in this case did not impermissibly vouch for the credibility of the victims, the statements were not improper. See State v. Douglas,

380 S.C. 499, 503-504, 671 S.E.2d 606, 609 (2009); see also State v. Baker, 390 S.C. 56, 68, 700 S.E.2d 440, 446 (Ct. App. 2010) (suggesting that the *disclosure* of abuse is the event that triggers a follow-up recommendation after a forensic interview).

Harmless Error – Merely Cumulative

In any event, the testimony regarding the forensic interviewers' recommendations of therapy for each victim was entirely harmless where it was merely cumulative to other un-objected-to testimony in the record. The law is clear that the admission of improper evidence is harmless where the evidence is merely cumulative to other un-objected-to evidence or other evidence properly in the record. See State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (“Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence.”); State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (finding any error in admission of evidence cumulative to other un-objected-to evidence is harmless); State v. Haselden, 353 S.C. 190, 196-97, 577 S.E.2d 445, 448-49 (2003) (recognizing admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (instructing admission of improper evidence is harmless where it is merely cumulative to other evidence); State v. Broaddus, 361 S.C. 534, 542, 605 S.E.2d 579, 583-84 (Ct. App. 2004) (concluding error in admission of drug evidence was harmless where it was cumulative to other un-objected-to testimony at trial regarding drug use and drug dealing); State v. Richardson, 358 S.C. 586, 596-97, 595 S.E.2d 858, 863 (Ct. App. 2004) (observing even if the challenged testimony constituted improper “character evidence,” any error in its admission was harmless where the testimony was cumulative to other similar testimony

that was admitted without objection); see also State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 555 (Ct. App. 2001).

Here, at the time of the forensic interviewer's testimony regarding the recommendation of therapy specific to each victim, a parent of that victim had already testified *without objection* regarding that victim's referral to therapy as a result of the abuse by Appellant. (R. p. 171, lines 3-12 – Victim 1; p. 356, lines 9-15 & p. 380, lines 17-20 – Victim 2; p. 444, lines 2-7 – Victim 3; p. 634, lines 3-7 – Victim 4; p. 733, lines 4-12 – Victim 5; p. 804, lines 6-16 - Victim 6). In addition, Deputy Megan Burrell testified *without objection* that, following the forensic interviews, the Children's Advocacy Center ("CAC") referred all of the victims to a certified therapist in Greenville to pursue therapy. (R. p. 219, line 22 – p. 220, line 23). Furthermore, the therapist herself was called to the witness stand near the end of the State's case, and significantly, she testified *without objection* that all of the victims had been referred to her by the CAC, where the victims' forensic interviews had taken place, and testified as to the dates each victim began therapy sessions with her. (R. p. 860-75). Because the testimony from the forensic interviewers regarding their recommendations of therapy was merely cumulative to the un-objected-to testimony of the victims' parents, Deputy Burrell, and the therapist herself, any error in admitting the challenged testimony was harmless. See Schumpert, 312 S.C. at 507, 435 S.E.2d at 862 (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); Douglas, 380 S.C. at 504, 671 S.E.2d at 609 (there was no prejudice stemming from the forensic interviewer's expert opinion that the victim needed a medical exam where a nurse practitioner subsequently testified about the victim's medical exam).

Harmless Error – Overwhelming Evidence of Guilt

Moreover, the admission of the challenged evidence is also harmless in light of the overwhelming evidence of Appellant's guilt. Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. at 196, 577 S.E.2d at 448; see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). Further, it is well-settled that error is harmless where there is overwhelming evidence of the defendant's guilt. See, e.g., State v. Sims, 387 S.C. 557, 566-67, 694 S.E.2d 9, 14-15 (2010).

In this case, the State established that Appellant devised and carried out a common scheme or plan to commit lewd acts upon children around the age of four in the bathroom at the daycare where she worked. The victims, who were approximately six years old at the time of trial, all testified that Appellant sexually abused them in the bathroom at the daycare. (R. p. 257-73; p. 387-400; p. 572-90; p. 659-75; p. 754-72; p. 817-37). Importantly, the fact that there were six young, *unrelated* victims who all

testified to similar events occurring in the daycare bathroom strengthened each single victim's testimony because it revealed the existence of Appellant's common scheme or plan. See State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009) (evidence of a common scheme or plan "is relevant because proof of one is strong proof of the other").

Further, all six videos of the victims' forensic interviews were entered into evidence and played for the jury, and the videos were largely consistent with the victims' trial testimony. (See State's Exhibits 1, 2, 6, 9, 10, 19, & 22). The victims' parents' testimony corroborated the victims' consistent disclosures - made *prior to* the forensic interviews - as to time and place.⁷ (R. p. 154-85; p. 246-56; p. 338-84; p. 427-73; p. 616-57; p. 724-51; p. 788-810). Appellant presented eight witnesses and testified herself, and, significantly, no motive for the all six of the victims to lie was apparent and no reason for anyone to coach all six of the victims was suggested, especially where Appellant herself established on cross-examination that the victims' parents had no problem with Appellant before the allegations arose and in fact liked Appellant and believed she took good care of their children. (See R. p. 176, lines 8-9; p. 810, line 25 - p. 812, line 5; see also p. 358; p. 376; p. 467-68; p. 638; p. 655; p. 736; p. 748; p. 792; p. 808).

Appellant repeatedly emphasizes the lack of physical evidence in her brief. However, it would be a rare occurrence for there to be physical evidence of a lewd act. (See R. p. 552, line 22 - p. 553, line 6). Significantly though, there was "physical" - or at least tangible and very compelling - evidence in this case. The State produced a drawing

⁷ One of the primary defense themes was that "the forensic interviews led this case." (R. p. 1072, lines 6-7). In other words, the defense contended that the allegations were manufactured as a result of the forensic interviews. However, this defense theory conveniently ignored the victims' consistent disclosures even prior to participating in the forensic interviews. In any event, the jury had the benefit of viewing each victim's forensic interview video and was thus able to make its own conclusion about whether or not the forensic interviewers "led" the victims to make their disclosures. (See State's Exhibits 1, 2, 6, 9, 10, 19, & 22).

by Victim 6 - made well before trial - depicting Appellant's birthmark under her left breast.⁸ (See State's Exhibit # 40; see also R. p. 1057-61). In addition to the drawing, the jurors could see for themselves on Victim 6's forensic interview video where Victim 6 discusses what he calls Appellant's "bruise" and where he actually draws it. (See R. p. 1057-60; see State's Exhibit # 22 at approximately 4:44 pm until 4:47 pm). This evidence was extremely damning because, as Appellant herself acknowledged, Victim 6 could not have known about the birthmark under her left breast unless he had seen underneath Appellant's shirt, as he testified he did. (See p. 831-32; p. 1048, lines 10-151). Thus, the truth of Victim 6's allegations against Appellant was established, and, as mentioned above, the fact that his testimony was proven to be true lent credibility to each of the other victims' allegations as well. See Wallace, 384 S.C. at 433, 683 S.E.2d at 277 (evidence of a common scheme or plan "is relevant because proof of one is strong proof of the other"). Any alleged improper vouching by the forensic interviewers pales in comparison to the drawing confirming Victim 6's allegations.

It is also significant that the jury in this case acquitted Appellant of the CSC charges, two more serious offenses in the case. (R. p. 1110, lines 1-7). This plainly illustrates that the jurors were not blindly swayed by any alleged improper bolstering or vouching on the part of the forensic interviewers; instead, they carefully examined the testimony of each of the victims and returned with a verdict that was supported by the evidence.⁹ Importantly, the forensic interviewers did not provide any testimony differentiating between the lewd act and CSC charges; therefore, if the jurors concluded

⁸ As mentioned previously, Victim 6 was the only victim that was of the same race as Appellant. (See State's Exhibit 22; see R. p. 1130; see also R. p. 1096-97).

