THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY

Thomas L. Hughston, Jr , Circuit Court Judge

Case No. 2013-000638

The State of South Carolina, Respondent,

v.

George White, Appellant.

FINAL REPLY BRIEF OF APPELLANT

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

Respondent argues that the trial court acted within its discretion by allowing evidence, over defense objection, of a videotaped forensic interview with the minor However, the trial court's discretion is not unlimited. An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *State v Pagan*, 369 S C 201, 208, 631 S.E.2d 262, 265 (2006). Here, the trial court abused its discretion by admitting evidence that did not satisfy statutory requirements for admissibility and was therefore controlled by an error of law.

1. The Trial Court Abused Its Discretion By Admitting the Out-of-Court Statement When the Sound Quality Was Inadequate to Satisfy the Statutory Requirements.

First, Respondent argues that there was no error in admitting the videotape because the sound was preserved, and the jury could hear it If the sound were adequate for the jury to hear the entire statement, as Respondent contends, then there would have been no need for the trial court to request a written transcript and no reason for the trial court to allow the jury to have a copy of the unofficial written transcript of the interview. The statute does not provide for the trial court to allow the jury to have a transcript of the recording, and the Respondent has not offered any authority showing otherwise

Instead, Respondent argues that the trial court had discretion to admit the transcript because the statute contemplates the admission of an out-of-court statement through mediums

other than audio and visual recording, as set forth in subsection 17-23-175(F). However, when the trial court suggested proceeding under 17-23-175(F) due to the problems with the audio recording, the State maintained that the interview had been properly preserved on videotape, consistent with the statute, and the trial court therefore proceeded on that basis. (Transcript, pp. 309-310) Any attempt to introduce the statement under Subsection (F) is fundamentally inconsistent with the admission of the audio and video recording of the statement under Subsection A. For Subsection (F) to apply, the trial court must find that "necessary visual and audio recording equipment was unavailable," 17-23-175(F)(1), which plainly was not the case here.

2. The Statute Did Not Authorize the Trial Court to Allow the Jury to Review An Unofficial Written Transcript of the Statement.

Respondent also argues that the trial court did not err in allowing the jury to review a written transcript, because Subsection (F) provides for admission of out of court statements in mediums other than a visual and audio recording. This is inconsistent with the plain language of the statute, however, which provides that a medium other than a visual and audio recording is admissible *only* if all the requirements are met S.C. Code Ann. § 17-23-175(F) In this case, the audio and visual recording equipment was available, therefore, section 17-23-175(F)(1) was not satisfied, and there was no basis for the trial court to allow the jury to have a written transcript.

3. Admission of the Statement Despite Sound Quality Problems and Accompanied By A Written Transcript Was Not Harmless Error.

Respondent also argues that, even if the trial court erred by admitting the video with sound problems and/or the written transcript, any error was harmless. Contrary to the Respondent's argument, Appellant was prejudiced by the trial court's error in admitting the video recording accompanied by a written transcript. The statement itself lacked guarantees of

trustworthiness, as discussed below. The trial court's decision to allow the jury to have a copy of the written transcript exacerbated the error as it encouraged the jury to read the transcript rather than to watch the video and observe the minor's demeanor. There was no physical evidence of any sexual assault in this case and no direct evidence to support the elements of the crimes charged. Instead, Respondent's entire case was circumstantial and depended heavily on the minor's statements. Allowing the jury to read the transcript distracted the jury from observing the minor's demeanor on the videotape, and defense counsel specifically objected on these grounds at trial. (Transcript, pp. 306, 343; ROA 220, 257)

As discussed in Appellant's Initial Brief, the reliability of the minor's statement was tainted and undermined by the improper questioning conducted by her neighbor, Ms. Kulpepper, the night before the forensic interview. The jury should have been encouraged to focus on the minor's statements and demeanor when repeating the words Ms. Kulpepper suggested to her, as recorded on the video, rather than reading an unofficial transcript which plainly reflected gaps in the audio recording. In addition, watching the videotape illustrated that the minor's purported identification of genital-to-genital contact was never actually recorded for the jury to see and, therefore, could not support the penetration element of the charge of criminal sexual conduct Instead, allowing the jury to read the transcript distracted the jury from watching the videotape, which was required for the jury to accurately assess the evidence the prosecution offered.

