STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County
G. Edward Welmaker, Circuit Court Judge

THE STATE,

Respondent,

vs.

GARY CLIFTON HAMILTON,

Appellant.

Appellate Case No. 2014-001665

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court did not err in allowing expert testimony concerning delayed disclosure and grooming. The expert, unaware of the facts of the case, did not improperly bolster the victim's testimony. The dynamics of child abuse is a particular phenomenon beyond the ken of lay jurors. The assertion that the expert's testimony is not reliable is not preserved for review, and the expert's testimony is reliable.

STATEMENT OF THE CASE

Appellant Hamilton was indicted for criminal sexual conduct with a minor in the first degree (CSC) and lewd act on a minor. A jury found Hamilton guilty as charged following trial before the Honorable G. Edward Welmaker on July 28-30, 2014. Judge Welmaker sentenced Hamilton to concurrent terms of thirty-two years imprisonment for CSC and fifteen years imprisonment for the lewd act.

STATEMENT OF FACTS

Victim was six years old at the time of trial. She was three years old when Hamilton sexually assaulted her. Victim testified that Hamilton would take her to the store and to church. Victim testified about a particular occasion Hamilton took her to church. While parked at the church, Hamilton pulled Victim's tights and panties halfway down. Hamilton put his finger in her "butt" and told her that if she kept moving, it would hurt worse.[1] Victim testified Hamilton pulled his pants down and "screamed" while he pulled his "weiner." ROA. pp. 190-192. Afterwards, Hamilton and Victim went to the church service. Victim said she felt sad and missed her mom during the service. ROA. p. 193. Victim later told her

[1] Victim explained on cross-examination that she never told anyone before about Hamilton's advice not to

mother about the abuse while Victim was taking a bath. ROA. pp. 193-194. Victim explained she disclosed the abuse to her mother because "if I choose the truth, I know that it would be more safer and she would protect me." ROA. p. 194, lines 7-8. Victim testified on redirect that no one told her what to say on the witness stand. ROA. p. 201.

Victim's mother (Mother) testified she was friends with Hamilton's daughter, which was how she met Hamilton. Mother admitted Hamilton's family helped her out while she was going through difficult times. For a couple of weeks, Mother did not have a place for her daughters to stay, and Hamilton let Victim and her sister stay at his house. Mother confirmed that Hamilton took Victim to church. She described Hamilton as a grandfather figure to Victim. Mother was able to secure a new home and about a month after they were in the new home, Mother was giving Victim a bath. Victim looked depressed, and after Mother inquired, Victim disclosed she was sexually assaulted at church when no one else was around. Mother testified that at first, she did not want to believe Victim, but Victim later restated that she was abused, and Mother decided to call the Pickens County Sheriff's Office. ROA. pp. 209-213.

Mother testified that before August 2011, Victim "was so happy." ROA. p. 213, lines 16-22. Ever since then, Victim has struggled. She has night terrors and wets the bed. She has received counseling. ROA. pp. 213-214. Mother described the ordeal as "literally watching the innocence of my child be stripped away. And the constant fear and worry of somebody coming to attack her or get her." ROA. p. 213, lines 19-22.

Hamilton's counsel asked Mother if she had bragged about getting Hamilton in

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move. She testified, "I've never said that in my life." ROA. p. 198, lines 9-16.

trouble. Mother explained that she talked about the situation at work and explained as follows:

> [B]ecause I had to take time off for bond hearings. I had to take time off for different things. You know, I wouldn't say I bragged about it. But because it's not really something to brag about. It's caused a lot of pain, a lot of heartache in my family.

ROA. p. 226, lines 4-8.

Mary Jane Bryant is friends with Mother. She testified that in October 2011, Victim disclosed that she was abused in a church parking lot. When Victim told Bryant, Mother walked out of the room. Bryant testified that Victim was sad when she disclosed the abuse. ROA. pp. 229-231.

Investigator Michele Hendrix from the Anderson County Sheriff's Office testified she received the case from the Pickens County Sheriff's Office in November 2011. She interviewed Hamilton on April 5, 2012. Hamilton appeared to have no problem understanding what was going on. Investigator Hendrix was unaware that Hamilton had a "special education." ROA. pp. 235-236. Hamilton denied the allegations. He admitted he took Victim to church but claimed his wife always accompanied them. ROA. pp. 234-237.

Investigator James Collins accompanied Investigator Hendrix to the first interview on April 5, 2012. Investigator Collins then met with Hamilton on April 19, 2012. Investigator Collins gave Hamilton his Miranda warnings while Hamilton's daughter was present. ROA. pp. 244-247. The first thing Hamilton said was he barely touched Vicitm. He claimed his finger barely went inside Victim's vagina. ROA. p. 249.

Hamilton tried out several explanations. His first explanation was that he tried to

pick up Victim from the car seat by her waist. Hamilton explained his finger might have accidently touched Victim's vagina. ROA. p. 249, lines 11-15. Naturally, this explanation made little sense to Investigator Collins.[2] Investigator Collins testified he told Hamilton he "didn't quite understand how [Hamilton] picked her up by the waist and . . . that she had on a dress, he picked her up by the waist, how his hand accidently went under her dress, moved her panties out of the way and his finger went inside of her at that point." ROA. p. 249, lines 15-23.