⁹ The evidence regarding the CSC charges pertaining to Victims 3 and 4 was weaker than the evidence regarding the lewd acts because these victims' testimony regarding a sexual battery was very vague. (See R. p. 578-89; p. 664-71).

that the forensic interviewers believed the victims - and therefore they should believe the victims too - they would have found Appellant guilty across the board. In that vein, during deliberations, the jury requested to re-hear the trial testimony of four of the victims and did **not** ask to re-hear any of the testimony from the forensic interviewers. (See R. p. 1103-1108).

Based upon the foregoing, the State submits there was overwhelming evidence of Appellant's guilt in this case. Further, "[t]he jury heard both sides of the story and nonetheless convicted Appellant." See Jennings, 394 S.C. at 484, 716 S.E.2d at 96 (Toal, C.J., dissenting). Accordingly, any error in admission of the testimony regarding the forensic interviewers' recommendations was not prejudicial to Appellant and was harmless beyond a reasonable doubt. See e.g., Fletcher, 379 S.C. at 25, 664 S.E.2d at 484 (error is harmless beyond a reasonable doubt if it does not contribute to the verdict); see also Calderon v. Coleman, 525 U.S. 141, 146 (1998) ("The social costs of retrial or resentencing are significant The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error.") (citations omitted). Therefore, a new trial is not warranted.

- II. Appellant's issue regarding the qualification of McMillan and Weber as experts is not preserved where Appellant raises different arguments on appeal than were raised below. In any event, the trial judge did not commit reversible error by qualifying McMillan and Weber as experts in the field of child abuse assessment because expert testimony regarding the ways in which children disclose sexual abuse was beyond the common knowledge and experience of the jurors, was highly relevant in this case, and was reliable. Furthermore, any error with respect to the expert qualifications was harmless beyond a reasonable doubt.**

Issue Preservation

In her second issue, Appellant contends that the trial judge erred by qualifying the forensic interviewers as experts because the forensic interviewers provided impermissible vouching testimony while having the status of experts and because the judge failed to find, as required by Rule 702, SCRE, that expert testimony was required and that the substance of the testimony was reliable. These issues are not preserved for appellate review because Appellant's counsel failed to raise objections on these grounds below.

At the conclusion of some preliminary questions regarding McMillan's background and experience, the State requested that McMillan be qualified as an expert in the field of child abuse assessment. (R. p. 278-87). Appellant's counsel was then given the opportunity to ask voir dire questions, and he established that there was no "forensic assessment degree" and that the course a person with the appropriate education and experience could take to become a forensic assessor was a forty-hour, one-week course. (R. p. 287-91). He then presented his objection at a recorded bench conference. (R. p. 291, lines 16-22). Appellant's counsel stated as follows: "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 is a – is a valid specialty or expert field." (R. p. 291, line 25 – p. 292, line 3). When the State clarified that it was seeking to qualify

McMillan in the field of child abuse assessment rather than forensic interviewing, Appellant's counsel responded that he had the "same objection" and 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." (R. p. 292, lines 4-12). Counsel added that he had "[n]o problem with [McMillan's] education." (R. p. 292, line 14).

The judge ruled that McMillan had been qualified on forty or fifty other occasions in court as an expert in child abuse assessment, that she had extensive training in that field, and that she was qualified to testify as an expert in the field of child abuse assessment. (R. p. 292, lines 15-22). The judge then provided the jury with an explanatory instruction regarding expert witnesses which informed the jurors that they should weigh an expert's opinions just like they would weigh any other evidence in the case and that they could accept or reject an expert's opinions.¹⁰ (R. p. 292, line 25 – p. 293, line 17).

When it was Weber's turn to testify, the State also offered her as an expert in child abuse assessment. (See R. p. 679-84). Again, on voir dire, Appellant's counsel established that there is no degree in forensic assessment and no license for forensic assessment. (R. p. 684, line 20 – p. 685, line 12). Appellant's counsel then stated "I would still object under Rule 702." (R. p. 685, lines 13-14). The trial judge stated that Weber would be qualified as an expert in the field of child abuse assessment over the objection of defense counsel. (R. p. 685, lines 15-18).

¹⁰ The judge told the jurors that the instruction would apply to any other witnesses qualified as experts in any field later in the trial and told them to keep the instruction in mind. (R. p. 293, lines 15-17). The judge provided a similar instruction in his final jury charge, telling the jury that it was not bound by the opinions given by any experts and that it could give them the weight, if any, it deemed them entitled. (R. p. 1102, lines 18-21).

As illustrated above, at trial, counsel never asserted that McMillan and Weber should not be permitted to testify as experts because their status as experts would compound the harm of impermissible vouching; in fact, counsel indicated he had no problem with the forensic interviewers being qualified as experts if it was in the field of “social work.” (See R. p. 292, lines 11-12). Defense counsel’s only objection below was that forensic interviewing and child abuse assessment were not valid specialties or expert fields; however, he qualified his objection by stating that the argument had been “rejected by the State Supreme Court.” (R. p. 291-92). Appellant’s counsel also never alerted the trial judge that he believed the judge had failed to make the necessary findings pursuant to Rule 702, SCRE, and never asserted that the subject matter of the expert testimony was not reliable.¹¹ (See R. p. 291-93; p. 684-85). Accordingly, the arguments Appellant now makes on appeal regarding the expert status of the witnesses are not preserved for appellate review. See, e.g., State v. Portillo, 408 S.C. 66, ___, 757 S.E.2d 721, 724 n2 (Ct. App. 2014) (defendant’s argument that the trial court erred in failing to make the findings required by Rule 702, SCRE, was not preserved for appellate review where the defendant raised this issue for the first time on appeal) (citation omitted); State v. Patterson, 324 S.C. at 19, 482 S.E.2d at 767 (an appellant is limited to the arguments he makes at trial); State v. Johnson, 63 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (“If a party fails to properly object, the party is procedurally barred from raising the issue on appeal.”); State

¹¹ Appellant’s counsel’s objection to Weber’s qualification related back to his earlier objection regarding McMillan’s qualification and did not operate to expand the prior objection simply because counsel mentioned Rule 702. (R. p. 685, lines 13-14). See State v. Daniels, 401 S.C. 251, 255, 737 S.E.2d 473, 475 (2012) (where the defendant on appeal complained about additional matters not objected to below, he was “improperly attempting to expand on appeal the scope of his objection below”); State v. Bailey, 253 S.C. 304, 309-310, 170 S.E.2d 376, 379 (1969) (a general argument not specifying any grounds supporting it will not preserve an issue for review); State v. Jones, 392 S.C. 647, 655-56, 709 S.E.2d 696, 700-701 (Ct. App. 2011) (short, conclusory statements present nothing for review).

v. Tucker, 319 S.C. 425, 427-28, 462 S.E.2d 263, 264-65 (1995) (a party may not argue one ground below and then argue a different ground on appeal); see also South Carolina Dept. of Social Services v. Lisa C., 380 S.C. 406, 414-15, 669 S.E.2d 647, 651-52 (Ct. App. 2008) (appellant's argument on appeal that psychologist/forensic interviewer improperly vouched for the victim's credibility was not preserved as to the comments not objected to below, even though appellant made objections on other grounds regarding the psychologist's testimony); cf. State v. Foster, 354 S.C. 614, 621, 582 S.E.2d 426, 429 (2003) (issue was sufficiently preserved for review where counsel objected and added that he was objecting because the statement would "add to" the witness's credibility).

Applicable Law

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. at 48, 625 S.E.2d at 220. Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995); see also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010). Likewise, the decision as to whether to admit or exclude expert testimony rests within the trial judge's sound discretion and will not be reversed on appeal absent a prejudicial abuse of that discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009).

“Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge.” Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

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

Rule 702, SCRE. A witness can properly be qualified as an expert where “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.” State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 467 (Ct. App. 1998). An expert's testimony is admissible where “it is relevant and based on some factual predicate in the record.” State v. Irick, 344 S.C. 460, 465, 545 S.E.2d 282, 285 (2001).

In addition, “all expert testimony under Rule 702, SCRE, imposes on the trial courts an affirmative and meaningful gatekeeping duty.” State v. White, 382 S.C. at 270, 676 S.E.2d at 686. Thus, “[a]ll expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration.” Id.; see also State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012). Once this threshold is met, however, defects in the amount or quality of the expert's education or experience go

to the weight to be accorded the expert's testimony and not its admissibility. See White at 273-74, 676 S.E.2d at 688-89.

