STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY

Court of General Sessions

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2014-000568

THE STATE,

Respondent,

v.

RONALD LEE LEGG,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

An Horry County Grand Jury indicted Appellant for committing a lewd act on a minor. (R.* Indictment.) On March 10, 2014, Appellant proceeded to trial before the Honorable Edward B. Cottingham and a jury. William Isaac Diggs, Esquire, represented Appellant, and Assistant Solicitor Martin Spratlin represented the State. The jury found Appellant guilty, and Judge Cottingham sentenced him to twelve years' imprisonment, and ordered sexual offender registry and mandatory GPS monitoring. (Tr. 457.) On March 13, 2014, Appellant appeared before Judge Cottingham for post-trial motions, where Appellant again asked for a directed verdict, argued section 17-23-175 was unconstitutional, and moved for a new trial based on missing evidence. (Tr. 458-60.) Judge Cottingham denied the motions. (Tr. 462-64.)

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

When M.W. (Victim) was between the ages of ten and eleven, between June 2010 and June 2011, Appellant touched her inappropriately. (Tr. 202, line 22–Tr. 205, line 23; Tr. 225, lines 6-11.) Eventually, Victim told her mother about the inappropriate touching, and her mother reported it to the police. (Tr. 183, line 16–Tr. 184, line 12; Tr. 212, line 17–Tr. 213, line 6; Tr. 224, line 24–Tr. 225, line 2.) The police arrested Appellant a few days later and charged him with committing a lewd act on a minor. (Tr. 324, lines 18–23; R.* Indictment.)

Pretrial, the State moved to admit the forensic interview video of Victim, and Appellant moved to exclude it. (Tr. 106, lines 2–6.) The State explained how the interview met the five elements of the statute. (Tr. 106, line 17–Tr. 109, line 20.) Appellant objected to the State's relying on the forensic interviewer video statute, specifically challenging its constitutionality on the basis of its being arbitrary, being used to bolster the victim, and allowing the State "two bites at the apple." (Tr. 110, lines 10–21; Tr. 111, lines 5–23.) The trial judge asked the State whether the video contained a statement by the interviewer that the child was telling the truth, and the State answered it redacted, in compliance with State v. Kromah, portions of the video where the interviewer discussed the necessity to tell the truth. (Tr. 114, lines 13–24.)

The State called Natalia Achury Demaio, the forensic interviewer, to the stand. (Tr. 116, lines 14–19; Tr. 119, lines 22–15.) She confirmed all portions of the interview in which she told Victim to tell the truth had been redacted from the copy of the video. (Tr. 122, lines 4–22.) The State entered the videotape of the forensic interview into evidence for purposes of the pretrial hearing, without objection by Appellant. (Tr. 123, lines 8–16.) Prior to the trial judge viewing the video, Appellant cross-examined Demaio

concerning the interview, her technique and training, and the report she wrote. (Tr. 124–30.) When the State objected to the line of questioning regarding the report, the trial judge allowed Appellant to continue and pointed out that he must consider the totality in order to assess the trustworthiness before the video could be viewed by the jury. (Tr. 130, line 22–Tr. 131, line 24.) When Appellant asked Demaio if she believed Victim at the time of the interview, Demaio answered, "It is not my job—it was never my job to determine whether the child is telling the truth or not, if I believed the child or not." (Tr. 132, lines 1–4.)

The trial judge then watched the forensic video in the presence of counsel and Appellant. (Tr. 137, line 20–Tr. 138, line 1.) Appellant argued a portion of the video where the interviewer says she appreciates Victim telling the truth should not be played before the jury, and the trial court agreed even though he did not hear her say that. (Tr. 138, lines 10–25.) The State agreed to turn off the recording before it got to that part. (Tr. 139, lines 1–16.) Appellant again tried to argue the video should not be played at all, to which the trial judge stated, "Well, that may be for the legislature, but I do not have the authority to order it not played provided it meets the statutory requirements." (Tr. 139, line 17–Tr. 140, line 12.) Ultimately, the trial judge ruled:

> I have listened to that child very carefully. I was impressed with her frankness, with her candor, with her honesty, and I conclude for the purposes of this hearing that that testimony is trustworthy. Of course, that will be for the jury to determine, but for the purposes of this hearing, I've reviewed all the elements, five of them that I must find, taken them into consideration, and conclude that it has the appearance of trustworthiness. It's for the jury to determine.