Instead of offering clarification, Hamilton made up a second story. Hamilton claimed he was picking Victim up by the waist, she almost fell, and when Hamilton went to catch her, that's when his finger might have accidently touched her vagina. ROA. p. 249, line 23 – p. 250, line 2. Investigator Collins found the explanation odd because Hamilton's hands were injured and he was "very immobile;" Hamilton was using a cane. Investigator Collins questioned whether Hamilton would have been able to pick up Victim by the waist. Further, Investigator Collins understood that Victim was able to walk, so it would seem unnecessary for Hamilton to pick Victim up. ROA. p. 250.

Rather than provide any clarification in response to Investigator Collins' valid observations, Hamilton provided a third story. Now Hamilton claimed Victim was sitting in the backseat and soiled herself. Hamilton surmised he must have touched her vagina while cleaning her. He first said he did not have anything on his hand. Then Hamilton said he used a wipe, and his finger might have accidently touched her vagina at that point. ROA. p. 250, line 21 – p. 251, line 4.

[2] The prosecutor noted during closing argument that you would not pick up a child from a car seat by the waist.

Noting this story was much different from the first two stories, Investigator Collins challenged Hamilton on these inconsistencies. Hamilton became frustrated so he resorted to telling the truth: Hamilton yelled "I did it." Then Hamilton provided his confession. ROA. p. 251. Investigator Collins testified that Hamilton's "special education" did not affect his ability to give a statement. ROA. p. 253.

In his statement, Hamilton explained he took Victim to church after dropping off his son at another church. No one else was there yet. While waiting, Hamilton went to the back of the car where Victim was sitting and rubbed his hand between Victim's legs and rubbed her vagina underneath her panties. Hamilton claimed to rub Victim's vagina but he did not put his finger inside Vicitm. Hamilton admitted rubbing Victim's vagina for a few minutes. Hamilton claimed he stopped of his own accord and waited on the steps of the church with Victim for another thirty to forty minutes before somebody else arrived. ROA. pp. 255. Investigator Collins noted that notwithstanding Hamilton's typed statement, Hamilton orally admitted to inserting his finger in Victim's vagina. ROA. pp. 255-256. Investigator Collins estimated the interview lasted only thirty minutes. ROA. p. 261.

Julie Anne Hamilton is Hamilton's daughter, and she testified for the State. She testified she was friends with Mother until the assault. It was Mother's choice to end the friendship, but Julie understood why Mother ended it, and she did not blame Mother. Julie lived with her parents. She verified that Victim stayed with them. Julie testified that her mother, Hamilton's wife, had infections that kept her from going to church. Julie and her mother went with Hamilton to the police station when he was interviewed by Investigator

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Instead the child would be picked up from underneath their armpits. ROA. p. 395, lines 20-25.

Collins. Julie was present when Hamilton was read his rights, and he did not have trouble understanding them. On the way home from the station, Hamilton handed Julie the confession and said "please don't hate me." ROA. pp. 267-272.

The case was transferred to the Central Police Department because the church was in Central which is not in Anderson County. Police Chief Khristy Justice was an investigator at the time she interviewed Hamilton. She went through Hamilton's rights with Hamilton. She testified she did not see any competency issues with Hamilton. At first, Hamilton claimed that he only accidently touched Victim's vagina. But then he admitted he rubbed Victim's vagina for two minutes. Hamilton demonstrated to Chief Justice how he rubbed Victim. Hamilton admitted he knew what he did was wrong. ROA. pp. 281-288. Hamilton claimed his "dick don't even work no more" when Chief Justice asked him if he masturbated in front of Victim. ROA. p. 298, lines 22-24.

Hamilton dictated another statement to Chief Justice consistent with the statement he provided Investigator Collins. However, Hamilton further claimed in this statement the following: "I don't know why I did this to [Victim], but it wasn't for sexual reasons. My dick don't even get hard. I don't know why." ROA. p. 301, lines 19-21. Hamilton was calm, and he did not seem intimidated. ROA. p. 302.

The State's case against Hamilton was strong, the defense was weak. Desperation apparently prompted Hamilton's counsel to attack Chief Justice's supposed lack of investigation. Hamilton's attorney asked Chief Justice the following question: "You never confirmed that he was ever there?" and Chief Justice replied: "Well that came out of your client's mouth that he was there." ROA. p. 309, lines 6-8.

Frederick Durham was an officer at the time of the statement, and he was present when Chief Justice interviewed Hamilton. Durham confirmed that Chief Justice provided warnings to Hamilton. Hamilton did not appear to have any trouble understanding what was going on, and he was not forced to give his statement to Chief Justice. When Chief Justice read Hamilton his statement back to him, Hamilton had no objections. ROA. pp. 316-318.

Brenda Hamilton, Hamilton's wife, testified Hamilton was disabled from a fall while working at a Duke Power dam. Brenda stopped going to church due to a debilitating staph infection. Brenda confirmed that Hamilton would take Victim to church alone. Brenda also testified she was unaware of any medical diagnosis that prevented Hamilton from having an erection. Tr. p. 320-323; p. 327.

