THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM FLORENCE COUNTY
General Sessions Court
William H. Seals, Jr., Circuit Court Judge

Case No. 2013-GS-21-01353
Appellate Case No. 2015-000235

The State,

Respondent,

v.

Bryant Christopher Gurley,

Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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2. Did the trial court err in qualifying the complaining witness's counselor as an expert and in admitting the counselor's testimony?

3. Did the trial court err in allowing rebuttal testimony, which was not responsive to any evidence introduced by the defense and which was improper character evidence?

4. Did the trial court err in allowing testimony of the mother of the complaining witness that exceeded the limitation on admission of out-of-court statements of alleged victims of sexual assault, except as to time and place?

5. Should appellant be granted a new trial based on the cumulative prejudice from the multiple errors of the trial court and the resulting denial of a fair trial?

ARGUMENT IN REPLY

Appellant's principal brief asserts four claims of error committed by the lower court in the trial of the charge against appellant and an additional claim of cumulative prejudice resulting from the multiple errors in this case, as framed in the statement of issues on appeal, above. Appellant relies on the arguments made in his principal brief and submits this reply brief not to repeat those arguments but only to respond to specific points made in the state's brief of respondent.

I. THE TRIAL COURT ERRED IN ADMITTING THE VIDEO RECORDING OF THE FORENSIC INTERVIEW.

Appellant challenges the admission of a recording of a forensic interview in which the interviewer, after hearing the child's account, stated "B.G. broke the rules."

State's Exhibit 1. This statement was an impermissible expression of the interviewer's belief in the truthfulness of the child's account, amounting to improper vouching for and bolstering of the child's credibility, as prohibited by recent decisions of the South Carolina Supreme Court and Court of Appeals. *See State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015); *State v. Kromah*, 401 S.C. 340, 358-360, 737 S.E.2d 490, 499-501 (2013); *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011); *State v. McKerley*, 397 S.C. 461, 464-65, 725 S.E.2d 139, 141-42 (Ct. App. 2012).

The state asserts the interviewer's statement that appellant "broke the rules" did not bolster the child or express an opinion as to the child's credibility. This assertion is disingenuous. The statement came at the conclusion of the child's account of the events she claimed had occurred involving appellant. It could only convey to the child and to anyone else who heard and saw the recording, including the jurors, that the interviewer believed the child's account – hence, the interviewer's conclusion that "B.G. broke the rules."

The state's attempts to characterize this statement as something other than a comment on the child's believability and to somehow place it in a different context are of no avail. Indeed, the context in which the comment was made emphasizes that it was an expression of the interviewer's opinion as to the child's truthfulness. The comment was made after the interviewer told the child that the interviewer was proud of her, that she was not in trouble, that she had done nothing wrong, and that none of this was her fault. After telling the child "B.G. broke the rules," the interviewer went on to tell her that nobody gets to touch her privates or make her touch theirs. The interviewer then reiterated, "I'm really, really proud of you," and added, "It takes a very brave girl to tell

about what happened." State's Exhibit 1. The only conclusion that can be drawn from the interviewer's entire statement is that she was telling the child she believed her. All of the interviewer's comments, including the comment that appellant "broke the rules," conveyed her opinion that she believed the child. The entire passage and the specific comment that "B.G. broke the rules" constitute improper bolstering of the child by expressing an opinion as to her credibility.

The state attempts an end run on the prohibition of such statements by arguing this statement was made to the child, not to the jury. This argument is also disingenuous. That the improper comment was made directly to the child and not to the jury from the witness stand does not diminish the impact of the jury's hearing the comment and does not circumvent the prohibition on such improper expressions of opinion as to the child's believability. Indeed, the Supreme Court recognized this fact in *Jennings*. There, the improper expressions of opinion by a forensic interviewer as to three children's believability were not from the lips of the interviewer on the witness stand. Instead, they were contained in the interviewer's written reports introduced into evidence. *See Jennings*, 394 S.C. at 477, 479-80, 716 S.E.2d at 93, 94-95. The Supreme Court found the statements in the written reports were improper vouching and their admission was prejudicial, not harmless, error. *See id.*, 394 S.C. at 480, 716 S.E.2d at 94-95.