(Tr. 144, lines 8–17.)

In his opening statement, defense counsel told the jury, "[Y]ou'll have a chance to look at the interview of this child where she claims these interactions were taking place. You can tell a little bit on the tape, but we'll bring it out more through the testimony." (Tr. 166, lines 1–4.) He also advised the jury: "When you look at the tape of the video, if you have a chance to see it, we'd ask you to look for evidence of any trauma this child suffered, or is it more the nature of something she's making up as they go along. . . . And we want to look and see from the words of this child if there's any evidence that she might have been coached . . . ." (Tr. 167, lines 7–10, 13–15.)

Victim's mother testified that Victim called her at school and told her Appellant had spread her legs and put his fingers down her "butt crack." (Tr. 184, lines 3–6.) She called the police on the way to her house, and an officer met her there. (Tr. 184, lines 9–12.) Victim then testified she used to go over to Appellant's house approximately three times a week when she was ten years old and lived near him. (Tr. 202, line 22–Tr. 206, line 3.) He would make her write papers about things she had done that he did not like. (Tr. 206, lines 17–25.) Victim testified Appellant "would touch me in the wrong places and it would make me feel uncomfortable." (Tr. 208, lines 15–25.) She specifically stated that he touched her vagina over her clothes. (Tr. 209, lines 1–7.) She further explained that on the day she told her mother, he touched her under her clothes. (Tr. 212, lines 1–17.) She testified, "[H]e came behind me and stuck his hand down in my pants, like in my butt crack, and he—I said—he was spreading my legs, and I said can you stop. He said I'm just stretching you." (Tr. 212, lines 17–21.)

Additionally, Victim testified to other instances of abuse and inappropriate behavior by Appellant. Victim testified Appellant pulled her bathing suit bottoms off while they were swimming in the river and swam away with them, laughing. (Tr. 213,

lines 14–23.) She also recounted a time when she and her brother went camping with Appellant and she asked to sleep next to her brother, but Appellant said no and slept between them. (Tr. 216, lines 3–16.) She testified Appellant put his arm around her and grabbed her by her vagina and pulled her toward him. (Tr. 216, lines 17–22.) She testified he touched her "butt" when she rode in his truck with him and also touched her "boobs." (Tr. 221, lines 1–11.) Appellant also exposed himself to her at his house when he was getting ready to take a shower. (Tr. 222, lines 5–9.) Victim also shared that Appellant talked about his private part with her and referred to it as "congressman." (Tr. 223, lines 17–24.) He also showed Victim sex movies and tried to go into the bathroom when she was in there, which led her to ask her friend Jessica to stand in front of the door when she used it. (Tr. 224, lines 4–18.) She testified she did not tell her mother about all about the things Appellant did to her because she was scared her mother would not believe her. (Tr. 224, lines 19–21.)

After the State concluded its questioning of Victim, Appellant decided to allow the trial court to play the forensic interview video before cross-examination. (Tr. 226, line 1–Tr. 227, line 23.) After the video was played, Appellant cross-examined Victim using the transcript of the video. (Tr. 236, lines 19–23.) Defense counsel asked her about the first time Appellant touched her inappropriately, and Victim testified it happened in his truck. (Tr. 240, line 24–Tr. 241, line 20.) He then pointed out to her that in the transcript when asked about the first time he touched her, she said it happened in his house while he was cooking. (Tr. 242, lines 1–7.) Victim confessed she was a little bit confused. (Tr. 242, lines 8–12.) Defense counsel highlighted the fact that it took Victim one hour and twenty minutes into the interview before she mentioned the incident

that happened in the tent, even though on the stand she claimed it was the most difficult of the events that happened. (Tr. 259, line 18–260, line 11.)

The State called Ms. Demaio, the forensic interviewer, to authenticate the video. (Tr. 273, line 20–Tr. 277, line 20.) Appellant renewed his prior objection. (Tr. 278, lines 2–3.) During cross-examination, Appellant asked Demaio if Victim said his client had touched her on her private parts in a way that made her feel "yucky" and she said yes. (Tr. 283, lines 11–15.)