Shauna Galloway-Williams was the State's penultimate witness. She was amply qualified as Hamilton's trial attorney surely recognized when she stated she did not object to Galloway-Williams' qualifications, explaining to the trial court: "No, I don't have any issue about her qualifications; just what her testimony would be, Your Honor." ROA. p. 335, lines 18-20. Hamilton's attorney declined voir dire concerning Galloway-Williams' qualifications.[3]

Galloway-Williams is the Executive Director of the Julie Valentine Center, a child abuse and sexual assault recovery center serving Greenville and Pickens Counties. The Center provides services for children and families impacted by child abuse and sexual

[3] Thus Hamilton has waived any claim that Galloway-Williams is only a "so-called expert" as Hamilton derisively claims, and Hamilton has conceded Galloway-Williams is a bona fide expert. It is the law of the case. State v. Sampson, 317 S.C. 423, 454 S.E.2d 721 (Ct. App. 1995) (unchallenged rulings are the law of the case).

assault. The Center also provides education and prevention services. ROA. pp. 348-349.

Galloway-Williams earned a bachelor's degree in psychology and a master's degree in counseling. She is a licensed professional counselor in South Carolina. She has worked in the field of mental health for seventeen years and has worked with children and families impacted by abuse and neglect for thirteen years. ROA. p. 349.

Galloway-Williams was the immediate past board president of the South Carolina Network of Children's Advocacy Centers. She is also a former board member for the South Carolina Professional Society on the Abuse of Children. She is Co-Chair of the Silent Tears Task Force. ROA. p. 350.

Galloway-Williams received over 140 hours of skills-based training directly related to working with children who may have been abused or neglected. Galloway-Williams is an adjunct faculty member of the Child Advocacy Studies Program at University of South Carolina Upstate. Galloway-Williams conducts training related to recognizing and responding to child sexual abuse. ROA. pp. 350-351.[4]

Galloway-Williams testified she never met Victim or observed Victim provide any statement. Galloway-Williams did not know anything about Hamilton. ROA. p. 352, line 24 – p. 353, line 7.

Galloway-Williams discussed grooming: She discussed how a perpetrator develops a trusting relationship with a child and the child's family by giving special attention to the child and the child's family. A perpetrator may also test the waters with the child by

[4] Hamilton claims Galloway Williams is "simply a forensic interviewer." Br. of App. p. 12. However, while Galloway-Williams testified she has conducted forensic interviews in the past, her testimony did not indicate she was currently conducting forensic interviews. She did not interview Victim.

innocuous touching to see how the child reacts. ROA. p. 353.

Galloway-Williams noted "most children are abused by someone that's known, loved and trusted to the child and to the family." ROA. p. 353, lines 3-4. Galloway-Williams explained, "And that a lot of times is why children have a hard time telling someone or letting someone know that this has happened to them." ROA. p. 354, lines 7-8.

Galloway-Williams explained how a child's disclosure is affected if the perpetrator is someone the child knows, explaining the following:

> That's really one of the main reasons why children don't tell, is because they know, love and trust the person that has done this to them. A lot of times they fear what's going to happen to them or to the person that's done this. A lot of times children have a very – have a lot of really good characteristics so there's a lot of good things about the relationship with the person in addition to the abuse. This may be the one person that gives them the most attention, that they like to play with. This may be the one person that they feel closest to. This may be the one person that the other family members are closest to. Knowing those things and experiencing those things makes it really hard for children to tell that something's happened.

ROA. p. 354, line 13 – p. 355, line 1. Galloway-Williams further explained:

> In most cases that we see at the Julie Valentine Center and in my experience and in what the research tells us, most children don't tell right away. And in fact, many adults live into their adult lives without having ever told anyone that this has happened to them. So from my experience and training and education, it's very common that children don't disclose or that they delay their disclosure.

ROA. p. 355, lines 4-11.

Galloway-Williams discussed factors affecting delayed disclosure:

> [O]ne of the strongest factors or one of the biggest influences

> is that relationship that the child has with the perpetrator; it being a loving, trusting relationship with them or a relationship with the family. Children may fear the consequences of what's going to happen to them or the perpetrator if they tell. They may have been threatened that something's going to happen. Children may know, without anyone even telling them, they may know that there are things that will happen if they tell. That they or something's going to have to move. That someone's not going to be able to take care of them or the household. Children are very aware of some of the consequences that may happen if they tell.

ROA. p. 355, line 19 – p. 356, line 6. Galloway-Williams explained the difference between partial and full disclosure, noting that "disclosure is a process." ROA. p. 356, lines 9 – 14. Galloway-Williams advised the jury, "Children don't always know exactly what we want to know." ROA. p. 356, lines 21-22.

Galloway-Williams explained children "may not have the same knowledge and understanding of sexuality and how to articulate what it is that's happened. So the way that children communicate is different than the way that adults communicate." ROA. p. 357, lines 15-19.