In cases involving nonscientific, or "experience-based" expert testimony, the factors applied in an analysis of scientific evidence cannot readily be applied. See White, 382 S.C. at 274, 676 S.E.2d at 688 ("The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony."). Accordingly, "no formulaic approach" can or must be applied to determine reliability in cases involving nonscientific expert testimony. Id.

Discussion

Relevant and Necessary

Assuming the issues raised on appeal were properly preserved, McMillan and Weber were properly qualified as experts in child abuse assessment.¹² McMillan and Weber's expert testimony regarding delayed disclosure, partial and tentative disclosure, and the ways in which children disclose sexual abuse was beyond the common knowledge and experience of a typical juror and was highly relevant in light of the fact that one of the defense themes in this case was to attempt to discredit the victims based upon the manner in which they disclosed the abuse; specifically, the defense repeatedly attacked the victims' credibility on the basis that they did not immediately report the sexual abuse and/or that they did not fully disclose all details about the abuse at the first opportunity. (See, e.g., R. p. 201, lines 6-12; p. 273, lines 8-11; p. 399, line 17 – p. 400, line 2; p. 420, line 17 – p. 421, line 4; p. 452, line 24 – p. 453, line 7; p. 473, lines 4-17;

¹² As mentioned previously, Appellant's trial took place in September of 2012, before the South Carolina Supreme Court stated in State v. Kromah that it could "envision no circumstance where [a forensic interviewer's] qualification as an expert at trial would be appropriate." Kromah at 357, 737 S.E.2d at 499.

p. 557-58; p. 848, lines 21-23; p. 1066, lines 4-9; p. 1067-72). The expert testimony regarding the ways in which children disclose sexual abuse was highly relevant and necessary to explain the behavior of the victims in the proper context and to rebut the defense's contentions. (See R. p. 285-86; p. 300-304; p. 683-84; p. 689-92).

In State v. Schumpert, a 1993 child sex abuse case, the South Carolina Supreme Court held that expert testimony regarding common behavioral characteristics exhibited by child victims of sexual abuse is admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect. 312 S.C. 502, 506, 435 S.E.2d 859, 861-62 (1993). In State v. Weaverling, a 1999 child sex abuse case, a social worker testified, among other things, that it was "not uncommon" for past victims of sexual abuse to become offenders themselves. 337 S.C. 460, 473-74, 523 S.E.2d 787, 794 (Ct. App. 1999). The defendant objected to this testimony, arguing that the behavioral evidence was irrelevant because the social worker never interviewed or met with the victim. Id. This Court ruled as follows:

Here, the challenged testimony is behavioral evidence concerning rape trauma. "[B]oth 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). Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible. See Frenzel v. State, 849 P.2d 741 (Wyo.1993). See also 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). Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. Frenzel, supra. 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. Id. See also Lujan, supra (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).

In the instant case, the evidence simply explained the effect of prior molestation on a person's subsequent conduct—that it is “very common” for a victim of sexual abuse to become a sexual offender. The fact that [the victim] molested another boy in the same manner he alleged [the defendant] molested him enhances the probative value of [the social worker’s] testimony such that it outweighs the prejudicial effect. The testimony was relevant and was properly admitted.

Weaverling, 337 S.C. at 474-75, 523 S.E.2d at 794-95.

In State v. White, a 2004 adult sex abuse case, a psychotherapist who counseled the victim was qualified as an expert in post-traumatic stress disorder and assessment and treatment of sexual abuse. 361 S.C. 407, 414, 605 S.E.2d 540, 544 (2004). The defendant argued that the psychotherapist’s testimony was outside the scope of the rape trauma evidence permitted in Schumpert since the defendant’s case involved an adult victim rather than a child victim. Id. The South Carolina Supreme Court disagreed and stated:

Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior. Nevertheless, the importance of rape trauma testimony in the case of a child victim does not negate the relevance of rape trauma evidence where the victim is an adult. 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. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). This is true whether the victim is an adult or child. See State v. Marks, 231 Kan. 645, 647 P.2d 1292 (1982) (concluding in prosecution for rape in which defendant raised defense of consent, psychiatrist's testimony that twenty-one year old victim had been suffering from rape trauma was relevant).

Schumpert, Weaverling, and White all clearly support that expert testimony regarding the ways in which children disclose sexual abuse is relevant because the subject matter is beyond the common sense, experience, and education of the average

juror, and because the testimony could help jurors understand the typical behavior patterns of child sexual assault victims and provide insight into what might otherwise be viewed as unusual or counterintuitive behavior.¹³ Such expert testimony was extremely

¹³ Significantly, a majority of other jurisdictions have specifically approved this type of testimony. See People v. Spicola, 16 N.Y.3d 441, 465, 947 N.E.2d 620 (N.Y. 2011) (recognizing that the majority of states allow the introduction of expert testimony to explain delayed disclosure and other behavioral characteristics exhibited by juvenile victims of sexual abuse); State v. Reser, 244 Kan. 306, 313, 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.”); State v. Reyna, 290 Kan. 666, 685, 234 P.3d 761, 775 (Kan. 2010) (“[C]ase law supports the conclusion that the testimony of general behavioral traits of sexual abuse victims is helpful to the jury and, therefore, admissible.”); People v. Baenziger, 97 P.3d 271, 275 (Colo. Ct. App. 2004) (“Because the ‘lay notion of what behavior logically follows the experience of being raped may not be consistent with the actual behavior or which social scientists have observed from studying rape victims,’ expert testimony explaining these reactions is helpful to the jury in determining whether this delay should support the conclusion that the sexual assault did not occur.” (citations omitted)); State v. Cardany, 35 Conn.App. 728, 732, 646 A.2d 291, 294 (Conn. App. Ct. 1994) (holding that the state may, in its case-in-chief, introduce expert testimony that explains in general terms the tendency of minors to delay in reporting incidents of abuse since “the consequences of the unique trauma experienced by minor victims of sexual abuse are matters beyond the understanding of the average person,” because “[i]t 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.”); State v. Crespo, 114 Conn. App. 346, 373, 969 A.2d 231, 248 (Conn. App. Ct. 2009) (“Such expert testimony, related to the issue of delayed reporting of sexual abuse, falls within the type of social framework testimony that has been deemed relevant in assessing a victim’s conduct in cases of sexual abuse.”); Harris v. State, 283 Ga. App. 374, 381, 641 S.E.2d 619, 625 (Ct. App. 2007) (recognizing that experts are properly permitted to testify in regard to the typical patterns of behavior exhibited by rape victims); State v. Gonzalez, 150 N.H. 74, 78, 834 A.2d 354, 358 (N.H. 2003) (“We have recognized that a layperson is not capable of making such observations because ‘a child’s delayed disclosure of abuse, and recantation of statements about abuse, may be puzzling or appear counterintuitive to lay observers when they consider the suffering endured by a child who is continually being abused.’ Because of its counterintuitive nature, expert testimony may be permitted to educate the jury about apparent inconsistent behavior by a victim following an assault and to ‘provid[e] useful information that is beyond the common experience of an average juror.’ ” (brackets in original and citations omitted)); State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984) (“Background data providing a relevant insight into the puzzling aspects of the child’s conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate in cases of sexual abuse of children.”); State v. Batangan, 71 Haw. 552, 557-58, 799 P.2d 48, 51-52 (1990) (child victims of sexual abuse exhibit patterns of behavior which are seemingly inconsistent with behavioral norms of other victims of assault, including delayed reporting of abuse and recantation of allegations of abuse; and “normally, such behavior would be attributed to inaccuracy or prevarication,” so it is helpful for the jury to know that many child victims of sexual abuse behave in the same manner and may play a particularly useful role by disabusing the jury of widely held misconceptions. . . .” (citations omitted)); W.R.C. v. State, 69 So.3d 933, 938-40 (Ala.Crim.App. 2010) (the testimony of an expert, who was qualified in the areas of child development and child and adolescent sexual abuse, regarding delayed disclosure and the possible reasons for delayed disclosure was relevant and properly admitted); State v. Schnabel, 196 N.J. 116, 133, 952 A.2d 452, 462 (2008) (general rule in New Jersey is that CSAAS testimony is admissible to explain traits sometimes found in abused children that could undermine the victim’s credibility and to dispel preconceived conceptions regarding victims of abuse); Sanderson v. State, 165 P.3d 83, 90 (Wy. 2007) (general rule in Wyoming is that CSAAS testimony is admissible to dispel misconceptions regarding victims of abuse if a victim’s post-abuse behavior is an issue in the case, such as when a victim recants allegations of sexual