The State called Dr. Carol Ann Rahter, a doctor at Georgetown Hospital Systems Waccamaw Emergency Department and the medical director of the Children's Recovery Center. (Tr. 288, lines 9–15.) The trial court qualified her as an expert in medicine and child sexual abuse, which Appellant objected to on the basis of relevancy. (Tr. 290, lines 8–16.) She testified she conducted a medical examination on Victim and found no abnormalities, explaining the finding did not rule out that any sort of sexual abuse had occurred. (Tr. 290, line 21–Tr. 291, line 5.) Dr. Rahter estimated she had seen over 1,500 victims of sexual abuse in her eighteen years working at the Children's Recovery Center. (Tr. 290, lines 1–7.) She further testified the majority of sexually abused children have completely normal medical examinations, often because they are not seen directly after the incident of abuse due to the delay commonly associated with the reporting of abuse and because injuries of that nature heal rapidly. (Tr. 291, lines 6–15.)

Appellant also objected to the State's question regarding Dr. Rahter's experience with child sexual assault victims on relevancy grounds based on the fact that the State had established no penetration. (Tr. 291, line 23–Tr. 292, line 4.) The trial court allowed the State to continue. (Tr. 292, line 5.) Dr. Rahter then testified that it is rare for children to disclose sexual abuse immediately and explained why. (Tr. 292, line 7–Tr. 293, line

25.) She further explained that children who are suffering sexual abuse can act differently—some may be laughing and giddy while others are tearful—and ultimately agreed that whether a child was crying or upset during the forensic interview would not have any relevance as to whether she was abused. (Tr. 293, line 5–Tr. 294, line 4.)

Detective Neil Frebowitz of the Horry County Police Department testified he spoke with Victim and her mother, reviewed the forensic interview video, and arrested Appellant. (Tr. 328, lines 2–21.) He audio recorded his interview with Appellant, and the State introduced it into evidence and played it for the jury. (Tr. 330, lines 10–17; Tr. 339, line 2–Tr. 340, line 12.)

After the State rested, Appellant moved for a directed verdict, arguing the evidence was deficient to show any act "was done with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the Defendant or the child." (Tr. 364, lines 1–11.) The trial court denied the motion, ruling that there was plenty of testimony to that effect by inference—including the last witness's testimony, the victim's testimony, and the expert's testimony—and that the jury could make that determination. (Tr. 364, lines 12–17.)

During his closing argument, Appellant told the jury, "If you want to, that video is available to look at if you don't believe or trust me. You don't have to. You can see it on the video." (Tr. 410, line 25–Tr. 411, line 2.) He also pointed out twice that it was an hour and twenty minutes into the interview before Victim mentioned the experience in the tent. (Tr. 412, lines 10–17; Tr. 413, lines 3-7.) Finally, he stated, "You look at that video and I would submit to you that child was happier then than she is now, and <u>if she were traumatized, it would have shown on that video</u>." (Tr. 417, lines 9–11.) (emphasis added.)

As soon as the jury went back to deliberate, it sent a note to the trial court asking for a transcript of the forensic interview. (Tr. 421, lines 19–21.) The State preferred the video be played instead because it had not reviewed the transcript in detail. (Tr. 421, line 25–Tr. 422, line 5.) The trial court determined the transcript was unavailable because it was not introduced into evidence and offered to have the interviewer's testimony played back in whole or in part. (Tr. 423, line 2–Tr. 424, line 6.) After some confusion over exactly what the jury was asking for, the trial judge asked the jury to come back in to discuss it. (Tr. 424, line 10–Tr. 428, line 2.) The jury explained that it wanted a copy of the transcript of the forensic interview and the trial judge explained it was not in evidence and was therefore unavailable, but he offered to replay the interviewer's testimony—other than the video—for the jury. (Tr. 428, lines 5–24.) He asked the jury to go back to its room and make a decision about what it wanted. (Tr. 429, lines 1–15.)