Galloway-Williams discussed factors affecting the risk to a child of sexual abuse:

> What we know is that there are certain things that put children and their families at higher risk for abuse. You know, one of the highest risk factors is substance abuse by a care giver. That puts a child and a family at risk for abuse and makes them more vulnerable. Single parent households make children more vulnerable to abuse. And again, none of these things are to indicate that parents . . . are at fault for this happening. These are just risk factors that often offenders will take advantage of. . . . Just by virtue of being much younger, children are more vulnerable. The less verbal a child is, the less likely they are to be able to talk or tell that something's happened. And often if children have some sort of disability, if children have had behavior problems, if

> they've been known to get in trouble, those kind of things set children up at higher risk and can often make them targets for offenders.

ROA. p. 357, line 23 – p. 358, line 16.

On cross-examination, Galloway-Williams explained: "Just because a child delays reporting or delays a disclosure, that doesn't really indicate that it didn't happen. Because what we know is that most times children delay disclosure and don't tell right away." ROA. p. 359, lines 2-5. She explained: "it's not really my job as an interviewer or as a therapist or in any of those roles to really determine whether the child has told the truth or not. That's not really my job." ROA. p. 359, lines 16-20. Galloway-Williams explained that she was speaking in general terms but that her testimony was "based on research and training and experience." ROA. p. 360, lines 3-4.

Dr. Mary Fran Croswell examined Victim and the exam was normal. This was consistent with 85% of the cases of reported child abuse. Victim told Dr. Croswell she was abused on the way to church. ROA. pp. 369-371.

The record fails to disclose any existing animus between Mother and Hamilton, or Victim and Hamilton.

Hamilton's confessions – the rest of the story

Hamilton's confessions were damaging to Hamilton's defense. Hamilton attempts to counter this on appeal by presenting facts in a way suggesting a coercive interrogation. Some counterpoint is necessary for a fuller picture:

First, Hamilton attempts to cast dispersions on law enforcement by writing, "Inexplicably, Collins permitted Appellant to leave the Sheriff's Office and return home with

his wife and daughter." App. Br. at p. 7. During the Jackson v. Denno hearing, Investigator Collins explained as follows why he did not arrest Hamilton after the interview:

> Based on his statement, the incident took place in Central, which is outside my jurisdiction. At that time I informed him of that information and that it would be forwarded to the Central Police Department. I also advised him that based on [Victim's] statement, our investigation may still be presented to a solicitor's office. And he was provided a copy of his statements, which I believe he threw in the trash prior to going back out with his family.

ROA. p. 92, lines 12-20. Respondent has designated this portion of the transcript for the record for this Court's edification.

Second, Hamilton's **first** confession actually occurred following his polygraph test which was administered by Charlie Lark in his role as a consultant for the Anderson County Sheriff's Office. Hamilton admitted to Lark that he put his finger in Victim's vagina even though he denied this during the polygraph examination. ROA. pp. 73-77. The trial court declined to admit this statement due to its connection to the polygraph examination and not on the basis of voluntariness. ROA. p. 170.

ARGUMENT

The trial court did not err in allowing expert testimony concerning delayed disclosure and grooming. The expert, unaware of the facts of the case, did not improperly bolster the victim's testimony. The dynamics of child abuse is a particular phenomenon beyond the ken of lay jurors. The assertion that the expert's testimony is not reliable is not preserved for review, and the expert's testimony is reliable.

Hamilton complains the trial court should not have allowed Galloway-Williams' expert testimony because it would not assist the trier of fact. Hamilton fails to support this assertion with relevant authority. Further, Hamilton complains, for the first time on appeal, that Galloway-Williams' testimony is not reliable even though Galloway-Williams' testimony is supported by "research, training, and experience." ROA. p. 360, lines 3-4. Hamilton also complains that Galloway-Williams' testimony is improper bolstering even though Galloway-Williams did not relate her testimony to the facts of the case and had not interviewed Victim or reviewed the facts of the case. Most of Hamilton's arguments were rejected by this Court in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) (cert. denied August 6, 2015).

Under Rule 702, SCRE:

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

"A party is allowed to present expert testimony to the factfinder if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the

evidence or to determine a fact in issue." Brown, 411 S.C. at 339, 768 S.E.2d at 251 (citation and internal quotation marks omitted). "Expert testimony may be used to help the jury determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." Id. (citing Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010)).

Watson provided a three prong test for a trial court to apply to determine if expert testimony is proper: (1) The trial court must first determine if the subject matter is beyond the ordinary knowledge of the jury requiring the expert to explain the matter to the jury, (2) the trial court must then determine if the expert has acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter, and (3) the circuit court must evaluate the testimony and determine if it is reliable. Watson, 389 S.C. at 446, 699 S.E.2d at 175.

In the instant case, Hamilton challenges the first and third prongs of Watson, but does not challenge Galloway-Williams qualifications. As shown below, numerous courts have found expert testimony on the general behaviors of sexually abused children is proper expert testimony beyond the knowledge of laypersons – Hamilton failed to cite one case that held otherwise. Further, the trial court evaluated the testimony and determined it was reliable, as it obviously is in light of the authority in this State and elsewhere.

Expert testimony on the behavioral traits of victims of child sexual abuse aids the trier of fact.