As the Court recognized in *State v Mitchell*, 286 S.C. 572, 573, 336 S E.2d 150, 151 (1985), cited on page 15 of Respondent's Brief, no particular rule of law controls the question whether an error of law resulted in prejudice. Instead, whether an error is harmless depends on the circumstances of the case. Unlike *State v Huntley*, 349 S C. 1, 562 S.E.2d 472 (2002), and

State v Odom, 382 S.C. 144, 676 S.E.2d 124 (2009), the cases cited by Respondent, here, the statutory violation resulted in prejudice at trial

4. Appellant's Challenges to the Admissibility of the Videotaped Interview Were Preserved For Appellate Review.

Respondent argues that Appellant failed to preserve its objections to admissibility of the videotaped interview at trial. Respondent first argues that defense counsel "did not have any objections" to the quality of the videotape. (Respondent's Brief, at p. 15) Respondent also argues that "trial counsel conceded the statutory requirements were met," (Respondent's Brief, p. 17) and therefore failed to preserve the argument that the statement should not have been admitted for lack of sufficient guarantees of trustworthiness. Both arguments are patently unsupported by the Record.

Before trial began, defense counsel sought to exclude the videotaped interview on several grounds. The trial court conducted a hearing to determine the admissibility of the videotaped interview outside the presence of the jury, but immediately before the videotape was played for the jury. (*See* Transcript, pp. 349-350; ROA 263-264) The trial court reviewed the videotape, and then heard the forensic interviewer, Ms. Dadin's *in camera* testimony relevant to the admissibility of the videotape. (Transcript, pp. 313-329; ROA 227-243) During that hearing, defense counsel argued that the videotape did not meet statutory requirements because the audio was not functioning properly and because the required guarantees of trustworthiness were not satisfied. Defense counsel also objected to introduction of the written transcript and that the statute itself was unconstitutional (Transcript, p. 306, 335-337, 340-341, 343, ROA 220, 249-251, 254-255, 257) The trial court overruled the defense objection to admission of the videotape on all grounds. (Transcript, pp. 341, 343; ROA 255, 257)

With regard to the sound quality issues, the Record plainly shows that defense counsel objected to admission of the recorded statement and transcript both because the transcript lacked sound quality *and* because the transcript would distract the jury's attention from watching the videotape and observing the minor's demeanor. The trial court expressly considered and overruled the defense objection on these grounds. (Transcript, p 343, ll. 6-16; ROA 257)

With regard to the particularized guarantees of trustworthiness, the trial court specifically acknowledged and overruled the defense objection that the statements were unreliable and did not meet the statutory requirements because of concerns that the interview was tainted. (Transcript, p 336, ll. 5-21; ROA 250) The fact that the minor ultimately offered testimony that conflicted with the statements made during the recorded interview is not a new objection that was not raised at trial, and Appellant is not seeking review of a new argument. Instead, the inconsistency between the minor's trial testimony and recorded statement is a fact which further elucidates the objection defense counsel repeatedly raised at trial – that the recorded statement should not have been admitted because it did not comply with the statute, including because required guarantees of trustworthiness were not satisfied. This objection was repeatedly overruled by the trial court, and defense counsel was not required to re-assert the objection to introduction of the videotape each time the minor made a statement that was inconsistent with the videotape. *State v Forrester*, 343 S C 637, 642, 541 S.E 2d 837, 840 (2001) ("where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection."), *State v Ross,* 272 S.C. 56, 60-61, 249 S.E.2d 159, 162 (1978) ("Once the court rules on an objection to a line of questioning, it is not necessary that counsel repeat his objection after each question.").

Therefore, the issue of whether the trial court abused its discretion by admitting a forensic video recording when that recording did not satisfy statutory standards for admission was properly raised at trial and is properly before this Court.

5. The Trial Court Abused Its Discretion By Admitting the Statement.

Finally, Respondent argues that the videotaped forensic interview possessed the required guarantees of trustworthiness because it was conducted by a qualified, skilled interviewer. Although Appellant does not concede that Ms Dadin was qualified, Ms. Dadin's qualifications to conduct a forensic interview were not the issue. Instead, the minor's recorded statement was tainted by the events of the prior evening, when the minor's neighbor, Ms. Kulpepper, questioned the minor during an emotionally fraught scene at the minor's home. Ms. Dadin herself acknowledged that the emotional scene and pointed questions by Ms Kulpepper were exactly the type of situation that should be avoided in order to conduct a forensic interview properly. (Transcript, pp. 320, 327-28, 378-79; ROA 234, 241-242, 292-293.) Indeed, Respondent's citation to *State v Michaels*, on page 23, fn 1, of Respondent's Brief, illustrates this very point. *State v Michaels*, 642 A.2d 1372, 1379 (N.J. 1994) ("highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child's recollection of events. . ."). The critical statement on which the prosecution relied – the minor's statement that "it hurt" – mirrored Ms. Kulpepper's statement to the minor to the effect that "if he had put his weiner inside you, it would have hurt." (Transcript, p. 82, ll. 14-20; ROA 41; Transcript, p. 147 L. 4-12; ROA 105.) The fact that there were inconsistencies between the prior recorded statement and the minor's testimony at trial, as discussed above, further reinforces the argument defense counsel articulated to the trial court – that the statement was untrustworthy and should

not have been admitted As discussed above, this issue was raised to and ruled upon by the trial court, and is therefore properly before this Court for review on appeal.