The solicitor asked the trial judge to let the jury know it could watch the video of the forensic interview because that is what he thought it wanted to do, and the trial judge refused. (Tr. 429, line 18–24.) Appellant agreed that the jury wanted to look at Victim's testimony that was elicited by the professional, rather than the testimony of the professional, and the trial judge disagreed but said he would do what the jury told him. (Tr. 430, lines 14–18.) The jury decided it wanted to view certain portions of the forensic interview video and asked for a laptop to play it on. (Tr. 433, lines 3–5.) Appellant asked that the transcript be sent back instead, but the trial judge would not allow it because it was an unredacted version and might prejudice Appellant. (Tr. 433, line 20–435, line 17.) The jury wanted to watch the beginning of the video, so the trial judge agreed to show it until the jury was satisfied and let him know. (Tr. 439, lines 2–15.) The jury then asked for the video to be fast-forwarded to the part where the questions

about touching began, and that portion of the video was played. (Tr. 441, lines 9–25.) The jury then asked for the video to be fast-forwarded to the portion where Victim discussed the incident in the tent. (Tr. 442, lines 3–5.) After the jury had seen the requested portions of the video, it retired to the deliberation room. (Tr. 442, line 19–Tr. 443, line 5.)

The trial court asked whether either party had any objections or additions to what had occurred, and neither did. (Tr. 443, lines 8–13.) The jury then reached a unanimous verdict of guilty, and the trial court sentenced Appellant to twelve years' imprisonment with credit for time served, mandatory sex offender registry, and GPS monitoring. (Tr. 446, line 18–22; Tr. 456, line 21–Tr. 457, line 10.)

ARGUMENT

I.

The trial court properly denied Appellant's challenge to the constitutionality of § 17-23-175.

Appellant argues the trial court erred by refusing to rule the South Carolina forensic interview statute unconstitutional, claiming the statute is arbitrary in that it allows a victim's testimony to be heard twice by the jury and thereby bolsters that testimony. He asserts no other type of criminal case allows such a procedure and its arbitrary nature deprived Appellant of his due process right to a fair trial under the Fourteenth Amendment. On the contrary, the statute is designed to provide a mechanism for admitting out-of-court statements by a child victim of sexual abuse but contains safeguards such as guarantees of trustworthiness and the requirement that the child testify and be subject to cross-examination. Thus, the statute, by its very nature, protects a defendant by setting certain standards that must be met in order for the video to be admitted, and it does not improperly bolster the victim nor does it violate due process rights. The trial court properly denied Appellant's challenge to the constitutionality of the statute.

The forensic interview video statute at issue provides:

> (A) In a general sessions court proceeding or a delinquency proceeding in family court, an out-of-court statement of a child is admissible if:
>
> (1) the statement was given in response to questioning conducted during an investigative interview of the child;
>
> (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);
>
> (3) **the child testifies at the proceeding and is subject to cross- examination on the elements of the**

> **offense and the making of the out-of-court statement**; and
>
> (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.
>
> (B) In determining whether a statement possesses **particularized guarantees of trustworthiness**, the court may consider, but is not limited to, the following factors:
>
> (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 Ann. § 17-23-175 (2014) (emphasis added).

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant. State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Our Supreme Court has found section 17-23-175 to be a valid legislative enactment that does not run afoul of either the United States or South Carolina Constitutions. State v. Whitner, 399 S.C. 547, 559-60, 732 S.E.2d 861, 867 (2012). See City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (holding that the General Assembly may enact any law not expressly, or by clear implication, prohibited by the state or federal constitutions); State v. Anderson, 413 S.C. 212, 776

S.E.2d 76 (2015) (finding section 17-23-175 valid in response to a challenge to unconstitutionality on the basis of violating the Confrontation Clause).

Additionally, this Court has previously found the bolstering effect of the video recording does not preclude its admission under the statute. See State v. Perry, 410 S.C. 191, 763 S.E.2d 603 (Ct. App. 2014); State v. Russell, 383 S.C. 447, 451, 679 S.E.2d 542, 544 (Ct. App. 2009). As this Court discussed, in general, the admission of a prior consistent statement has been held to be hearsay and, when the statement has been admitted for the sole purpose of bolstering the credibility of a crucial witness, the error in admission is not harmless. See e.g., State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003) (holding the admission of a witness's prior consistent statement, which clearly bolstered her crucial trial testimony, could not be considered harmless error). The statute in this case, however, has made a specific allowance for these out-of-court statements by child victims provided the above requirements have been met.[1] Russell, 383 S.C. at 451, 679 S.E.2d at 544.