Hamilton coyly argues the area of "child abuse dynamics" does not exist. If Hamilton really believed this, then he is proof that it is beyond the ken of laypersons. The testimony

concerned general behavior characteristics of sexually abused children including a discussion of delayed disclosure and grooming, topics well-known amongst those involved with the criminal justice system. Hamilton's head-in-the-sand argument is betrayed by Hamilton's begrudging recognition of this Court's recent opinion in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) (cert. denied August 6, 2015). In that case the expert was none other than Ms. Galloway-Williams and the trial judge was none other than Judge Welmaker. The arguments presented in that appeal track the arguments in this case closely. As in that case, Galloway-Williams did not interview Victim and did not comment on the facts of the case but instead provided general background testimony on the behaviors of victims of child abuse. This Court noted the following in Brown: "Numerous jurisdictions considering this issue have similarly concluded it is more appropriate for an expert to explain the behavioral traits of child sex abuse victims to a jury." Id. at 342, 768 S.E.2d at 246. Since Hamilton cited Brown, it is confusing as to how Hamilton can assert that the area of expertise does not exist.

Since Hamilton submitted his brief, the Supreme Court affirmed the holdings of the cases that Hamilton claims have been overruled. State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015). In Anderson, the Supreme Court held that expertise in forensic interviewing is not recognized and the person performing the forensic interview is restricted to testimony about the facts of the case and may not be qualified as an expert. However, Anderson clarified that a witness who did not perform the forensic interview and is appropriately qualified may testify as an expert witness on the behavioral characteristics of sex abuse victims, citing with approval State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859

(1993); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999); and State v. White, 361 S.C. 407, 605 S.E.2d 540 (2004). Anderson, 776 S.E.2d at 79. Hamilton claimed in his brief that Weaverling has been overruled. Hamilton ignored the binding authority of the other two cases in his brief.

The testimony Hamilton is attacking is hardly novel. Behavioral testimony on the effects of sexual abuse on children and their reactions to sexual abuse has been a topic of expert testimony for over a quarter of a century. The Supreme Court of Hawaii observed in 1990 that "sexual abuse of children 'is a particularly mysterious phenomenon.'" State v. Batangan, 799 P.2d 48, 51 (Haw. 1990) (quoting State v. Castro, 756 P.2d 1033, 1044 (Haw. 1988)). The Hawaii Supreme Court quoted with approval the observations of other courts as follows:

> While jurors may be capable of personalizing the emotions of victims of physical assault generally, and of assessing witness credibility accordingly, tensions unique to trauma experienced by a child sexually abused by a family member have remained largely unknown to the public. . . . [T]he routine indicia of witness credibility – consistency, willingness to aid the prosecution, straight forward rendition of the facts – may, for good reason, be lacking. As a result jurors may impose standards of normalcy on child victim/witnesses who consistently respond in distinctly abnormal fashion.

Batangan, 799 P.2d at 51 (quoting State v. Moran, 728 P.2d 248, 251 (Ariz. 1986) and State v. Middleton, 657 P.2d 1215, 1222 (Or. 1983) (Roberts, J., concurring)).

The Batangan court further observed:

> Child victims of sexual abuse have exhibited some patterns of behavior which are seemingly inconsistent with behavioral norms of other victims of assault. Two such types of behavior are delayed reporting of the offenses and recantation of

> allegations of abuse. Normally, such behavior would be attributed to inaccuracy or prevarication. . . . In these situations it is helpful for the jury to know that many child victims of sexual abuse behave in the same manner. Expert testimony exposing jurors to the unique interpersonal dynamics involved in prosecutions for intrafamily child sexual abuse . . . may play a particularly useful role by disabusing the jury of some widely held misconceptions . . . so that it may evaluate the evidence free of the constraints of popular myths.

Batangan, 799 P.2d at 51-52 (citations and internal quotation marks omitted). The Minnesota Supreme Court found: "Background data providing a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate in cases of sexual abuse of children." State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984).

The Alabama Criminal Court of Appeals found an expert's testimony on delayed disclosure based on her specialized knowledge was admissible and "clearly assisted the jury to understand the evidence presented" regarding the victim's ten-year delay in disclosing abuse. W.R.C. v. State, 69 So.3d 933, 939 (Ala. Crim. App. 2010) (noting "other jurisdictions have held similar testimony to be admissible in child-sexual-abuse cases").

A law review article confirms the soundness of expert testimony on delayed disclosure:

> Psychological research demonstrates that delayed reporting is common among sexually abused children. Frequently when children finally disclose, they give slightly different versions of the abuse to different interviewers. Finally, although there is debate about how many sexually abused children recant, it is undisputed that some children recant and some recant their recantation. Thus, from a psychological point of view, expert testimony about delay, inconsistency, and recantation is not

> controversial. From the legal perspective, such testimony is not worrisome.

John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y, 45-46 (2010) (footnotes omitted).

Generally, "[e]xpert testimony that abused children often delay reporting the abuse . . . 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. App. Ct. 2003). Further, disclosure in child abuse cases is generally delayed because of coercion, guilt, or some other reason, [and thus] there will be no physical evidence to corroborate the victim's allegations. Therefore . . . expert testimony will . . . assist the jury in understanding the evidence." People v. Beckley, 456 N.W.2d 391, 402 (Mich. 1990); see also State v. Carpenter, 556 S.E.2d 316, 321 (N.C. Ct. App. 2001) (finding expert testimony on delayed disclosure is "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").