important in this case because it could help the jurors understand the evidence related to the victims' behavior following the abuse, which could have been misunderstood particularly in light of the defense's contentions. 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."); cf. State v. Carpenter, 147 N.C. App. 386, 393, 556 S.E.2d 316, 321 (N.C. Ct. App. 2001) (holding that expert testimony indicating that delayed and incomplete disclosures are not unusual in cases of child abuse was "clearly instructive and helpful to the jury in understanding the evidence" because the nature of the juvenile sexual abuse places lay jurors at a disadvantage). Therefore, the expert testimony on these issues was clearly relevant and helpful to the jury.¹⁴ See Weaverling at 475, 523 S.E.2d at 794 ("Such

abuse; then testimony regarding that particular aspect of CSAAS is admissible); Brodit v. Cambra, 350 F.3d 985, 991 (9th Cir. 2003) (noting that "CSAAS testimony is admissible in federal child-sexual-abuse trials, when the testimony concerns general characteristics of victims and is not used to opine that a specific child is telling the truth"); Com. v. Bougas, 59 Mass.App.Ct. 368, 375-76, 795 N.E.2d 1230, 1236 (2003) (expert testimony that abused children often delay in reporting abuse, a familiar and permitted proposition, informs the jury that the victim's failure to disclose in a timely fashion does not necessarily exonerate the defendant); People v. Beckley, 434 Mich. 691, 733, 456 N.W.2d 391, 409 (Mich. 1990) (experts in dealing with sexually abused children should be permitted to rely on their own experience and their knowledge of the experience of others to rebut an inference that specific behavioral patterns attributed to the victim are not characteristic of the class of child sexual abuse victims); State v. Middleton, 294 Or. 427, 436-37, 657 P.2d 1215, 1220 (1982) (expert testimony explaining child sex abuse victims' superficially bizarre behavior by identifying its emotional antecedents could help the jury make a more informed decision in evaluating the credibility of a testifying child); see also John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y 1, 45-46 (2010) ("Psychological research demonstrates that delayed reporting is common among sexually abused children. Frequently when children finally disclose, they give slightly different versions of the abuse to different interviewers. . . . Thus, from a psychological point of view, expert testimony about delay, inconsistency, and recantation is not controversial. From the legal perspective, such testimony is not worrisome." (footnotes omitted)); Elizabeth Trainor, Admissibility of Expert Testimony on Child Sexual Abuse Accommodation Syndrome (CSAAS) in Criminal Case, 85 A.L.R. 5th 595 (discussing cases dealing with the admissibility of testimony regarding the common behavioral characteristics of victims of sexual abuse).

¹⁴ The fact that some of an expert's testimony may help to explain or indirectly support another witness's version of events does not mean that the expert *improperly* bolsters the credibility of the witness. See State v. Douglas, 380 S.C. at 503-504, 671 S.E.2d at 609 (rejecting claim that expert vouched for the victim's credibility where the expert gave no indication about the victim's veracity); see also State v. Middleton, 294 Or. 427, 435-36, 657 P.2d 1215, 1219-20 (1982) ("Defendant contends that the evidence given by the experts here was a direct effort to support the credibility of the complaining witness. It is true that if the

testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault.”); State v. White, 361 S.C. at 415, 605 S.E.2d at 544 (“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.”); State v. Schumpert, 312 S.C. at 506, 435 S.E.2d at 862 (1993) (“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”); cf. State v. Hill, 287 S.C. 398, 400, 339 S.E.2d 121, 122 (1986) (holding that expert testimony on battered woman’s syndrome, which involves testimony on the common characteristics that are exhibited by women abused over an extended period of time, was not only relevant but “critical”); see also State v. Morgan, 326 S.C. 503, 508, 485 S.E.2d 112, 115 (Ct. App. 1997) (in cases where there are allegations of child sexual abuse, “[e]xpert testimony concerning child abuse typically comes from two sources: medical evidence provided by physicians and behavioral science evidence provided by

jurors believed the experts' testimony, they would be more likely to believe the victim's account. Neither of the experts directly expressed an opinion on the truth of the victim's testimony. Much expert testimony will tend to show that another witness either is or is not telling the truth. This, by itself, will not render evidence inadmissible.”) (citations omitted); People v. Koon, 724 P.2d 1367, 1370 (Colo.App.1986) (finding that, although child incest pattern testimony may incidentally give rise to an inference that a victim is or is not telling the truth about the specific incident in question, “this fact alone is insufficient to deny admission of the evidence, because expert testimony generally tends to bolster or attack the credibility of another witness”); State v. Kennedy, 320 N.C. 20, 32, 357 S.E.2d 359, 367 (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.”); State v. White, 123 N.M. 510, 512, 943 P.2d 544, 546 (N.M.App. 1997) (“The fact that expert testimony contradicts or supports the testimony of another witness does not mean that the expert testimony constitutes comment on the other witness's veracity. Otherwise, virtually all expert testimony would be inadmissible. One must distinguish between expert opinion that contradicts or supports a witness and expert opinion regarding a witness's veracity. It is only the latter type of testimony that is prohibited.”); Westbrooks v. State, 309 Ga.App. 398, 402, 710 S.E.2d 594, 598 (Ga.App. 2011) (“Moreover, “the fact that such testimony may also indirectly, though necessarily, involve the child's credibility does not render it inadmissible.” (citation omitted)).

psychiatrists, psychologists, and social workers.”), *overruled on other grounds by State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009).

Reliability of the Expert Testimony

Furthermore, also assuming Appellant’s challenge to the reliability of the expert testimony was preserved for appellate review, the substance of the expert testimony discussed above was indeed reliable. As discussed above, behavioral science evidence, including behavioral science evidence in regard to the common behavioral characteristics exhibited by juvenile victims of sexual abuse, has historically been recognized as admissible by the majority of courts in the United States. *See People v. Spicola*, 16 N.Y.3d 441, 465, 947 N.E.2d 620 (N.Y. 2011) (recognizing that the majority of states allow the introduction of expert testimony to explain delayed disclosure and other behavioral characteristics exhibited by juvenile victims of sexual abuse); *see also Baenziger*, 97 P.3d at 275 (“It has been repeatedly held that rape trauma syndrome evidence is reasonably reliable.”); *see, e.g., Elizabeth Trainor, Admissibility of Expert Testimony on Child Sexual Abuse Accommodation Syndrome (CSAAS) in Criminal Case*, 85 A.L.R. 5th 595 (listing cases in which courts have found testimony on the common behavioral characteristics of victims of sexual abuse to be reliable and unreliable). Moreover, such evidence has also historically and specifically been recognized as proper and admissible by South Carolina courts. *See Schumpert*, 312 S.C. at 505-506, 435 S.E.2d at 861-862 (holding an expert in the field of sexual abuse was properly qualified to testify in regard to the victim’s behavioral characteristics and the fact that those characteristics were typical for victims of sexual abuse); *Weaverling*, 337 S.C. at 474-475, 523 S.E.2d at 794 (instructing that expert testimony concerning the

common behavioral characteristics exhibited by juvenile victims of sexual abuse was relevant, helpful, and admissible); see also White, 361 S.C. at 415, 605 S.E.2d at 544 (recognizing that rape trauma evidence is admissible in sexual assault cases involving either adult or juvenile victims); State v. Whaley, 305 S.C. 138, 142, 406 S.E.2d 369, 371-372 (1991) (holding that expert testimony in regard to factors that could affect eyewitness identifications was admissible); State v. Hill, 287 S.C. at 400, 339 S.E.2d at 122 (holding that expert testimony on battered woman's syndrome, which involves testimony on the common characteristics that are exhibited by women abused over an extended period of time, is admissible if the expert is qualified on the subject). Thus, expert testimony regarding the ways in which children disclose sexual abuse and the behavioral characteristics exhibited by child victims of sexual abuse is subject matter that has been recognized as relevant and reliable in the majority of jurisdictions in the country, including in South Carolina.