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

The statute is unconstitutional as applied to this case. As defense counsel objected at trial, introduction of the minor's prior statement, as recorded in the videotape of the forensic interview, violated Appellant's due process rights. (Transcript, pp. 340-341; ROA 254-255)

Respondent's Brief does not address any of the limited South Carolina case law addressing the constitutionality of Section 17-23-175, which was discussed in Appellant's Initial Brief. Instead, Respondent cites *State v Russell*, 383 S C. 447, 679 S E.2d 542 (Ct. App. 2009) for the proposition that the legislature has made a specific allowance for these out-of-court statements that would otherwise be inadmissible and further relies on a case decided in 1985 by the Kansas Supreme Court to explain the rationale behind South Carolina's statute. Neither of these authorities addresses the issue presented or supports Respondent's argument, and no South Carolina appellate court has yet ruled on whether Section 17-23-175 satisfies due process standards.[1]

Appellant's due process rights were violated by the admission of hearsay testimony pursuant to a statute which creates a basis for introduction of evidence that would otherwise be inadmissible bolstering evidence without rational justification None of the reasons cited in the *Myatt* case from Kansas supports the Respondent's argument The quoted portion of that

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[1] In *State v Russell*, 383 S.C. 447, 451 n. 2, 679 S.E.2d 542, 544 (Ct App. 2009), the appellant argued the statute was unconstitutional because it allowed improper bolstering, but the court held that this issue was not properly preserved for appellate review.

decision states that the justification for allowing the out-of-court statement is that the minor may be unable to testify at trial for various reasons, such as tender age or inability to appreciate the proceedings in which he or she is a participant *State v Myatt*, 697 P.2d 836, 841 (Kan 1985). *Myatt* is inapposite. The Kansas statute at issue in *Myatt* provided for an exception to the hearsay rule for a child's statement, but only if the child was *unavailable* to testify, and only after the trial court made a determination that the statement was reliable, taking into account various factors, including the child's age. Unlike the Kansas statute, the South Carolina statute at issue here only applies if the minor is *available* to testify at trial. Therefore, the rationale provided by the *Myatt* court cannot shed any light on the purposes of the South Carolina statute. If a minor is present at trial and able to testify to the details of the alleged sexual abuse, then there is no need to bolster that statement with a prior consistent statement. Instead of considering the age or capacity of the complaining witness to testify, however, the South Carolina statute imposes a mechanical application of the rule if the minor is under the age of twelve when the forensic interview is conducted. In this case, the statement was made when the minor narrowly fit the statutory age requirements, but the trial occurred when the minor was sixteen, familiar with "the birds and the bees" and fully capable of testifying about her allegations of sexual assault. Therefore, admission of the statement pursuant to the statute did not serve any discernible, rational purpose.

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

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

1. Ms. Dadin's Testimony Improperly Bolstered The Minor's Credibility.

Respondent argues that Ms Dadin's testimony was properly admitted as "behavioral background" evidence about common characteristics of sexual assault victims. Respondent cites three South Carolina cases and a host of cases from jurisdictions around the country in support of the assertion that behavioral background evidence is commonly permitted in cases involving allegations of sexual assault Respondent's cases are inapposite, however, because they do not stand for the proposition that a court may properly admit a social worker to offer testimony that improperly bolsters the credibility of an alleged sexual assault victim.

First, the three South Carolina cases cited, *State v Weaverling*, 337 S.C. 460, 523 S E 2d 787 (Ct. App. 1999), *State v Schumpert*, 312 S.C. 502, 435 S E.2d 859 (1993), and *State v White*, 361 S.C. 407, 605 S.E.2d 540 (2004), were decided long before important changes in the law impacting treatment of expert testimony, both in South Carolina and in other jurisdictions nationwide. Among other key rulings, in *State v White*, 382 S C 265, 676 S.E.2d 684 (2009), the South Carolina Supreme Court overruled previous precedent and held that the trial court's gate-keeping function applied to the testimony of a nonscientific behavioral science expert As such, the trial court was required to address foundational requirements of qualifications and reliability as well as whether the proposed evidence would assist the trier of fact before admitting the expert testimony. In this case, the trial court abused its discretion by qualifying Ms. Dadin to

testify as a behavioral science expert in "the dynamics of child abuse" because, in addition to her lack of qualifications, her testimony was unreliable and served to improperly bolster the credibility of the minor.