In State v. Cardany, 646 A.2d 291 (Conn. App. Ct. 1994), Connecticut's Appellate Court found expert testimony on delayed disclosure admissible in the state'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 that 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 state'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).

The Iowa Court of Appeals found counsel was not ineffective for failing to object to an expert's testimony on characteristics of abused children, noting in part: "We determine the opinion evidence could help the jury in understanding the evidence because it explained the delayed reporting symptom that existed in children who were sexually abused." State v. Tonn, 441 N.W.2d 403, 405 (Iowa Ct. App. 1989).

"Indeed, the majority of states permit expert testimony to explain delayed reporting,

recantation, and inconsistency . . . ." People v. Spicola, 947 N.E.2d 620, 635 (N.Y. 2011).

South Carolina recognizes the role of this testimony too. This Court recently observed the following:

> When sexual abuse occurs, particularly if the victim is a child, the victim may not be able to immediately disclose the abuse for numerous reasons, including the victim's feelings of shame over what happened and the victim's fear of or intimidation by the perpetrator. We find this was an appropriately general explanation [by an expert witness] of the medical or scientific reasons a child might not immediately disclose sexual trauma.

State v. Smith, 411 S.C. 161, 171, 767 S.E.2d 212, 217-18 (Ct. App. 2015) (cert. denied June 17, 2015).

Similarly, other jurisdictions have found expert testimony on grooming admissible and the information is beyond the ken of lay jurors. Grooming is "the process of eroding a victim's boundaries to physical touch and desensitizing them to sexual issues." State v. Berosik, 214 P.3d 776, 782 (Mont. 2009) (finding generalized testimony about grooming by expert witness was admissible). This testimony has been found to assist the trier of fact. See Morris v. State, 361 S.W.3d 649 (Tex. Crim. App. 2011); People v. Diaz, 988 N.E.2d 473 (N.Y. 2013) (finding expert testimony about grooming proper as it is "beyond the ken of the typical juror" and favorably noting that the expert testified she was not aware of the facts of the particular case). "[T]he D.C. Circuit, among other courts, has upheld the admission of [the expert's] testimony on the grooming techniques of child molesters precisely because the average layperson lacks knowledge regarding the manner in which preferential sex offenders operate." Jones v. United States, 990 A.2d 970, 978 (D.C. Ct. App. 2010). "The testimony

[helps] to explain not only how a child molester could accomplish his crimes without violence, but also why a child victim would acquiesce and be reluctant to turn against her abuser." Id.

This Court, in finding prior bad acts evidence admissible, noted that "[t]he six to seven year pattern of escalating abuse of Victim by [appellant] is the **essence of grooming** and continuous illicit activity." State v. Kirton, 381 S.C. 7, 36, 671 S.E.2d 107, 121 (Ct. App. 2008) (emphasis added).

Like expert testimony on delayed disclosure, general expert testimony on how grooming affects a child's disclosure of sexual abuse is acceptable behavioral testimony. See Weaverling. Accordingly, the trial court did not abuse its discretion in allowing this testimony.

Hamilton contradicts himself in his brief: Hamilton claims that expertise on understanding behaviors of sexually behaved children does not exist and then claims the subject matter of the testimony is so well-known that it is not beyond the realm of laypersons. Hamilton does not cite a single case that finds testimony regarding delayed disclosure, grooming, and the like inadmissible because it is not beyond the knowledge of laypersons.

Instead, Hamilton cites State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) and State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). But those cases present a fact pattern where the person performing a forensic interview was qualified as an expert in forensic interviewing. To avoid an obvious distinction, Hamilton mischaracterizes Galloway-Williams as a forensic interviewer, although that was obviously not her role. Br. of App. p.

12. Of course, Galloway-Williams did not conduct a forensic interview. She only testified to provide general background information on the behaviors of child victims of sexual abuse.[5] Douglas held that under the facts of that particular case it was unnecessary to qualify the forensic interviewer as an expert. Douglas, 380 S.C. at 501, 671 S.E.2d at 608. In Kromah, the Supreme Court in dicta declared they did not foresee a circumstance where it was necessary to qualify the interviewer as an expert in the RATAC methodology. Kromah, 401 S.C. at 357, 737 S.E.2d 499 n.5. Neither case cites Weaverling or Shumpert, and neither case discussed behavioral testimony. Of course Hamilton's brazen assertion that these cases were overruled by Kromah or Douglas has now been rejected by the Supreme Court in Anderson.

Testimony is reliable and the argument is not preserved for review

Hamilton's argument that the testimony is not reliable is not preserved for review. Hamilton's trial attorney objected, claiming the testimony was not probative, the testimony would improperly bolster Victim's testimony, and the subject matter was not knowledge beyond the ken of jurors. ROA. pp. 332-334. Hamilton did not argue that the testimony was unreliable before the trial court.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94

[5] Galloway-Williams' testimony on delayed disclosure and grooming is what a Texas court aptly described as "educator expert" evidence. Coble v. State, 330 S.W.3d 253 (Tx. Crim. App. 2010) (finding expert testimony about Texas prison classification system and prison violence admissible despite claim the testimony did not relate to appellant personally; testimony was relevant as rebuttal "educator-expert" evidence). Galloway-Williams did not relate her testimony to Victim personally.