In Appellant's case, McMillan and Weber's testimony regarding the ways in which children disclose sexual abuse was based upon their substantial knowledge gained through extensive education and training as well as ample clinical and teaching experience.¹⁵ (See R. p. 278-87; p. 679-84). Both had earned master's degrees in social work and were licensed social workers. (R. p. 279-80; p. 679). McMillan had been trained regarding the ability of children to communicate, and Weber had been extensively trained in childhood development and pediatric therapy and psychotherapy. (R. p. 283, lines 4-8; p. 679, lines 20-22). They were both members of relevant professional associations and had reviewed publications and literature regarding child abuse

¹⁵ Notably, Appellant did not challenge McMillan and Weber's expert qualifications below and does not challenge them on appeal. (See R. p. 291, line 16 – p. 292, line 14; p. 685, lines 13-14; see Brief of Appellant, p. 24-27).

assessment to include delayed disclosure and partial and tentative disclosure. (R. p. 281-83; p. 681). Both testified that the great majority of their experience with child sexual abuse victims involved delayed disclosure and partial and tentative disclosure. (R. p. 285-86; p. 683-84). Finally, both McMillan and Weber had been qualified as experts in court in the area of child abuse assessment approximately fifty times previously. (R. p. 287, lines 6-10; p. 684, lines 9-15).

The testimony of McMillan and Weber testimony demonstrated that the underlying subject matter of their expert testimony met a threshold level of reliability such that the testimony was admissible. See State v. White, 382 S.C. at 270, 676 S.E.2d at 686 (the proposed expert testimony must meet a reliability threshold before it is admitted for the jury's ultimate consideration); id. at 274, 676 S.E.2d at 688 (pointing out that “no formulaic approach” can or must be applied to determine reliability in cases involving nonscientific expert testimony); State v. Schumpert, 312 S.C. at 505-506, 435 S.E.2d at 861 (“[The witness] testified she had a master’s degree in social work and specialized in child and adolescent services. She attended training seminars regarding sexual abuse survivors and worked on more than one hundred cases involving sexually abused children. We find no abuse of discretion in her qualification as an expert [in the field of sexual abuse.]”); State v. Whaley, 305 S.C. at 142, 406 S.E.2d at 372 n2 (rejecting the suggestion that expert testimony on factors that might affect eyewitness identifications was not sufficiently reliable to warrant its admission during trial due to the fact that the subject was a legitimate area of psychological study and had generated a large body of work); see also Perry v. New Hampshire, ___ U.S. ___, 132 S. Ct. 716, 728 (2012) (“[T]he jury, not the judge, traditionally determines the reliability of evidence.”);

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1983) (vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking disputed but admissible evidence); see, e.g., State v. Jones, 273 S.C. 723, 732, 259 S.E.2d 120, 125 (1979) (finding the trial judge properly exercised his discretion in admitting expert testimony on “bite-mark” evidence where there was no showing that the techniques and theories employed were contrary to those accepted by the photographic and dental communities).

Based on the foregoing, McMillan and Weber were properly qualified as experts in the area of child abuse assessment and were properly allowed to offer expert testimony regarding the ways in which children disclose sexual abuse. Again, although courts in South Carolina have found it to be unnecessary for an expert to be qualified as an expert forensic interviewer, our courts have consistently found expert qualification to be appropriate in the area of child sexual abuse. Compare Kromah, 401 S.C. at 357, 737 S.E.2d at 499 n5 (noting that “we can envision no circumstance where [a forensic interviewer’s] qualification as an expert at trial would be appropriate”); and Douglas, 380 S.C. at 502-503, 671 S.E.2d at 608-609 (finding it was unnecessary for a witness to be qualified as an expert in forensic interviewing where the witness testified only as to her own personal observations and discussions with the victim); with Schumpert, 312 S.C. at 506, 435 S.E.2d at 862 (holding the testimony of an expert qualified in the field of sexual abuse was properly admitted during trial); Weaverling, 337 S.C. at 475-476, 523 S.E.2d at 795 (concluding the trial judge did not err in admitting the testimony of an expert qualified in the field of “victims of sexual abuse”); and Henry, 329 S.C. at 278, 495 S.E.2d at 469 (finding a witness was properly qualified as an expert psychotherapist

“with a specialty in child sexual abuse”). Therefore, where, as here, the witnesses were not qualified as expert “forensic interviewers” and not touted as “human lie detectors” as was the Supreme Court’s concern in Kromah,¹⁶ but were instead qualified in the area of child abuse assessment and provided testimony regarding relevant behavioral science evidence that was substantively reliable, there was no reversible error with respect to the witnesses’ qualification as experts.

Harmless Error

In any event, as discussed at length previously, there was overwhelming evidence of Appellant’s guilt such that any trial error, including the qualification of McMillan and Weber as experts in child abuse assessment, was harmless beyond a reasonable doubt, especially considering that the jury was twice instructed that it needed not give an expert’s testimony greater weight simply because the witness was qualified as an expert. (See R. p. 292-93; p. 1102). See State v. Fletcher, 379 S.C. at 25, 664 S.E.2d at 484 (it is well-settled that error is harmless where there is overwhelming evidence of the defendant’s guilt); State v. Portillo, 408 S.C. 66, ___, 757 S.E.2d 721, 726 (Ct. App. 2014) (finding any errors arising from a forensic interviewer’s qualification as an expert *in forensic interviewing* and any alleged vouching to be harmless beyond a reasonable doubt considering the other evidence in the case, the trial judge’s instructions to the jury that they were not required to give an expert witness’s testimony any greater weight, and that

¹⁶ The State mentioned McMillan and Weber only one time in its lengthy closing argument, and this was to refer to the expert testimony regarding delayed and tentative disclosure. (R. p. 1094, lines 8-17; see p. 1074-1101). Significantly, this reference was in direct response to the defense attack on the victims’ credibility based upon the manner in which they disclosed the abuse. (See R. p. 1094, lines 5-7). The majority of the State’s closing argument focused on discussing the victims’ trial testimony. (See R. p. 1074-1101).

the expert never testified about making a “compelling finding”); see also Douglas, 380 S.C. at 503-504, 671 S.E.2d at 609. Therefore, a new trial is not warranted.

III. The trial judge properly admitted the forensic interview videos of Victims 1, 2, 3, and 6 where the totality of the circumstances surrounding the making of the video statements provided particularized guarantees of trustworthiness as required by S.C. Code § 17-23-175. In any event, any error in admitting the victims’ forensic interview videos was harmless beyond a reasonable doubt.

Appellant argues on appeal that the trial judge erred in admitting the forensic interview videos of Victim 1, 2, 3, and 6 because these videos did not meet the statutory requirements set forth in S.C. Code § 17-23-175 (B). Specifically, Appellant contends that the trial judge misapplied the “internal coherence” factor¹⁷ and that the trial judge erred in concluding the statements made in the videos represented detailed accounts of the alleged offenses and that the statements were not elicited by leading questions. To the contrary, the judge did not commit error by admitting the forensic interview videos of Victims 1, 2, 3, and 6 because the totality of the circumstances surrounding the making of these victims’ prior statements provided particularized guarantees of trustworthiness.

Subsection (A)(4) of S.C. Code § 17-23-175 states that an out-of-court statement of a child is admissible if “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.” (emphasis added). Subsection (B) states as follows:

(B) In determining whether a statement possesses particularized guarantees of trustworthiness, the court *may* consider, *but is not limited to*, the following factors:

¹⁷ Appellant’s counsel never objected on this basis below. (See R. p. 310-20; p. 408-12; p. 609-16; p. 851-56). See State v. Patterson, 324 S.C. at 19, 482 S.E.2d at 767 (“Appellant is limited to the grounds raised at trial.”) (citation omitted).