In Whitner, our Supreme Court addressed the issue of whether the admission of a forensic interview videotape was cumulative repetition of the minor victim's testimony and, thus, improper bolstering. 399 S.C. at 558, 732 S.E.2d at 867. The Court noted that "[u]less a legislative enactment concerning a matter of evidence violates the constitution, the legislative enactment is valid" and found section 17-23-175 valid. Id. at 559, 732 S.E.2d at 867.

[1] It should be noted Appellant has not challenged the trial court's ruling that the requirements for admission of the videotape have been met. Accordingly, the unappealed finding of the trial court that the videotape met the requirements for admissibility under the statute is the law of the case. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (holding that an unchallenged ruling, right or wrong, is the law of the case).

In Perry, Appellant argued the content of the video recording of the forensic interview improperly bolstered the victim's testimony. 410 S.C. at 204, 763 S.E.2d at 609. This Court correctly noted that the legislature made specific allowances for the admission of an out-of-court statement by a victim of child sexual abuse when the requirements of section 17-23-175 are met. Id. at 205, 763 S.E.2d at 610. Appellant specifically argued that even though Whitner permitted the admission of the forensic interview video, it should only be admissible if it does not bolster the child's credibility. Id. Notably, this Court pointed out Justice Pleicones' concurrence in Whitner: "[T]here is no basis for an improper bolstering argument when [a child victim's] prior testimony is admitted pursuant to § 17-23-175." Id. at 206, 763 S.E.2d at 611.

Chief Judge Few concurred in part and dissented in part, stating that no valid issue was before this Court because Appellant's argument on appeal that the forensic interview video "impermissibly bolstered [the victim's] testimony" was of no legal consequence because his objection to it at trial was not based on a specific rule of evidence. Id. at 207, 763 S.E.2d at 611 (Few, C.J., concurring in part, dissenting in part). He stated, "As with any relevant evidence, therefore, a trial court may not exclude evidence that bolsters other evidence unless the exclusion is 'provided' for by some constitutional, statutory, or rule-based principle of law." Id. at 208, 763 S.E.2d at 611 (Few, C.J., concurring in part, dissenting in part). He wrote about the recognition by our General Assembly that the central issue in child sexual assault cases is whether the victim's testimony is truthful and accurate, noting that § 17-23-175 represents a "policy determination that a forensic interview should be admissible to enhance the credibility of a child sexual assault victim's trial testimony—bolster—if it meets the criteria of the statute." Id. at 209, 763 S.E.2d at 612 (Few, C.J., concurring in part, dissenting in part).

He went so far as to write, "[Section 17-23-175] specifically provides for the admission of these forensic interviews for the very reason Perry contends admission was improper—the interviews bolstered the credibility of the victim." Id. at 210, 763 S.E.2d at 612 (Few, C.J., concurring in part, dissenting in part).

It is clear the legislature intended to allow a video recording of a forensic interview into evidence even though it will likely constitute hearsay under Rule 801, SCRE, and may run afoul of other rules of evidence. The hearsay rules or any other rules of evidence are superseded by the statute in determining the admissibility of the video recording. See Rule 101, SCRE ("Except as otherwise provided by rule or by statute, these rules govern proceedings in the courts of South Carolina to the extent and with the exceptions stated in Rule 1101."). The legislative enactment requires the child to testify in addition to allowing the video recording into evidence, which demonstrates the legislature presupposed some bolstering will naturally occur and the bolstering was deemed acceptable. Additionally, the statute shows the legislature of our State has made a public policy decision that admitting evidence of the child's prior statement will be beneficial to finding the truth in sexual crimes where there is a child victim. As a result, the court need not partake of the same analysis required of other evidence, and the video recording should not be excluded on the basis that it bolstered the minor victim's testimony. The trial court did not err in admitting the video recording because it did not impermissibly bolster the victim's testimony, and the statute is not unconstitutional.