(2003). The ground asserted at trial must be supported by the objection raised at trial. State v. Silver, 314 S.C. 483, 486, 431 S.E.2d 250, 251 (1993). An objection must sufficiently bring into focus the precise nature of the alleged error so it may be understood by the trial judge. State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). The party may not argue one ground at trial and another on appeal. Id.

Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. I'On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); see also Ellie, Inc. v. Miccichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004) ("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error."). In the instant case, there was no challenge to the reliability of the testimony. This Court should decline to address the issue.

Further, the record establishes the reliability of Galloway-Williams' testimony. Scientific expert testimony requires that a court consider the following: "(1) the publications and peer review of the technique; (2) prior applications of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." Graves v. CAS Medical Systems, Inc., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012) (citation and internal quotation marks omitted). "However, these factors serve no useful analytical purpose for nonscientific evidence." Id. at 74, 735 S.E.2d at 655-56 (citation and internal quotation marks omitted).

In Graves, the Supreme Court found error in excluding a doctor's expert testimony on SIDS even though the doctor testified she did not consider herself a SIDS (Sudden Infant Death Syndrome) expert. The Supreme Court opined, "The record before us reveals a doctor with over thirty years' experience as a neonatologist who stays current on SIDS literature. It is also clear from her testimony that she routinely encounters SIDS in her practice." Id. at 78, 735 S.E.2d at 657-58.

Obviously in counseling children who were sexually abused, and their families, Galloway-Williams has had the opportunity to observe and analyze their behaviors. Hamilton did not raise an issue concerning the reliability of the expert testimony to the trial court, but Galloway-Williams addressed it on cross-examination when she testified that everything she talked about "is all based on research and training and experience." ROA. p. 360, lines 3-4. The record reveals that Galloway-Williams worked in the field of mental health for seventeen years. ROA. p. 349, lines 22-24. Galloway-Williams teaches a child maltreatment course at USC-Upstate. She conducts training related to recognizing and responding to child sexual abuse. ROA. p. 350, lines 18-23. Like the doctor in Graves, Galloway-Williams has the requisite experience on the subject matter at hand to give reliable background information on the behaviors of sexually abused children.

Hamilton relies on the Supreme Court's recent case of State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015). However, that case is inapplicable to the present case. In Chavis, a forensic interviewer was qualified as an expert based on her training, education and knowledge of the RATAC protocol in order to give an opinion on whether there was a disclosure of sexual abuse in an interview of a child performed by another forensic

interviewer who was unavailable to testify at trial. The Supreme Court noted issues with the foundation to establish the testifying forensic interviewer's reliability. The expert testified she was unable to discern an error rate, and when asked what her quality control procedures were, she responded she uses RATAC every time. Peer review of her use of the RATAC technique was minimal. Id. at 107, 771 S.E.2d at 339. The Supreme Court opined "mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies. We find no evidence in this record as to [the forensic interviewer's] ability to draw reliable results from the RATAC procedures she consistently follows, and thus find that the threshold reliability requirement of Rule 702 is not met." Id. at 108, 771 S.E.2d at 339.

In the present case there is no "procedure" employed such as RATAC and no "result" was drawn. Galloway-Williams simply provided general background information on victims of child sexual abuse without applying this background information to the facts of the case. Chavis has no application to the present case.

Further, the reliability of this testimony was demonstrated when the prosecution provided the trial court with citation to Weaverling, which the trial court relied upon. Weaverling recognized the admissibility of this kind of testimony in several jurisdictions. Accordingly, the authority itself established the reliability of testimony on the behaviors of sexually abused children. See State v. Charles Allen Cain, Op. No. 5324 (S.C. Ct. App. filed July 15, 2015) (finding expert could testify as to theoretical yield of methamphetamine from precursor materials where the prosecution provided the trial court with authority from other

jurisdictions approving the use of such analysis, and the trial court based its ruling on the authority provided to it: "The cases on which the court based its ruling were directly on point and, therefore, qualified as prior applications of the theoretical yield method to the type of evidence involved in the instant matter.").

Not improper bolstering

Hamilton argues that Galloway-Williams' testimony improperly bolstered the Victim's testimony. Galloway-Williams did not comment on Victim's veracity. Instead Galloway-Williams supplied background information on the behaviors of victims of child sexual abuse without applying the facts to the present case. Galloway-Williams did not review the facts of the case or Victim's interview.

"[I]t is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." State v. Kromah, 401 S.C. 340, 358-59, 737 S.E.2d 490, 500 (2013). In this case, Galloway-Williams did not opine on Victim's veracity. Accordingly, this case is readily distinguishable from Kromah and other cases where the expert testimony was found to be unfairly prejudicial to the defendant. See State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding the admission of the forensic interviewer's written report into testimony to be error because the reports stated that each child "provided a compelling disclosure of abuse by appellant."); State v. McKerley, 397 S.C. 461, 465, 725 S.E.2d 139, 142 (Ct. App. 2012) (finding the forensic interviewer's "opinion as to whether she thinks something happened [was] nothing other than her inadmissible opinion as to whether the victim was telling the truth").