In *Jennings*, the Court did not draw any distinction based on the statements not having been made directly to the jury by the interviewer from the witness stand. The Court found admission of the statements prejudicial because the credibility of the children was the most critical determination to be made by the jury in the case. *See id.*, 394 S.C. at 480, 716 S.E.2d at 95. *Jennings* demonstrates that the Supreme Court

recognizes the resulting prejudice from admission of such improper vouching ***in any form***, because the expression of the interviewer's opinion as to the child's believability impacts the jury's consideration of the critical credibility determination. *Cf. McKerley*, 397 S.C. at 463-64, 725 S.E.2d at 141 (Court of Appeals rejected state's attempt to distinguish between in-court and out-of-court statements that impermissibly bolster the child's credibility). Here, contrary to the state's argument, the fact that the interviewer's comment was made to the child during the interview and not to the jury from the witness stand does not negate the improper bolstering effect of the statement and does not negate the prejudicial effect of the improper comment on the child's credibility.

The state also contends the offending comment in this case is not akin to the recommendation in *Chavis* that the complaining witness not be around the defendant for any reason. The state further contends the comment was about people breaking the rules when they touch someone's private parts. To the contrary, this statement was not a generic statement about the conduct of people in general. It was ***specific*** to ***this defendant*** and it affirmatively stated a ***definite conclusion*** as to his conduct: "B.G. broke the rules." Unlike the recommendation in *Chavis* not to be around the defendant, this interviewer's comment was a direct comment on appellant's alleged conduct and a clear affirmation that the interviewer believed the child's account. Even more so than the recommendation in *Chavis*, this direct comment on appellant's alleged conduct can only be interpreted as a statement that the interviewer believed the child. *Cf. Chavis*, 412 S.C. at 108-09, 771 S.E.2d at 340.

The state argues the interviewer's comment is not within the categories of improper comments listed in *Kromah*. It appears the state would limit the applicability of

the prohibition of improper vouching to those instances in which the interviewer uses the descriptive term "compelling" in describing a child's account, as in *Kromah* and *Jennings*. *See Kromah*, 401 S.C. at 359, 737 S.E.2d at 500 (addressing interviewer's reference to a "compelling" finding); *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 (addressing interviewer's reference to "compelling" disclosures). But our appellate courts have not limited the prohibition of improper vouching to any specific verbiage. Rather, as *Chavis* demonstrates, the prohibition applies to ***any comment*** that conveys to the jury the interviewer's opinion as to the child's truthfulness. *See Chavis*, 412 S.C. at 108-09, 771 S.E.2d at 340.

Finally, the state argues that the comment was not improper because it was made for the child's benefit and was meant to make the child feel safe. This argument is meritless. The inadmissibility of improper bolstering evidence does not turn on the interviewer's motives in making the comment. The admissibility of the evidence must be evaluated based on its ***substance and import*** and its ***prejudicial effect***. Here, the comment "B.G. broke the rules" could only convey to the jury that the interviewer believed the child's allegations concerning appellant's conduct. Moreover, its prejudicial effect was substantial. There was no physical evidence corroborating the child's allegations. There was a significant delay in her making the allegations. The child's accounts were internally inconsistent. As to one alleged incident, the child's account was contradicted by her own family members that were present. Other witnesses undermined her account with respect to other alleged incidents, giving testimony that appellant was elsewhere when the incidents were alleged to have occurred. With so many weaknesses in the state's case and with the verdict depending solely on the jury's assessment of the

child's believability, the interviewer's comment vouching for the child's credibility and essentially conveying to the jury her belief in the child's account cannot be deemed harmless. This Court should reverse the admission of the video containing this impermissible, prejudicial bolstering comment and grant appellant a new trial.

II. THE TRIAL COURT ERRED IN QUALIFYING THE CHILD'S COUNSELOR AS AN EXPERT AND IN ADMITTING THE COUNSELOR'S TESTIMONY.

Appellant challenges the qualification of the child's counselor as an expert in "child sexual trauma" and challenges the admission of the counselor's testimony on multiple grounds.