Appellant contends the trial court erred in admitting the forensic video of the minor victim because the statute allowing the admission is unconstitutional. He maintains the video was inadmissible because the statute arbitrarily allowed the State to present not only Victim's testimony at trial but also a video of essentially that same

testimony from the forensic interview. However, the statute explicitly requires the victim to testify and be subjected to cross-examination before the trial judge agrees to allow the forensic video to be admitted into evidence. Because Victim testified and was subject to cross-examination regarding the video recordings, there is no violation of the constitution.

In the present case, the State conducted its direct examination of Victim and then, immediately following, the State published the forensic interview video to the jury. After that, Appellant conducted his cross-examination of Victim. Appellant had the right to fully cross-examine Victim regarding the video and any inconsistencies in her testimony at trial. Particularly in this case, he was able to cross-examine Victim after the video was played and utilized a transcript of the forensic interview to question her regarding inconsistencies. Specifically, he was able to cast doubt on her credibility by highlighting inconsistencies in her testimony about the circumstances of the first time Appellant sexually abused her. The trial court, or any procedure utilized by the trial court, never prevented Appellant from cross-examining Victim regarding her testimony or the content of the video statement she gave pretrial.

Not only did Appellant point out these inconsistences between the interview video and her trial testimony, he also mentioned the videotape in his opening and closing remarks to the jury. For example, he told the jury, "When you look at the tape of the video, if you have a chance to see it, we'd ask you to look for evidence of any trauma this child suffered, or is it more the nature of something she's making up as they go along. . . . And we want to look and see from the words of this child if there's any evidence that she might have been coached . . . ." (Tr. 167, lines 7–10, 13–15.) Later he told the jury, "You look at that video and I would submit to you that child was happier then than she is

now, and if she were traumatized, it would have shown on that video." (Tr. 417, lines 9–11.)

It is clear Appellant astutely used the videotape in conjunction with Victim's testimony at trial to make his case to the jury. Thus, no violation of Appellant's right to a fair trial existed from the admission of the videotape as he was able to use it—and particularly the comparison of it to Victim's testimony at trial—to his advantage. Accordingly, the trial court properly found the statute constitutional and properly admitted the recordings of the forensic interviews into evidence. This Court should affirm the trial court's ruling.

II.

The trial court properly qualified Dr. Carol Rahter as an expert in medicine and child sexual abuse despite Appellant's objection on the basis of relevancy. Furthermore, Appellant's argument that Dr. Rahter's opinion regarding a victim laughing or crying when disclosing abuse was irrelevant and misleading is not preserved, but even if preserved, the trial court properly allowed the testimony regarding how children act during disclosure because it was relevant in this case.

Appellant contends the trial court erred in qualifying Dr. Carol Rahter as an expert in medicine and in child sexual abuse because he claims her testimony was not relevant. However, her testimony was not irrelevant; rather, it served to educate the jury regarding delayed disclosure and to eliminate likely misconceptions regarding the behaviors of sexually abused children. The trial court properly qualified Dr. Rahter as an expert in child sexual abuse, and this Court should affirm its ruling. Additionally, Appellant argues Dr. Rather's opinion "that the jury should not draw essentially 'rational' conclusions from a victim laughing or crying when disclosing abuse was extraordinarily irrelevant and misleading." This issue is not preserved as it was neither raised to nor ruled upon by the trial court. Thus, this Court need not address it.

Qualification of a witness as an expert and the subsequent admission of that witness's testimony are matters within the sound discretion of the trial court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); State v. Schumpert, 312 S.C. 502, 505, 435 S.E.2d 859, 861 (1993). The expert must possess the necessary learning, skill, or practical experience to enable her to give opinion testimony. State v. Myers, 301 S.C. 251, 255-256, 391 S.E.2d 551, 554 (1990). Absent an abuse of discretion amounting to

an error of law, the trial court's ruling will not be disturbed on appeal. State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999).

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Here, the expert's testimony explaining delayed disclosure and how child victims act when disclosing was relevant to eliminating common misconceptions regarding how a child victim should behave after the trauma and explained the delay in disclosure.