Georgia's Court of Appeals rejected an argument that an expert's testimony

"bolstered" the victim's testimony. Westbrooks v. State, 710 S.E.2d 594, 597-98 (Ga. Ct. App. 2011). The Georgia court found the forensic interviewer's testimony regarding partial disclosure and delayed disclosure was relevant and did not directly address the victim's credibility or express a direct opinion that the victim was sexually abused. Id. The Georgia court opined "the fact that such testimony may also indirectly involve the child's credibility" does not mean that it improperly bolsters the child's credibility. Id. at 598. Similarly, South Dakota's Supreme Court also rejected the argument that an expert who testified as to the general characteristics of an abused child bolstered the victim's credibility, noting the expert did not interview the witness or testify that the victim had any of those characteristics. State v. Edelman, 593 N.W.2d 419, 423 (S.D. 1999).

Generally, "[e]xpert testimony that abused children often delay reporting the abuse . . . 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. App. Ct. 2003).

Hamilton misapprehends what constitutes improper bolstering. All relevant evidence in some way "bolsters" the strength of the offering party's case, and a trial court may not exclude evidence that bolsters other evidence absent a constitutional, statutory or rule-based principle of law providing for exclusion. State v. Perry, 410 S.C. 191, 763 S.E.2d 603, 611 (Ct. App. 2014) (Few, C.J., concurring in part and dissenting in part). "'Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the

inference to be drawn is not beyond the ken of the average juror.'" State v. Taylor, 404 S.C. 506, 745 S.E.2d 124, 128 (Ct. App. 2013) (*quoting* State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct.App.2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009)). Generally, bolstering is prohibited to prevent a witness from testifying whether another witness is credible, which is exclusively within the province of the jury. Id.

Galloway-Williams never testified about the credibility of the victim. This is simply not improper bolstering under the definition this Court provided for the benefit of bench and bar.

The trial court did not abuse its discretion in admitting this testimony as it is clearly admissible under Schumpert and Weaverling and case law from the majority of jurisdictions that goes back decades and recently reaffirmed by this Court under Brown and subsequently the Supreme Court in Anderson. Any conceivable confusion over the precedent of this state and whether this state should become possibly the only jurisdiction to disallow such testimony was laid to rest by the Supreme Court's opinion in Anderson and its denial of a writ of certiorari in Brown the next day.

Prejudice

Hamilton argues that the testimony was unfairly prejudicial. However the testimony was probative to cure misconceptions about sexually abused children and explain the phenomenon of the behaviors of sexually abused children. It may be prejudicial to Hamilton because it limits his ability to mislead the jury or rely on a juror's misconceptions about child abuse, but it is not **unfairly** prejudicial.

Trial judges have considerable discretion in ruling on the admission or exclusion of

evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives **great deference** to the trial court." (emphasis added)).

In South Carolina, "[t]he admission or exclusion of expert testimony is a matter within the sound discretion of the trial court." Burroughs v. Worsham, 352 S.C. 382, 390, 574 S.E.2d 215, 219 (Ct. App. 2002). "A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). A trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). "There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." State v. Goode, 305 S.C. 176, 178, 406 S.E.2d 391, 393 (Ct. App. 1991).

For the reasons articulated above, Galloway-Williams' testimony carries abundant probative value. The testimony is not unfairly prejudicial. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610

S.E.2d 494 (2005). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (internal quotation marks omitted). "All evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (internal quotation marks omitted).

The fact that a jury might extract useful information from the expert testimony in understanding Victim's behaviors is not unfairly prejudicial. Hamilton fails to cite any cases finding general testimony on delayed disclosure or grooming is unfairly prejudicial. The trial court did not err. State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.").

Harmless error

Additionally, any conceivable error is harmless. See State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). There was no real defense in this case. Hamilton corroborated Victim's claims. When arguing against harmless error, Hamilton does not even mention his confessions. Moreover, there is not a hint of improper motive anywhere in the record for Victim or her mother to fabricate claims.

Behavioral testimony should continue to be allowed to dispel misconceptions of laypersons about how a sexually abused child might behave. During closing argument,

defense counsel told the jury, "They are dressing their doll for the show." ROA. p. 411, lines 6-7. Hamilton's attorney attempted to dehumanize the Victim in a win-at-all-costs approach increasingly being used against victims of sexual abuse. Defense attorneys know children are vulnerable when isolated, they know experts limit their ability to prey upon misconceptions about child abuse or make disingenuous attacks on children. Hamilton received his fair trial. Victims deserve fair trials too.

In the instant case, the trial court did not abuse its discretion in allowing Galloway-Williams to testify on the general behaviors of victims of child sexual abuse. Her qualifications and reliability were not challenged. However, both were firmly established by the record. The testimony is allowable in this jurisdiction and many others because the phenomenon of the behaviors of victims of sexual abuse still remains beyond the understanding of laypersons.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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September 30, 2015

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IN THE COURT OF APPEALS

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G. Edward Welmaker, Circuit Court Judge

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v.

GARY CLIFTON HAMILTON, Appellant.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Susan B. Hackett, Esquire, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 30th day of September, 2015.

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