- (1) whether the statement was elicited by leading questions;
- (2) whether the interviewer has been trained in conducting investigative interviews of children;
- (3) whether the statement represents a detailed account of the alleged offense;
- (4) whether the statement has internal coherence; and
- (5) sworn testimony of any participant which may be determined as necessary by the court.

S.C. Code § 17-23-175 (B) (emphasis added).

The language of the statute makes it clear that, before admitting a prior out of court statement of a child, a trial court **must** consider the “totality of the circumstances” surrounding the making of the out of court statement, and that the trial court **may consider** but is not limited to the factors contained in subsection (B). Significantly, the language of the statute does not indicate that a child’s out-of-court statement would *necessarily* be inadmissible if some leading questions were used, if the statement was less detailed than it could have been, or if the statement was lacking in internal coherence. In that vein, the fact that the “totality of the circumstances” must be considered gives the trial court flexibility to consider the out-of-court statement in full context and allows the court to consider the optional, non-exhaustive list of factors in subsection (B) in light of the age and abilities of the particular child in question.

The State believes the following points should be considered when evaluating the forensic interviews in this case. First, as the trial judge recognized, a small child is unable to communicate and relate information on the same level as an older child, particularly when discussing very personal and perhaps shameful occurrences. (See R. p.

318, line 14 – p. 319, line 4; p. 411, lines 1-2; p. 854-56). As a result, the degree of “internal coherence” and degree of detail will generally decrease the younger the child. Second, it is also important to remember that “[a] leading question is one which suggests to the witness the desired answer.” State v. McHoney, 344 S.C. 85, 99, 544 S.E.2d 30, 37 (2001). As forensic interviewer McMillan explained, there is a difference between leading questions and questions that are geared toward focusing a young child on a particular topic. (See R. p. 294-95; p. 420, lines 5-8). Third, subsection (B)(1) of the statute states that one of the factors a judge may consider is “whether the statement was *elicited* by leading questions” (emphasis added). Thus, even if leading questions are used in a forensic interview, if the leading questions do not result in incriminating responses from the child, the statement was not “elicited by” leading questions. Fourth and finally, regarding the “internal coherence” factor, the statute does not appear to contemplate that there might be successive forensic interviews; thus, it is unclear whether each forensic interview must be considered “a statement” on its own or whether successive forensic interviews should be considered “a statement” collectively. See S.C. Code § 17-23-175 (B) (referring to “the statement” and “a statement”). Either way, however, “internal coherence” means nothing more than that the statements in the forensic interview pertaining to the allegations against the defendant are logically related and capable of being understood.¹⁸

In Appellant’s case, the totality of the circumstances surrounding the making of Victim 1, 2, 3, and 6’s forensic interview videos provided particularized guarantees that

¹⁸ “Coherent” has been defined as “sticking together, cohering; marked by orderly or logical relation of parts that affords comprehension or recognition.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, NEW COLLEGE EDITION 259 (1980).

the statements made by these victims in the videos were trustworthy. These victims were all four years old at the time of their interviews. (See R. p. 306, line 20; p. 404, line 5; p. 427, lines 13-16; p. 593, lines 21-22; p. 839, lines 7-8). While it is certainly true that all of the young victims had to be focused and directed back to the relevant topic at times, the questions asked by the interviewers were generally not “leading” in the sense that they suggested a particular desired answer. (See State’s Exhibits # 1, 2, 6, 9, & 22). Additionally, each victim’s statement represented a “detailed account” of the alleged offense in that each victim provided details about who was involved in the inappropriate touching and what the inappropriate touching entailed. (See State’s Exhibits # 1, 2, 6, 9, & 22). The fact that the four-year-old victims – who quite obviously did not wish to talk about the abuse at all – were unable to provide as much detail as an older child was not fatal to the admissibility of the forensic interviews. Further, the statements had “internal coherence” in that each victim’s description of the abuse was capable of being understood, taking into account the limitations of a four year old. (See State’s Exhibits # 1, 2, 6, 9, & 22). Moreover, as the trial judge repeatedly noted, all of the victims appeared to go to great lengths to avoid talking about the sexual abuse by Appellant. (See R. p. 611-15; p. 710-13; p. 786; p. 854-56; see also State’s Exhibits 1, 2, 6, 9, & 22). Each victim’s clear avoidance supplied an additional layer of consistency that added to the internal coherence of each statement. (See R. p. 615, lines 10-24).

Appellant contends for the first time on appeal that the trial judge misapplied the “internal coherence” factor by considering external evidence it was not allowed to consider. (See Brief of Appellant, p. 29-30). However, any error in this regard was entirely harmless where the judge’s admission of the forensic interview videos was

proper where, as discussed above, the victims' out-of-court statements did in fact have internal coherence, did represent detailed accounts of the alleged offenses, and were not elicited by leading questions. See Securities and Exchange Com. V. Chenery Corp., 318 U.S. 80, 88 (1943) (“...[W]e do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct ‘although the lower court relied upon a wrong ground or gave a wrong reason.’ The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate.” citation omitted)).

In sum, based upon the foregoing, the State submits that the trial court did not abuse its discretion in admitting the forensic interview videos of Victims 1, 2, 3 and 6 where the totality of the circumstances surrounding the interviews provided particular guarantees that the statements made by the victims therein were trustworthy as required by S.C. Code Ann. § 17-23-175.

Harmless Error

In any event, any error in the admission of the forensic interview videos of Victim 1, 2, 3, and 6 was harmless beyond a reasonable doubt. The victims all testified at trial and the jury was fully capable of assessing their trial testimony. In that vein, it is clear that the jurors found the victims' trial testimony to be the most important part of the case since during deliberations they requested to re-hear the testimony of four of the victims but did not request to watch the forensic interview videos again. (R. p. 1103-09). Further, as discussed previously, there was overwhelming evidence of Appellant's guilt such that any trial error, including the admission of these four forensic interview videos,

was harmless beyond a reasonable doubt. See e.g., State v. Fletcher, 379 S.C. at 25, 664 S.E.2d at 484 (it is well-settled that error is harmless where there is overwhelming evidence of the defendant's guilt).

IV. Victim 3 was properly allowed to testify via closed-circuit television pursuant to S.C. Code § 16-3-1550(E) where the trial judge made case-specific findings that Victim 3 would be traumatized by testifying in front of Appellant in open court and these findings were supported by evidence in the record. In any event, any error in allowing Victim 3 to testify via closed-circuit television was harmless beyond a reasonable doubt.

Relevant Facts

Prior to trial, the State made a motion for Victim 3 to be allowed to testify via closed-circuit television. (See R. p. 20-21). The basis of the motion was S.C. Code § 16-3-1550 (E), which provides for the sensitive treatment of witnesses who are very young or who have special needs by using closed or taped sessions when appropriate. (R. p. 21). In support of the motion, the State first presented the testimony of Meredith Thompson-Loftis, a licensed professional counselor since 2001 and Victim 3's therapist for the past year and seven months. (R. p. 10; p. 25-26). Thompson-Loftis testified that Victim 3 was fearful of Appellant. (R. p. 24, lines 7-8). She stated Victim 3 was also fearful that she had done something wrong with regard to Appellant and that she would be in trouble for disclosing the abuse or for participating in it. (R. p. 25, lines 7-11). Thompson-Loftis also testified that Victim 3 was "very angry" with Appellant. (R. p. 25, lines 12-13). More significantly, Thompson-Loftis stated that if Victim 3 were to have to testify in court in front of Appellant, "it would be extremely overwhelming for her," and that "she would probably regress," most likely developing "baby talk" and "infantile behaviors." (R. p. 26, lines 21-25). Thompson-Loftis also stated Victim 3 would

“probably shut down emotionally” to a degree that was “more than mere nervousness or anxiety.” (R. p. 26, line 25 – p. 27, line 2; see also p. 32, lines 18-23). She elaborated on cross-examination that Victim 3 could have “severe regressive behaviors that affect her school, could affect her life, could affect her friendships, her social skills.” (R. p. 29, lines 1-2). Thompson-Loftis also confirmed on cross-examination that Appellant’s presence would “make a difference” with respect to Victim 3’s ability to testify in the courtroom. (R. p. 27, lines 9-13).