Second, the cases cited by Respondent are factually distinguishable because the courts in those cases did not allow a social worker, who conducted a forensic interview of the alleged victim at the request of the police department, to be qualified as an expert witness offering "behavioral background" evidence while, at the same time, providing a foundation for admission of a videotaped forensic interview and commenting on the credibility of the minor's statements. In this case, unlike the cases cited by Respondent, the trial court allowed the social worker who had conducted the forensic interview with the minor to testify as an "expert" on the dynamics of child abuse This case is, therefore, immediately distinguishable from *Weaverling* (1999), *Schumpert* (1993) and *White* (2004), because, here, the expert witness was not testifying as an "educator expert" but rather as a social worker who had interviewed the minor for the purposes of determining whether her allegations should be pursued by law enforcement.

In *State v Weaverling*, 337 S C. 460, 474-75, 523 S.E.2d 787, 794 (Ct. App. 1999) the testifying expert had no prior contact with the alleged victim, and the expert testimony was allowed strictly for the stated purpose of "educating" the jury about the dynamics of sexual abuse. In *State v Schumpert*, 312 S.C. 502, 506, 435 S.E 2d 859, 862 (1993), a mental health counselor who had interviewed the alleged victim testified that the victim's behavioral symptoms were typical for a victim of sexual abuse. The Court in *State v Schumpert*, however, specifically held that expert behavioral science testimony should only be admitted if its probative value outweighs its prejudicial effect. In this case, because Ms. Dadin was the forensic interviewer acting on behalf of the police, the prejudicial effect of her testimony could not be outweighed.

Any benefit to the jury of hearing about the behavioral characteristics of abuse victims was outweighed by the prejudicial effect of allowing the social worker who interviewed the minor for the police to testify about the behavior of abuse victims and to comment on the credibility of the minor. Further, unlike this case, the expert in *Schumpert* did not testify about the credibility of the alleged victim. Likewise, in *State v White*, the expert who testified was a psychotherapist who had been treating the alleged victim and not a forensic interviewer acting on behalf of the police Further, the facts of the case do not indicate that the expert was permitted to testify to statements made by the alleged victim nor to comment on the alleged victim's credibility Instead, the expert was permitted to testify only about the alleged victim's behavior. By contrast here, Ms. Dadin's testimony improperly bolstered the credibility of the minor.

Further, nothing in Respondent's cases supports the admissibility of expert testimony to comment on or otherwise bolster the credibility of a witness. To the contrary, the key fact that continues to set Ms. Dadin's testimony apart from the behavioral background evidence found admissible in the cases cited by Respondent is that Ms Dadin interviewed the minor on behalf of the police department as a forensic interviewer, and her testimony, both implicitly by its very nature, and expressly on re-direct examination, improperly commented on the minor's credibility. (Transcript, p 384; ROA 298) *Compare, e g, People v Carroll*, 95 N.Y.2d 375, 387, 740 N.E.2d 1084, 1091 (2000) (expert witness offered for the purpose of instructing the jury about reasons why a child might not immediately report incidents of sexual abuse had never interviewed either the defendant or the alleged victim and was unaware of the facts of the case); *W R C v State*, 69 So. 3d 933, 939 (Ala. Crim. App. 2010) (expert's testimony was general in nature, and no testimony was presented about the alleged victim specifically); *Com v Bougas*, 59 Mass. App. Ct. 368, 375, 795 N.E.2d 1230, 1236 (Mass. App. Ct. 2003) (while expert

testimony is admissible to explain apparently illogical behavior by the alleged victim, it is inadmissible to comment on the alleged victim's credibility); *People v Spicola*, 16 N.Y.3d 441, 466, 947 N.E 2d 620, 636 (N.Y. 2011) (behavioral background expert witness had never met the alleged victim and did not know details of allegations of sexual abuse)

Moreover, none of the cases cited by Respondent undercut the well-established principle of South Carolina law that if an expert's testimony has the effect of commenting to the jury on the credibility of the witness, the testimony is impermissible and should be excluded. For example, in *State v Morgan*, 326 S.C. 503, 515, 485 S.E.2d 112, 119 (Ct. App. 1997) *overruled by State v White*, 382 S.C 265, 676 S.E.2d 684 (2009), the Court of Appeals expressly recognized the prejudicial effect of allowing an expert to testify about the credibility of a witness. *Morgan*, 326 S.C. at 515, 485 S.E 2d at 119 (citing *State v Milbradt,* 756 P 2d 620, 624 (1988) ("We have said before, and we will say it again, this time with emphasis-*no psychotherapist may render an opinion on whether a witness is credible in any trial in this state* The assessment of credibility is for the trier of fact and not for psychotherapists.") and *State v Foret*, 628 So. 2d 1116, 1129 (La. 1993) ("Prejudice can result from an expert's testimony about the victim's credibility, by giving factfinders "little more than a false sense of security based on the incorrect assumption that a reasonably accurate scientific explanation" for behavior has been provided ")) Although *Morgan* was overruled by *White* to the extent *Morgan* had held that nonscientific, behavioral evidence was not subject to gate-keeping reliability standards, the *Morgan* court's holding that it is improper to allow an expert to comment, in any way, on the credibility of a witness continues to be the law in South Carolina. Additional cases are discussed on pages 18-19 of Appellant's Initial Brief