A. Improper bolstering in answer to question about coaching.

One of appellant's arguments under this issue is the improper bolstering of the child's credibility in response to a question by the solicitor concerning whether the child had been coached. Although the defense objected when the solicitor asked the question and the court overruled the objection, the state contends the issue is not preserved because the defense did not renew the objection during the witness's answer explaining why she did not believe the child had been coached. This argument is spurious. All that is required to preserve an issue for appellate review is that the issue be fairly raised to and ruled upon by the trial court. *See State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011); *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595-96 (2010); *State v. Taylor*, 338 S.C. 624, 626 n.1, 527 S.E.2d 395, 396 n.1 (Ct. App. 2000). Once an objection has been made to the admission of evidence, no further reservation of rights concerning the objection is required. *See* Rule 17, S.C.R.Crim.P. Indeed, the rules prohibit further argument after the court's ruling has been pronounced. *See* Rule 18(a), S.C.R.Crim.P.

Here, the defense had articulated multiple objections to the testimony of this witness, including that her testimony was improper bolstering, that the witness was going to explain the child's testimony piece by piece, and that the witness should not be able to get into statements the child had made. Tr. p. 204, lines 14-22. The court overruled the defense objections and allowed the witness to testify. Tr. p. 208, lines 24-25. When the witness was asked about coaching, the defense interposed essentially the same objections, arguing the witness could not render an opinion on that subject and it was a jury question. Tr. p. 219, lines 19-22. When the court overruled the objection, the witness proceeded to answer the question about coaching by explaining that the mother had not been present when the counselor met with the child. The witness testified that the child's account, given verbally and by drawing pictures, was "very detailed" and "very consistent." Because the objection had been overruled, it was not incumbent upon the defense to further object to the answer given by the witness.

In addressing the merits of this issue, the state argues the testimony that the child's account was "very detailed" and "very consistent" is not problematic in this case because those terms were not used in the context of explaining the witness's belief that the child's statement was "compelling for sexual abuse." *Cf. McKerley*, 397 S.C. at 463, 725 S.E.2d at 141. On the contrary, as in *McKerley*, the purpose of the witness's testimony about detail and consistency was to bolster the child's credibility in the eyes of the jury. Whether explaining why the witness found the child's account to be compelling or explaining why the witness believed the child had not been coached, the impact is the same: the testimony improperly invades the province of the jury to make credibility determinations and impermissibly vouches for the child's truthfulness.

B. Improper qualification as expert and additional improper bolstering.

In response to appellant's argument that the witness was improperly qualified as an expert, the state addresses this state's and other states' precedents that allow expert testimony on the behavior of sexual assault victims. However, the state's argument sidesteps the fundamental problem with the qualification of this particular witness as such an expert. The crux of the issue in this case is that the individual who was allowed to testify as an expert was the child's own counselor and her testimony exceeded the parameters of what is allowed with respect to behavioral evidence in sexual abuse cases. *See State v. Anderson*, 413 S.C. 212, 218-19, 776 S.E.2d 76, 79 (2015); *State v. Brown*, 411 S.C. 332, 343-45, 768 S.E.2d 246, 251-53 (Ct. App. 2015).

This witness had been seeing the child ***as her counselor*** since May 2013, and she ***was still seeing the child*** as of the January 2015 trial of this charge. Tr. pp. 215, 224. Indeed, she had seen the child the Friday before the start of trial. Tr. p. 225. Her testimony was not limited to a discussion of the behaviors exhibited by child victims of sexual abuse in general. Her testimony was specific to the behaviors of ***this particular child***. *Cf. Brown*, 411 S.C. at 344-45, 768 S.E.2d at 252-53 (upholding qualification of witness as expert on "child abuse dynamics and delayed disclosures" where witness "never interviewed the victims and had no knowledge of the facts of the case beyond her discussions with the solicitor's office prior to trial" and "never commented – directly or indirectly – about the credibility of the victims' allegations or testimony").