First, the trial court properly allowed Dr. Rahter to testify as an expert in the area of child sexual abuse given her background, experience, and education. Dr. Rahter was the medical director of the Children's Recovery Center, where she had seen over 1,500 sexual abuse victims in her eighteen years there, and also worked as an emergency physician at the Waccamaw Emergency Department of Georgetown Hospital Systems. (Tr. 288, line 11–Tr. 290, line 7.) Her testimony regarding the behavioral characteristics of a child sexual abuse victim based on her training, background, education, and experience did not make the sexual abuse less probable as would generally be believed.

This Court and the South Carolina Supreme Court have acknowledged the benefit and necessity of expert testimony in child sexual abuse cases. "Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible." Weaverling, 337 S.C. at 474, 523 S.E.2d at 794. "Such testimony is **relevant** and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault." Id. at 475, 523 S.E.2d at 794 (emphasis added); see also State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) (acknowledging the importance of rape trauma and behavioral evidence

in a sexual abuse case whether the victim is an adult or a child); Schumpert, 312 S.C. 502, 435 S.E.2d 859 (finding both expert testimony and behavioral evidence are admissible as rape trauma evidence).

Most recently, in State v. Anderson, our Supreme Court confirmed the findings of Schumpert, Weaverling, and White when it stated, "Certainly we recognize that there is such an expertise [as child abuse assessment]: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims." 413 S.C. 212, ___, 776 S.E.2d 76, 79 (2015). Although the Court in Anderson determined the "better practice" was to not have the individual who examined the victim testify because it runs the risk of vouching for the victim's credibility, it did not go so far as to rule that any time an expert has examined the child the result is reversible error. The Anderson court reversed based on the improper vouching allowed by the trial judge. That type of vouching did not happen here.

Further, this Court, as well as the South Carolina Supreme Court, has allowed behavioral testimony to be admitted at trial. In Schumpert, 312 S.C. 502, 435 S.E.2d 859, the South Carolina Supreme Court considered expert testimony regarding rape trauma syndrome. The expert testified to behavior and characteristics commonly found in sexual assault victims. The Supreme Court overturned its holding in State v. Hudnall, 293 S.C. 97, 359 S.E.2d 59 (1987) (finding expert testimony of common behavioral characteristics of a child victim of sexual abuse only admissible to rebut a defense claim the victim's response was inconsistent with such a trauma), and specifically found: "both expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect." Id. at 506, 435 S.E.2d at 862.

This Court had a chance to address similar behavior testimony in State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). In Weaverling, an expert testified regarding behavior and characteristics of a sexual abuse victim. This Court stated: "Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible." Id. at 474, 523 S.E.2d at 794 (citing 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)). This Court explained:

> **Such testimony is relevant** and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. 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.

Weaverling, 337 S.C. at 475, 523 S.E.2d at 794 (emphasis added and citations omitted); see also Lujan, 192 Ariz. 448 (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 State v. Brown, 411 S.C. 332, 341, 768 S.E.2d 246, 250 (Ct. App. 2015), this Court cited its holding in Weaverling that expert testimony in the areas of child abuse dynamics and disclosure "was properly admitted because it was **relevant** and explained the effect of sexual abuse on a victim's subsequent conduct." (emphasis added). This Court also cited White, 361 S.C. at 415, 605 S.E.2d at 544, in which the Supreme Court "confirmed the admissibility of expert testimony and behavioral evidence in sexual abuse cases, holding such testimony was **relevant** regardless of the victim's age." (emphasis

added). Accordingly, this Court found the expert's "specialized knowledge of the behavioral characteristics of child sex abuse victims was **relevant** and crucial in assisting the jury's understanding of why children might delay disclosing sexual abuse . . . ." Brown, 411 S.C. at 341-42, 768 S.E.2d at 251 (emphasis added).

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

> Indeed, the majority of states permit expert testimony to explain delayed reporting, recantation, and inconsistency, as well as to explain why some abused children are angry, why some children want to live with the person who abused them, why a victim might appear 'emotionally flat' following sexual assault, why a child might run away from home, and for other purposes.

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

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

children places lay jurors at a disadvantage." Id. (internal quotations and citations omitted).