Similarly, in *State v Batangan*, 71 Haw. 552, 560, 799 P.2d 48, 53 (1990), a case cited at length on pages 26-27 of Respondent's Brief, the Hawaii Supreme Court actually found that the expert witness' testimony *should not have been admitted* because it did not satisfy the requirements of Hawaii's HRE 702 Among other reasons for that decision, the Hawaii Supreme Court recognized that the expert's testimony improperly informed the jury that the expert believed the alleged victim. Even though the expert "did not explicitly say that Complainant was "truthful" or "believable", [] there is no doubt in our minds that the jury was left with a clear indication of [the expert's] conclusion that Complainant was truthful and believable " *State v Batangan*, 71 Haw 552, 562, 799 P.2d 48, 54 (1990).

Respondent's Brief virtually ignores the significance of the more recent case law cited on pages 15-18 of Appellant's Initial Brief, in which the Supreme Court of this State has stated that there is no reason for a trial court to qualify a forensic interviewer as an expert As the South Carolina Supreme Court recently stated in *Kromah*,

> Even though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others. It is undeniable that the primary purpose for calling a "forensic interviewer" as a witness is to lend credibility to the alleged victim's allegations. When this witness is qualified as an expert the impermissible harm is compounded.

Kromah, 401 S.C. at 358, 737 S.E.2d at 499. In a footnote, the court continued

> we can envision no circumstances where [a forensic interviewer's] qualification as an expert at trial would be appropriate. . . . The rules of evidence do not allow witnesses to vouch for or offer opinions on the credibility of others, and the work of a forensic interviewer, by its very nature, seeks to ascertain whether abuse occurred at all, i.e., whether the victim is telling the truth, and to identify the source of the abuse.

Kromah, 401 S.C. at 357, n. 5, 737 S.E.2d at 499, n 5. *See also*, *State v Douglas*, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009) (error to qualify a forensic interviewer as an expert witness)

That is exactly what happened in this case, when Ms. Dadin was allowed to testify, over defense objection, as an expert in "the dynamics of child abuse " Under *Kromah* and *Douglas*, even if Ms. Dadin should have been permitted to testify at all, which Appellant does not concede, her testimony should have been limited to foundational testimony offered to support admission of the videotaped forensic interview pursuant to Section 17-23-175, and she should not have been qualified as an expert Regardless of whether any expert should have been allowed to testify as a background behavioral expert on child abuse, which Appellant does not concede, the trial court abused its discretion by allowing the social worker who conducted the forensic interview with the minor to testify as an expert on the dynamics of child abuse.[2]

2. Respondent Improperly Elicited An Opinion From Its Expert As to The Minor's Credibility.

Respondent also argues that improper bolstering is not an issue in this case because Ms. Dadin did not opine on the minor's credibility. (Respondent's Brief, p. 35) This is plainly inaccurate, because Respondent's counsel specifically elicited Ms. Dadin's opinion on whether the minor was telling the truth during the following colloquy.

Q: Did you do anything in your interview to determine whether or not [the minor] was suggestible?

A: I did.

Q. And what was that and what were the results.

A So some of the concrete examples are, I asked her about favorite things and then offer my favorite to see if she will change what she says. A lot of

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[2] Further, the prosecutor offered the testimony of the pediatric nurse who examined the minor, Ms Tracy Halasz, and Ms Halasz testified that there was no physical evidence of sexual abuse and that the minor did not show any behavioral symptoms consistent with abuse (Transcript, pp 235-37, RAO 182-183) If, as Respondent maintains, Ms Dadin's testimony was offered by way of background only and not as an opinion on the minor's behavior or credibility, then the testimony was further irrelevant because there was no evidence to support the conclusion that the minor exhibited behavioral symptoms consistent with sexual abuse

> younger kids typically, you know, between three and probably as old as eight, when I had set [sic] my favorite is chocolate, might have said, my favorite is chocolate too. She resisted suggestions several times though

(Transcript, p. 384; ROA 298) This is classic bolstering and was improperly admitted under the authorities cited on pages 15-16 of Appellant's Initial Brief.