Upon questioning from the court, Thompson-Loftis testified that if Victim 3 were to testify in court with Appellant present and within her view, there was a “strong possibility that she could shut down emotionally; that she could regress and even have “more problematic behaviors than what we started with possibly.” (R. p. 33, lines 7-12). When asked what effect Appellant’s presence would have on Victim 3’s ability to testify in court, Thompson-Loftis stated: “I think it would traumatize her. I don’t know that she would be able to complete her thoughts. I don’t know that she would be able to stay focused. I don’t know that she would recover from that.” (R. p. 33, lines 16-21).

Following the testimony of Thompson-Loftis, the State called Victim 3’s mother, who testified about unusual behaviors on the part of Victim 3 that began around the time of the sexual abuse and continued to occur even at the time of trial. (R. p. 34-36). Victim 3’s mother stated that Victim 3 would be “very nervous” in a courtroom setting “with a bunch of people,” but was unable to give an opinion about how Appellant’s presence in the courtroom would affect Victim 3 because she had not talked with Victim 3 about Appellant or about what happened. (R. p. 36, lines 15-25; p. 38, lines 5-12). However, Victim 3’s mother did state that Victim 3 knew she was coming to court and

knew that Appellant would be present. (R. p. 38, lines 13-16). Thereafter, the judge stated that he would wait to rule on this issue since he wanted to speak with Victim 3 herself. (R. p. 41-42).

After the parties' opening statements, the judge heard testimony from Victim 3 outside the presence of Appellant and the jury. Victim 3 testified that she didn't know how she felt about Appellant but indicated she wasn't afraid of her. (R. p. 134-35). The six-year-old also stated that she would be able to "tell what happened" and answer questions if Appellant was seated next to her lawyer in the courtroom and Victim 3 could see her. (R. p. 135, line 8 – p. 136, line 2). Following Victim 3's testimony, the trial judge noted that his primary concern was that if the victims became traumatized by testifying in front of the defendant, the trauma could not be undone; however, the judge ruled that Victim 3 should try to testify in open court but if she froze up or was unable to answer questions, the State could renew its motion regarding having her testify via closed-circuit television. (R. p. 140-41; p. 153, lines 9-19).

Later in trial, the State called Victim 3 to the witness stand. (See R. p. 559). Initially, Victim 3 answered several background questions without incident. (R. p. 560-61). However, when the prosecutor began to ask questions relating to the daycare where Appellant committed the lewd acts, Victim 3 started to have problems responding. (See R. p. 561-62). At one point she stopped responding at all. (R. p. 562, line 17 – p. 563, line 1). She was subsequently able to identify her daycare classroom and the bathroom from pictures; however, when the prosecutor asked her to talk about what happened in the bathroom, she stated that she did not remember. (R. p. 563-65).

At that point, outside the presence of the jury, the State renewed its motion to

allow Victim 3 to testify via closed-circuit television. (R. p. 566). Appellant's counsel objected, stating that he believed the prosecutor could have continued to work with the child on testifying before the jury. (R. p. 567-68). The trial judge noted that Victim 3 had stated she was unable to remember certain basic facts that all the other children had remembered, and, significantly, found that there were two different times when Victim 3 looked over at Appellant and "froze up" and completely stopped talking. (R. p. 568, lines 14-18; p. 568-69; p. 570, lines 9-17). The judge also found important the therapist's testimony that Victim 3 would not be able to testify with Appellant present and that she would be traumatized by doing so. (R. p. 569, lines 16-20). The trial judge stated that he thought Victim 3 was traumatized by Appellant and also by the jury. (R. p. 570, lines 4-5). Ultimately, the judge ruled, based upon Thompson-Loftis' testimony and what he had observed of Victim 3's attempt to testify in court, Victim 3 had "special needs" and would be allowed to testify via closed-circuit television. (R. p. 568-71).

Discussion

S.C. Code § 16-3-1550 (E) provides for the sensitive treatment of witnesses who are very young or who have special needs by using closed or taped sessions when appropriate.¹⁹ In State v. Murrell, the South Carolina Supreme Court set forth the following guidelines for determining whether allowing a victim to testify via videotape or closed-circuit television would be appropriate:

First, the trial judge must make a case-specific determination of the need for videotaped testimony. In making this determination, the trial court should consider the testimony of an expert witness, parents or other relatives, other concerned and relevant parties, and the child. Second, the court should place the child in as close to a courtroom setting as possible. Third, the defendant should be able to see and hear the child, should have

¹⁹ This section was formerly codified at S.C. Code § 16-3-1530 (G).

counsel present both in the courtroom and with him, and communication should be available between counsel and appellant.

State v. Murrell, 302 S.C. 77, 80–82, 393 S.E.2d 919, 921–922 (1990).

In State v. Bray, our Supreme Court reaffirmed that a trial judge must make a case-specific determination regarding the need for videotaped or closed-circuit testimony. 342 S.C. 23, 29, 535 S.E.2d 636, 640 (2000). The Bray court also pointed out that the United States Supreme Court addressed the issue in Maryland v. Craig and stated as follows:

The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify.... The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant.... the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, i.e., more than mere nervousness or excitement or some reluctance to testify.

Id. at 29, 535 S.E.2d at 640 (citing Maryland v. Craig, 497 U.S. 836, 856-57 (1990)).

Bray also reaffirmed that “[a] trial court’s decision to allow videotaped or closed-circuit testimony is reversible “only if it is shown that the trial judge abused his discretion in making such a decision.” Id. at 27, 535 S.E.2d at 639 (citing State v. Murrell, 302 S.C. 77, 82, 393 S.E.2d 919, 922 (1990)). “Where there is evidence to support a trial court’s ruling, it will not be overturned for an abuse of discretion.” Id. (citing State v. Morgan 326 S.C. 503, 485 S.E.2d 112 (Ct.App.1997)).

In Bray, the Supreme Court found that there was sufficient evidence in the record establishing the necessity of allowing the seven-year-old victim to testify via closed-circuit television. Bray at 27-32, 535 S.E.2d at 639-41. The “sufficient evidence” included the victim’s counselor’s testimony that she did not believe the victim would be

able to testify in court before the defendant and that doing so would cause her further emotional trauma, and the victim's mother's testimony that if required to testify in court in front of the defendant, the victim would not be able to say anything about what the defendant did to her. Id. at 28, 535 S.E.2d at 639. However, the trial judge's ruling allowing the closed-circuit procedure did not specifically state there would be harm to the victim, and he ruled only that "this is probably a classic case of why [the statute] was passed" while noting the young age of the child her fear that most of her family members did not believe her. Id. at 30-31, 535 S.E.2d at 640. Therefore, the Supreme Court held, the trial judge erred because he failed to make a case-specific finding that the procedure was necessary.²⁰ Id.

In Appellant's case, the trial judge did not abuse his discretion because he made case-specific findings regarding the necessity of the closed-circuit procedure for Victim 3 and there was sufficient evidence supporting his findings.²¹ Here, the trial judge based his ruling allowing the closed-circuit procedure on the testimony from the expert, Thompson-Loftis, who was Victim 3's counselor of almost two years, and on his observations of Victim 3 herself. (R. p. 570, line 24 – p. 571, line 1; see also p. 42, lines 1-4). Importantly, Thompson-Loftis confirmed that Victim 3 was fearful of Appellant and afraid she had done something wrong; that if Victim 3 were to have to testify in-court in front of Appellant, it would be extremely overwhelming for her and she would probably regress to an extent that her life would be disrupted; that under these

²⁰ Chief Justice Toal dissented and would have held that the trial judge's findings were sufficient where it was clear from the record that he did make a case-specific finding as to the victim and this finding was obviously supported by testimony in the record. Bray at 32-34, 535 S.E.2d at 641-42 (Toal, C.J., dissenting).