The Nebraska Supreme Court observed the following:

> The reasoning for a rule allowing an expert to testify about sexual abuse in generalities . . . is that few jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually abusive relationship, and the behavior exhibited by sexually abused children is often contrary to what most adults would expect.

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

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

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

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

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

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

In finding an expert's testimony on delayed disclosure admissible under its supreme court's authority, the Massachusetts Court of Appeals opined: "Expert testimony that abused children often delay reporting the abuse, a familiar and permitted proposition at least since [Commonwealth v. Dockham, 542 N.E.2d 591 (Mass. 1989)], informs the jury that the victim's failure to disclose in a timely fashion does not necessarily exonerate the defendant without suggesting that the particular child witness in the case was or was not abused." Commonwealth v. Bougas, 795 N.E.2d 1230, 1236 (Mass. Ct. App. 2003) (emphasis added). The Court clearly acknowledges the educational aspect of the testimony, the disabusing of the misconceptions, and provides the jury with information they would not have otherwise possessed.

The Georgia Court of Appeals found testimony about child sexual abuse syndrome, including testimony about delayed disclosure, admissible. McCoy v. State, 629 S.E.2d 493, 494 (Ga. Ct. App. 2006); see also Keri v. State, 347 S.E.2d 236, 238 (Ga. App. 1986) (finding expert testimony assisted jury in understanding why sexually abused children are secretive, why they were frightened, why they act out and become

disciplinary problems, and why the children could not give specific dates for the acts they say were committed by the defendant). Relying on its longstanding supreme court precedent, the Court found:

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

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

The Montana Supreme Court recently stated:

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

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

The Delaware Supreme Court elucidated:

> We agree that where a complainant's behavior or testimony is, to the average layperson, superficially inconsistent with the occurrence of a rape, and is otherwise inadequately explained, thus requiring an expert's explanation of its

> emotional antecedents, expert testimony can assist a jury in this regard. Exposing jurors to the unique interpersonal dynamics involved in prosecutions for . . . child sexual abuse can provide jurors with possible alternative explanations for complainant actions and statements that are, to average laypeople, "superficially bizarre," "seemingly unusual," "seemingly inconsistent," or normally attributable to "inaccuracy or prevarication." Thus informed, the jury will be better able to perform its fact finding duty.

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

Further, the trial court charged the jury regarding expert testimony. The trial court explained the jury was to give the expert's testimony "the weight you think it deserves." The trial court also told the jury it could disregard the opinion of the expert entirely and was not required to accept the expert's opinion even if it is not contradicted. Additionally, the trial court explained: "An expert witness's testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert." (Tr. 381, lines 14–16.)

Accordingly, the trial court properly qualified Dr. Rahter as an expert in child sexual abuse given her background, experience, and education as well as the fact her testimony as an expert would assist the trier of fact. Her testimony educated the jury regarding the "normal" behaviors of child sexual abuse victims and disabused the jury of any misconceptions regarding "normal" behavior. Despite Appellant's argument to the contrary, her testimony was relevant to the issue of whether Appellant sexually abused Victim in this case as it had a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Specifically, the "specialized knowledge" of Dr. Rahter "assist[ed] the trier of fact to understand the evidence or

determine a fact in issue" by providing the jury with the tools and information necessary to properly judge the credibility of the victim and determine whether she was sexually abused by Appellant. See Rule 702, SCRE. Dr. Rahter's testimony assisted the jury in understanding the evidence, including Victim's normal medical exam and her delay in disclosing the abuse. The trial court's ruling should be affirmed.

CONCLUSION

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

Respectfully submitted,

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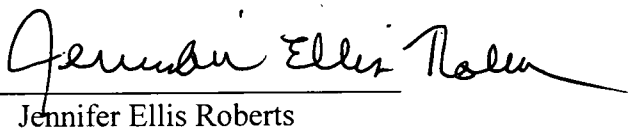
BY: 
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October 8, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of General Sessions

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2014-000568

THE STATE,

Respondent,

v.

RONALD LEE LEGG,

Appellant.

PROOF OF SERVICE

I, Jennifer Ellis Roberts, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 8th day of October, 2015.

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