Although the state tries to minimize the comments of the Supreme Court in *Anderson* concerning calling as an expert a person who was personally involved with the child, the discussion in *Anderson* is important, because the very circumstance

contemplated by *Anderson* occurred here. The *Anderson* Court discouraged using an individual who personally examined the child because of the risk that such an individual will vouch for the child's credibility. *See Anderson*, 413 S.C. at 218-19, 776 S.E.2d at 79. Contrary to the state's conclusory assertion that no such vouching occurred in this case, the testimony of the child's counselor who was qualified as an expert witness (addressed in detail in the principal brief at pages 10-12) did vouch for the child's credibility. Tr. pp. 215-25. As in *Anderson*, the counselor specifically addressed the characteristics displayed by ***this child***, not just child victims of sexual abuse in general. *See id.*, 413 S.C. at 219, 776 S.E.2d at 79. Moreover, she referenced the account of the alleged incidents given by ***this child***. Indeed, she even described the specifics of the child's statements and testified concerning the "very detailed" and "very consistent" nature of the child's statements. The qualification of this witness as an expert and the admission of her improper bolstering testimony is reversible error.

C. Non-compliance with S.C. Code Ann. § 17-23-175.

Appellant also challenges the admissibility of the testimony of this witness under S.C. Code Ann. § 17-23-175. The state contends this issue is not preserved because the defense did not ask the court to conduct the analysis required by Section 17-23-175(F). No such request was necessary. The defense objected to the admission of the witness's testimony concerning statements the child made during unrecorded counseling sessions and specifically invoked the statute as the basis for its objection. Once the defense invoked the statute, the responsibility to conduct the statutorily-mandated analysis rested upon the trial court. Nothing further was required of the defense to preserve the issue raised on appeal.

The state further contends the issue is not preserved, arguing the defense did not object to the specific testimony of the witness concerning the child's statements. To the contrary, as noted in greater detail in the discussion of Issue II, A, *supra* at 6-7, the defense did object to such testimony, both before the witness testified and again when the solicitor asked the question that elicited the testimony concerning the child's statements. Tr. pp. 204, 219-220. The objections were raised and ruled upon, and the issue is preserved.

Finally, the state contends the child's drawings were tantamount to a recording of her statements. This argument is baseless. The witness's own testimony makes clear that the drawings were made in conjunction with the child's verbal statements. The drawings themselves are no substitute for an audio and visual recording of the counseling sessions in which the child's statements (both verbal and pictorial) were elicited. The "electronically unrecorded statement" of this child "made to a professional in [her] professional capacity" should not have been admitted without conducting the analysis mandated by Section 17-23-175(F).

III. THE TRIAL COURT ERRED IN ALLOWING REBUTTAL TESTIMONY, WHICH WAS NOT RESPONSIVE TO ANY EVIDENCE INTRODUCED BY THE DEFENSE AND WHICH WAS IMPROPER CHARACTER EVIDENCE.

Appellant challenges the court's ruling allowing the child's former teacher to testify as a rebuttal witness. The state responds with an argument that the defense somehow opened the door to this witness's testimony in rebuttal, but the state does not specify how the character evidence elicited from the teacher rebutted the particular testimony given by appellant's father. The state's failure to do so is for good reason: the

testimony allowed in rebuttal was simply not responsive to the evidence presented by the defense and therefore was not proper rebuttal.

The testimony of the teacher was ostensibly to rebut testimony that the child's mother had left her alone in a hotel room and additional testimony implying that the mother may have stolen things or lied about certain matters. Tr. p. 437. The only evidence that would have been responsive to this testimony and proper rebuttal would have been evidence that the mother had not left the child alone and had not stolen or lied. The solicitor's stated purpose for offering the teacher's testimony was to show the mother was a good mother and took excellent care of the child. Tr. p. 437. But there had been no testimony to the contrary to make this testimony proper rebuttal evidence. The state's purpose was to do what the rules of evidence prohibit – to introduce impermissible character evidence where the particular traits of character had not been put in issue. *See* Rules 404(a)(2), 404(a)(3), and 608(a), SCRE. For the reasons set forth in the principal brief, this improper character evidence was both inadmissible and prejudicial.

IV. THE TRIAL COURT ERRED IN ALLOWING TESTIMONY OF THE CHILD'S MOTHER THAT EXCEEDED THE LIMITATION ON ADMISSION OF OUT-OF-COURT STATEMENTS OF ALLEGED VICTIMS OF SEXUAL ASSAULT, EXCEPT AS TO TIME AND PLACE.

Appellant relies on the argument of this issue in his principal brief. As stated therein, the admission of the mother's testimony concerning statements the child made to her exceeded the exception for hearsay as to time and place. Her testimony was impermissibly premised on what the child explained to her. It was improper corroborative evidence, and its admission was reversible error.