²¹ Note that, although the State specifically mentioned the Bray case when it made its motion for closed-circuit testimony, Appellant failed to raise any objection on the ground that the trial judge failed to make case-specific findings. (See R. p. 21, lines 5-6; see p. 571, lines 2-24). See State v. Patterson, 324 S.C. at 19, 482 S.E.2d at 767 ("Appellant is limited to the grounds raised at trial." (citation omitted)).

circumstances Victim 3 would likely shut down emotionally to a degree that was more than mere nervousness or anxiety; and that there was a strong possibility that testifying in front of Appellant would traumatize Victim 3 and could result in her having more problematic behaviors than she started with. (R. p. 24-33). Additionally, the trial judge observed Victim 3 when she attempted to testify in open court in front of Appellant and saw that each of two times that Victim 3 looked over at Appellant, Victim 3 “froze up” and completely stopped talking. (R. p. 568, line 14 – p. 569, line 13). The victim also had trouble testifying about basic information and at times was unable to answer questions at all. (See R. p. 560-71).

Unlike in Bray, the trial judge here made case-specific findings after discussing the expert’s testimony regarding Victim 3 and after considering Victim 3’s statements and demeanor during her attempt to testify in court. (See R. p. 568-71; see also p. 42, lines 1-4). The judge found that Victim 3 was traumatized by Appellant’s presence and that she “shut down” and “froze up” when the prosecutor was trying to elicit her testimony in Appellant’s presence. (R. p. 569-71). The trial judge concluded by stating that “I find [Victim 3] has special needs and that she would not be able to – to be able to testify in – court for whatever reason after looking at [Appellant] or looking at – directly at the jury she shut down.²² So we’ll try it this way where there’s no jury and [Appellant] is not present and with – with the safeguards that are provided by statute. And again she

²² The fact that the trial judge found that the presence of the jury also traumatized Victim 3 lends additional support to the finding that the closed-circuit procedure was appropriate; however, contrary to Appellant’s suggestion (see Brief of Appellant, p. 37-39), the fact that the victim might have **also** been traumatized by additional factors is not a basis for reversal where the trial judge made case-specific findings regarding the necessity of the closed-circuit procedure which are supported by the record. See In Interest of Cisco K., 332 S.C. 649, 506 S.E.2d 536 (Ct. App. 1998) (no abuse of discretion in allowing the child victim to testify via closed-circuit television where the trial judge relied on testimony of an expert witness indicating the victim was afraid of the defendant and would be re-traumatized if she had to testify in front of the defendant **and** “in a courtroom full of strangers” (emphasis added)).

still might not be able to testify. If she's not, she can't testify; it's as simple as that. But we'll – we will see.” (R. p. 571, lines 2-8).

Significantly, even before Victim 3's attempt to testify, the trial judge had already stated that “the expert's testimony is such that it is clear, in her opinion, [Victim 3] would be traumatized by testifying” and that “she . . . very well could regress in how she responds generally when you get down to that subject.” (R. p. 42, lines 1-4). He further elaborated that “the counselor's testimony was such that there is a significant chance that [Victim 3] will shut down and not be able to testify and also be harmed emotionally by attempting to testify in front of [Appellant].” (R. p. 42, lines 22-24). Considering the statements made by the judge immediately after the expert's testimony in conjunction with the statements he made following Victim 3's attempt to testify, it is clear that the judge concluded that Appellant's presence would cause more than *de minimis* trauma to Victim 3 and that testifying via closed-circuit television was necessary to protect her from that trauma.²³

Based upon the foregoing, the trial judge did not abuse his discretion by allowing Victim 3 to testify using the closed-circuit television procedure. See Bray at 27, 535 S.E.2d at 639 (holding that a decision to allow videotaped or closed-circuit testimony is reversible only where it is shown that the trial judge abused his discretion in making such a decision); see also State v. Lopez, 306 S.C. 362, 412 S.E.2d 390 (1991) (children were properly allowed testify out of the line of sight of the defendant where expert testimony established they were fearful of the defendant and would be traumatized by testifying in front of her and where, although one of the boys denied - “as [wa]s typical of this age” -

²³ The case law does not require that the trial judge find the victim's trauma would be significant or momentous; instead it requires only that the judge find that the victim would experience trauma that is more than *de minimis*. See e.g., Bray at 29, 535 S.E.2d at 640 n4.

that he was afraid of the defendant, the trial judge was able to observe both children and their demeanor); In Interest of Cisco K., 332 S.C. at 649, 506 S.E.2d at 536 (the trial judge did not err in allowing the child victim to testify via closed-circuit television where she relied on the testimony of the expert witness, who had conducted eighteen treatment sessions with the victim, stating that the victim was afraid of the defendant and would be re-traumatized if she had to testify in front of the defendant and “in a courtroom full of strangers”); cf. State v. Lewis, 324 S.C. 539, 478 S.E.2d 861 (Ct. App. 1996) (in case involving six alleged victims of child sexual abuse at the defendant’s daycare, the trial judge erred in ruling that one of the victims could testify via closed-circuit television where there was no expert testimony supporting the victim would be traumatized; where the victim’s own testimony indicated that any trauma she might experience from testifying in front of the defendant was *de minimis*; and where the trial judge’s ruling allowing that particular victim to testify via closed-circuit procedure was based upon his erroneous conclusion that if any of the victims were allowed to testify via closed-circuit television, they all should testify in that manner for consistency’s sake).

Harmless Error

In any event, any error in allowing Victim 3 to testify via closed-circuit television was harmless beyond a reasonable doubt. The harmlessness of any error is supported by the fact that Victim 3’s trial testimony was cumulative to what Victim 3 stated in her forensic interview videos; considering the presence of corroborating evidence as to Victim 3’s allegations on material points (R. p. 429-48; p. 460-73; p. 595-96); and in light of the fact that Appellant was permitted to cross-examine Victim 3 in exactly the same manner as he would have if Victim 3 had been present in court. (See R. p. 590-92).

See State v. Graham, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994) (listing harmless factors to consider). Furthermore, as discussed several times previously, there was overwhelming evidence of Appellant's guilt such that any trial error, including any error in allowing Victim 3 to testify via closed-circuit television, was harmless beyond a reasonable doubt. See e.g., State v. Fletcher, 379 S.C. at 25, 664 S.E.2d at 484 (it is well-settled that error is harmless where there is overwhelming evidence of the defendant's guilt). Therefore, a new trial is not warranted.

CONCLUSION

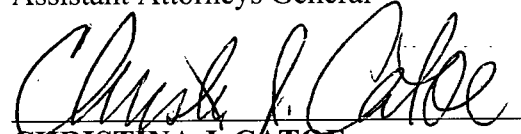
For the reasons discussed above, Respondent requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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June 26, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

The Honorable Lee S. Alford, Circuit Court Judge

Lower Court Case Nos. 2012-GS-42-2624; -2625; -2626; -2627; -2633; -2634

Appellate Case No. 2012-213228

THE STATE OF SOUTH CAROLINA,

RESPONDENT,


v.

RONASHA TAYLOR,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's most recent **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.


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June 26, 2014

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable Lee S. Alford, Circuit Court Judge
Appellate Case No. 2012-213228

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

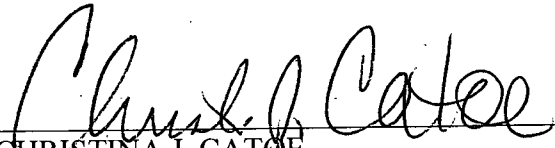
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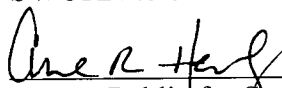
AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **Andrew R. de Holl**, Womble Carlyle Sandridge & Rice, LLP, Post Office Box 999, Charleston, South Carolina, 29402, and **Robert M. Dudek**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **26th** day of **June, 2014**.


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SWORN to before me this 26th day of June, 2014.


Notary Public for South Carolina.
My Commission Expires: 7/18/2017

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JUN 26 2014

SC Court of Appeals