Respondent next argues that this testimony was properly elicited because defense counsel "opened the door" to this testimony. Contrary to Respondent's argument, defense counsel did not "open the door" to allowing Respondent to elicit Ms. Dadin's opinion as to the credibility of the minor, which improperly bolstered her testimony. Ms. Dadin was qualified as an expert in forensic interviewing techniques, so that she could lay a proper foundation for admission of the videotaped forensic interview pursuant to Section 17-23-175. On cross-examination, defense counsel sought to show that the forensic interview which Ms. Dadin conducted was tainted and rendered unreliable by the emotional scene involving Ms Kulpepper that occurred the night before the interview. However, defense counsel never asked Ms. Dadin whether she had an opinion on whether the minor was telling the truth or whether it was likely that her testimony had been influenced. On cross-examination, Respondent's counsel then introduced the concept of "suggestibility" and improperly elicited Ms Dadin's opinion as to the veracity of the minor in the colloquy discussed above.

The cases cited by Respondent are unavailing In both *State v Foster*, 354 S.C. 614 (2003) and *State v Page*, 378 S.C. 476 (Ct App. 2009), the Supreme Court held the trial court had erred in finding the defendant had "opened the door" to the prosecution's evidence. In *State v Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991), appellant moved for a mistrial based on evidence linking the appellant to drug dealing, and the court observed that the appellant could not complain about evidence that was actually given during appellant's cross-examination

of a witness. Here, as in *State v Foster* and *State v Page*, defense counsel's cross-examination, which was aimed at establishing the unreliability of the forensic interview, did not "open the door" to allowing the prosecution's witness to improperly comment on the minor's credibility.

3. Appellant's Objection to Ms. Dadin's Expert Testimony Was Preserved.

Before trial began, Appellant moved to exclude the videotaped recording of the forensic interview with the minor. (Transcript, p. 13; ROA 10) The prosecution identified the forensic interviewer, Ms. Dadin, as a witness who would be called to testify in opposition to the defense's motion to exclude the recording. (Transcript, pp. 13-14, 310-311; ROA 10-11, 224-225) During the *in camera* hearing, the prosecution also proffered Ms. Dadin as an expert in the area of child abuse psychology or the "dynamics of child abuse." (Transcript, pp. 351-352; ROA 265-266)

During the *in camera* hearing conducted immediately before introduction of the recorded interview and Ms. Dadin's testimony, the trial court listened to testimony from Ms. Dadin and arguments of counsel to assess the admissibility of the recorded interview as well as Ms. Dadin's proffered expert testimony on delayed disclosure and grooming. In addition to objecting that the videotaped recording failed to meet statutory requirements for admissibility, defense counsel repeatedly objected that the proffered evidence, including the prior recorded statements and Ms. Dadin's expert testimony, was inadmissible because, among other reasons, the evidence was improper character evidence and improper bolstering evidence. (Transcript, pp. 14, 340, 342, 347-48, 357-360, ROA 11, 254, 256, 261-262, 271-274) The trial court heard, considered and overruled defense counsel's objections to introduction of both the recorded statement and Ms. Dadin's additional expert testimony immediately before introduction of the videotape and Ms Dadin's testimony. Therefore, defense counsel was not required to re-assert the objection during

the prosecution's re-direct examination *State v Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection "); *State v Ross,* 272 S.C. 56, 60-61, 249 S.E.2d 159, 162 (1978) ("Once the court rules on an objection to a line of questioning, it is not necessary that counsel repeat his objection after each question.")

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

1. Ms. Dadin's Testimony Improperly Commented on Appellant's Character.

Respondent argues that Ms Dadin's testimony was proper "general background expert testimony about the phenomenon of grooming" and did not implicate Appellant's character at all (Respondent's Brief, p. 44) Respondent argues that, rather than improper character evidence, this testimony was intended to explain the effects of grooming on a child's potential disclosure of sexual abuse and suggests that Ms. Dadin's testimony had essentially nothing at all to do with Appellant. (Respondent's Brief, p. 45)

Appellant refers to the discussion on pages 20-21 of its Initial Brief, where Appellant addresses the evidence showing that Ms Dadin's testimony about "grooming" was classic improper character evidence because Ms Dadin essentially informed the jury that by developing a relationship with the child and her family, Appellant was behaving like a child molester. The prosecution's opening and closing statements played on the improper character evidence,

attempting to convince the jury that it should convict Appellant because he was acting like a child molester, or a "wolf in sheep's clothing." (Transcript, p. 60; ROA 19)

Of the three cases cited by Respondent on page 45 in support of the proposition that Ms. Dadin's testimony about grooming was acceptable behavioral testimony, only *State v Sena*, 192 P.3d 1198 (N M. 2008) actually addresses evidence about grooming. In that case, the New Mexico court held that testimony about grooming was admissible because it was offered to show sexual intent, taking care to distinguish such evidence from impermissible general character evidence about grooming. *State v Sena*, 192. P.3d at 1204 In addition, the *Sena* court commented that expert testimony was not required to explain the concept of grooming to a jury for purposes of establishing sexual intent. *Id.*