The state attempts to contradict the assertion in appellant's principal brief that there was no corroborative evidence tending to establish that an incident occurred in a

bedroom. Appellant's assertion is correct. The child's reference to an incident "under the covers" is not ***corroborative*** evidence. Moreover, the child testified twice during cross-examination that she could not remember where a fourth incident occurred. Tr. p. 194, lines 15-16, 23-25. She specifically denied telling anyone there was an incident in a bedroom. Tr. p. 194, lines 17-20. Under these circumstances, for the mother to be allowed to testify concerning the child's statement about this alleged fourth incident and to further testify that, based on what the child explained to her, she remembered the occasion the child described, cannot be deemed harmless.

V. APPELLANT IS ENTITLED TO A NEW TRIAL BASED ON CUMULATIVE PREJUDICE FROM THE MULTIPLE ERRORS COMMITTED BY THE TRIAL COURT AND THE RESULTING DENIAL OF A FAIR TRIAL.

The state claims the cumulative prejudice argument is not preserved, citing the Court of Appeals decision in *State v. Beekman*, 405 S.C. 225, 746 S.E.2d 483 (Ct. App. 2013), for the proposition that cumulative error is not preserved where the defendant did not specifically raise the doctrine to the trial court or argue he was entitled to a new trial based upon errors made during the trial. Appellant disputes that *Beekman* stands for the sweeping proposition the state asserts, and the South Carolina Supreme Court has not announced such a rule of preservation as to a claim of cumulative prejudice from errors in a criminal trial. In fact, *Beekman* relied upon a ***dissenting*** opinion of a Court of Appeals judge in a case in which both the Court of Appeals majority and the Supreme Court found reversible error and further relied upon a Court of Appeals decision addressing a claim that the cumulative effect of improper jury charges warranted a new trial in a ***civil*** case. *See Beekman*, 405 S.C. at 236-237, 746 S.E.2d at 490, *citing State v. Covert*, 368 S.C. 188, 214, 628 S.E.2d 482, 496 (Ct. App. 2006) (Goolsby, J., dissenting), *majority aff'd as modified*, 382 S.C. 205, 675 S.E.2d 740 (2009), *and Wells v. Halyard*,

341 S.C. 234, 240, 533 S.E.2d 341, 344 (Ct. App. 2000). Appellant submits his claim of cumulative prejudice is preserved by the objections made throughout the trial. Each individual error was properly preserved at the time it arose, and trial counsel renewed its objections made throughout the trial at the close of the evidence. Tr. p. 461. Appellant's cumulative prejudice argument is appropriately before the appellate court. If this Court finds the trial court's multiple errors were harmless standing alone, it should review the prejudice resulting from those errors in combination and find that the cumulative prejudice affected the outcome and denied appellant a fair trial. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3.

CONCLUSION

For the foregoing reasons and the additional reasons set forth in appellant's principal brief, this Court should reverse appellant's conviction and grant him a new trial.

Respectfully submitted,

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The State,

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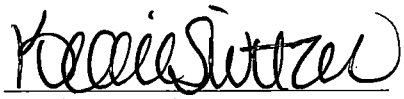
PROOF OF SERVICE

I certify that I have served the appellant's initial reply brief and additional designation of matter to be included in the record on appeal upon respondent, by mailing a copy, postage prepaid, to counsel for respondent, Assistant Attorney General Jennifer Ellis Roberts, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29202, on January 20, 2016.



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January 20, 2016

VIA HAND-DELIVERY
The Honorable Jenny A. Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
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RE: The State v. Bryant C. Gurley
Appellate Case No.: 2015-000235

Dear Ms. Kitchings:

Enclosed for filing are the Initial Reply Brief of Appellant, Additional Designation of Matter to be Included in the Record on Appeal and Proof of Service in the above referenced matter.

By copy of this letter, I am serving Jennifer Ellis Roberts, Assistant Attorney General, with a copy of same.

If you have any questions, do not hesitate to contact me.

Very truly yours,

Jack B. Swerling

JBS/kas
Enclosure

cc: Jennifer Ellis Roberts, Assistant Attorney General
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