In addition, the cases cited by Respondent on page 30 of its brief are inapposite. Most of the cases are from other jurisdictions and therefore not controlling Further, these cases do not address challenges to expert evidence on grooming as improper character evidence. *See, e g*, *Morris v State, 361 S W 3d 649, 653* (Tex. Crim. App. 2011) (objection at issue that study of "grooming" was not a legitimate field of expertise); *State v Norlander*, 2005 WI App 176, 285 Wis 2d 804, 701 N.W.2d 652 (Wis. Ct. App. Table Op. 2005) (objection to grooming evidence as improper character evidence not preserved for appellate review); *People v Diaz*, 20 N.Y.3d 569, 576, 988 N.E.2d 473, 476 (N Y. 2013) (no discussion of whether the expert evidence constituted improper character evidence); *Jones v United States*, 990 A.2d 970, 978 (D C 2010) (objection that testimony on grooming was not "beyond the ken" of the average juror and therefore not a proper basis for expert testimony).

Finally, Respondent's reliance on *State v Kirton*, 381 S.C. 7, 36-37, 671 S.E 2d 107, 122 (Ct. App. 2008) is likewise misplaced. *Kirton* did not involve admission of background

behavioral evidence on grooming. Instead, in *Kirton*, the court found evidence of a six to seven year pattern of escalating abuse was admissible as evidence of a common scheme or plan. No such evidence was offered in this case.

2. Appellant Properly Preserved Its Objection To Ms. Dadin's Testimony.

Respondent argues that Appellant failed to preserve any objection to Ms. Dadin's testimony based on lack of qualifications. Defense counsel specifically objected to Ms. Dadin's qualifications as an expert beyond the limited purpose of providing foundational testimony for the videotaped interview (Transcript, pp. 342, ll. 9-13, 358-59, ROA 256 (Ms Dadin's testimony about grooming was inadmissible character evidence and "way outside the bounds of her expertise.")) Defense counsel further objected that the expert testimony on grooming should not have been allowed because it would not be helpful to the jury. The trial court heard and overruled on these objections. (Transcript, pp. 359-360; ROA 273-274) When the prosecution questioned Ms. Dadin about the meaning of the term "grooming," defense counsel again asserted the previously overruled objection, and the trial court stated, "Your position is maintained." (Transcript, p. 363; ROA 277) Therefore, the issue was properly preserved for review on appeal.

3. The Trial Court Abused Its Discretion By Qualifying Ms. Dadin To Testify As An Expert In Child Abuse Dynamics.

As discussed above, it was improper to allow Ms. Dadin to testify as an expert on "the dynamics of child abuse" under South Carolina Supreme Court precedent, regardless of her background, training or experience because she was the social worker who conducted the forensic interview and because she improperly commented on the minor's credibility. The cases cited on pages 46-49 of Respondent's Brief address the specific qualifications of experts admitted to testify in other cases. None of those cases, however, involved qualification of the social

worker who had conducted a forensic interview of the minor as a behavioral background expert. Therefore, regardless of whether Ms. Dadin might have been qualified to testify as an expert in the "dynamics of child abuse," which Appellant does not concede, she should not have been permitted to offer testimony as a so-called "educator expert" in this case when she personally interviewed the minor and improperly offered her opinion on the minor's credibility

Second, the trial court should not have admitted Ms. Dadin's testimony about "grooming" because it improperly commented on the character of Appellant, as discussed above. Appellant was substantially prejudiced by the trial court's error in allowing Ms. Dadin to testify as an expert about "grooming" As discussed in Appellant's Initial Brief, the minor's statement alleging an assault was the key evidence in the prosecution's case. There was no physical evidence of abuse, and the pediatric nurse practitioner who examined the minor did observe any behavioral symptoms consistent with abuse. Although the State attempted to offer circumstantial evidence of sexual intercourse between Appellant and the child based on items found in the back of Appellant's van, the evidence was virtually irrelevant and did not support the allegations of abuse. (Transcript, pp. 268-270; ROA 215-217) Given the lack of direct or substantial circumstantial evidence of sexual assault, the jury's verdict was likely influenced by the improper character evidence Accordingly, Appellant respectfully requests an order reversing the convictions on both charges and remanding the case for a new trial.

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

To meet its burden of proof on the charge of criminal sexual conduct with a minor under S.C. Code Ann. § 16-3-655(B), the State was required to present either direct evidence, or substantial circumstantial evidence, supporting the conclusion that a part of Appellant's body made an intrusion into the minor's "genital opening." For the reasons discussed in Appellant's Initial Brief at pages 27-32, Respondent failed to meet that burden.

Respondent cites *State v Morgan,* 352 S C. 359, 373, 574 S.E.2d 203, 210 (Ct. App. 2002) in support of the proposition that "penetration of the vagina is not necessary or required" to prove a sexual battery. However, the issue in *Morgan* was whether the State was required to prove vaginal penetration to prove a sexual battery had occurred by virtue of the act of cunnilingus. The court held it was not, because cunnilingus was a separately enumerated act that constituted a sexual battery under the statute. Moreover, the trial court in *Morgan* refused to charge the jury on sexual battery by sexual intercourse because there was no evidence of penetration, despite the fact that the alleged victim had stated that it had "hurt" when the defendant touched her with his penis. *Morgan*, 352 S.C. at 363-64, 574 S E.2d at 205. In this case, however, the crime charge is sexual battery by sexual intercourse, which, unlike *Morgan*, requires proof that a part of Appellant's body made an intrusion into the minor's "genital opening." *See*, *State v Marshall*, 273 S C 552, 554, 257 S.E.2d 740, 742 (1979). Here, as in

Morgan, there was no evidence of vaginal penetration, as required to sustain the charge of sexual intercourse.

As the discussion on pages 29-31 of Appellant's Initial Brief illustrates, there was no direct evidence of penetration, or intrusion into the minor's genital opening. Therefore, Respondent was required to prove an intrusion by *substantial* circumstantial evidence As our Supreme Court has repeatedly recognized, "mere suspicion is insufficient to support a guilty verdict." *State v Odems*, 395 S.C 582, 590, 720 S.E.2d 48, 52 (2011). Viewed in the light most favorable to Respondent, the evidence offered at trial creates, at best, a suspicion that there may have been penetration. This is insufficient as a matter of law to support the crime charged. *See State v Hepburn*, 406 S.C 416, 438, 753 S.E.2d 402, 413 (2013), *reh'g denied* (Jan. 31, 2014) (trial court erred in denying appellant's motion for directed verdict because Respondent had failed to present substantial circumstantial evidence of the crime charged, homicide by child abuse); *State v Bostick*, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011) (trial court erred in denying directed verdict where evidence raised only a suspicion of guilt).

Citing *State v Mathis* and *State v Johnson*, Respondent argues that the jury was entitled to assume that there had been an intrusion, based on trial testimony that Appellant sat the minor on his lap, facing him, with no clothes on and rocked her back and forth, and the minor's statement that it hurt. In *State v Johnson*, 334 S.C 78, 512 S.E.2d 795 (1999), the court found there was sufficient evidence of an intrusion where the minor testified that the defendant touched her and it hurt, and where the physical examination revealed that she had suffered an injury inside her vagina that was consistent with sexual abuse. In *State v Mathis*, 287 S.C. 589, 593, 340 S.E.2d 538, 541 (1986) the court found there was sufficient evidence of an intrusion where

the six-year-old witness testified that the defendant had touched her with his penis and that it hurt, but could not remember whether the defendant had put his penis inside her body.

This case is distinguishable on its facts from *Johnson* and *Mathis*. Unlike *Johnson*, where there was physical evidence of intercourse, here, there was no physical evidence of intercourse. The physical examination conducted by the pediatric nurse was normal, and revealed no physical evidence of sexual abuse, nor behavioral changes consistent with sexual abuse. Detailed examination of a comforter and paper towels found in the back of the van where the minor testified the alleged abuse occurred revealed no relevant physical evidence and could not support the conclusion that Appellant engaged in an act of sexual intercourse with the minor, involving penetration, in the back of the van or anywhere else

Unlike *Mathis*, where the six-year-old witness testified that the defendant had touched her with his penis, here, the sixteen-year-old witness denied ever having seen Appellant's penis, and testified that she didn't know whether there had been penetration. Although Respondent argued that the minor's statements during the recorded forensic interview established genital-to-genital contact, the recording does not show the body parts the minor purportedly identified, and therefore cannot be considered evidence of penetration.

Based on the lack of any direct evidence, and the lack of substantial circumstantial evidence, Respondent failed to meet its burden of proving an essential element of the crime charged Therefore, the trial court erred by denying Appellant's motion for directed verdict on the charge of criminal sexual conduct with a minor in the second degree, and Appellant respectfully requests that this Court vacate the conviction and enter a judgment of acquittal on the charge of criminal sexual conduct with a minor in the second degree.

CONCLUSION

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

Respectfully submitted,

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November 7, 2014

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IN THE COURT OF APPEALS

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Appeal from Charleston County

Thomas L. Hughston, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

GEORGE WHITE,

APPELLANT

Appellate Case No. 2013-000638

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with the Final Reply Brief of Appellant by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es): David Spencer, Esquire, State of South Carolina, Office of the Attorney General, 1000 Assembly Street, Room 519, Columbia, SC 29201 (two copies); Robert M. Dudek, Esquire, Chief Appellate Defender, SC Commission on Indigent Defense, Division of Appellate Defense, P.O Box 11589, Columbia, SC 29211 (one copy); George White, SCDC ID: 354767, Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669 (one copy).

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November 7, 2014