STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of General Sessions

Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-001501

THE STATE,

Respondent,

v.

WAYLAND PURNELL,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Wayland Purnell was indicted at the October 2012 term of the grand jury for Richland County for two counts of criminal sexual conduct with a minor in the first degree and one count of lewd act upon a child. Purnell proceeded to a trial by jury from July 7-10, 2014, in Columbia, South Carolina. At the conclusion of trial, Purnell was found guilty of lewd act upon a child and one count of criminal sexual conduct with a minor. He was sentenced by the Honorable Clifton Newman to imprisonment for a term of twenty-five years for criminal sexual conduct with a minor in the first degree and fifteen years imprisonment for lewd act upon a child, with all sentences running concurrently. Purnell timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Sometime in 2010, Mother began dating Wayland Purnell, the appellant in this case. ROA. p. 61. Mother explained that the two dated via Facebook and text message communications. ROA. p. 61. Mother and Appellant also spent a few weekends together in Atlantic City. ROA. p. 61. Mother and Appellant eventually got married on March 18, 2011. ROA. p. 61. Once they were married, Appellant permanently came to live with Mother and her children at her home in New Jersey. ROA. p. 61. Mother has five children: K.B., B.M., Victim 1, Victim 2, and B.S. ROA. p. 29. At the time Appellant moved into Mother's home, B.M., Victim 1, Victim 2, and B.S. were all living with her. ROA. p. 62. Prior to moving into Mother's residence, Appellant never stayed in or spent extended time at the home. ROA. pp. 61-62. On September 2, 2011, Mother and Appellant moved to South Carolina with Mother's children. ROA. p. 63.

On April 30, 2012, D.H. was at an after-school reading club with Victim 1. ROA. p. 40. During a conversation while they were at the reading club, Victim 1 disclosed to D.H. that she knew what a man's private was. ROA. p. 42. D.H. was immediately concerned and told her mother what Victim 1 disclosed to her at reading club. ROA, p. 43. D.H.'s mother, Danielle Jackson, is a friend of Mother. ROA. p. 46. Following D.H.'s disclosure regarding her concerns that Victim 1 was sexually abused, Jackson immediately called Mother. ROA. p. 49. Mother came directly to Jackson's house where Jackson detailed D.H.'s disclosure. ROA. p. 49. Mother then spoke with Victim 1 and took her home. ROA. p. 49.

After arriving home, Mother talked to both Victim 1 and Victim 2 who confirmed that they were abused. ROA. p. 69. Following the conversation at her home with Victim

1 and Victim 2, Mother contacted police. ROA. pp. 69-70. Mother testified she made contact with the police within half an hour of her conversation with Jackson. ROA. p. 70. Officer David Rogers, a patrolman with the City of Columbia Police Department, was dispatched to Mother's home on April 30, 2012. ROA. p. 54. Officer Rogers testified he was dispatched to investigate a sexual assault. ROA. p. 54. Investigator Barbara Coleman was also dispatched to Mother's home on April 30, 2012. ROA. p. 160. Investigator Coleman advised Mother to not interview her daughters any further regarding the assault, as she was going to refer the girls to the Assessment Resource Center for a forensic interview and a medical interview. ROA. pp. 160-161. Investigator Coleman subsequently faxed the investigative report to the Assessment Resource Center and scheduled appointments for Victim 1 and Victim 2. ROA. p. 163.

While investigators were at Mother's home, Appellant arrived at the home. ROA. p. 55. Appellant was given a ride to police headquarters after he agreed to speak with investigators. ROA. p. 55. Appellant told investigators he wanted to travel to Delaware to tend to his ill father. ROA. p. 164. Police had not set up the interview for Victim 1 and Victim 2 at the Assessment Resource Center at the time, so they agreed to let Appellant travel to Delaware on the condition that he check in with investigators on a weekly basis. ROA. p. 164.

On May 22, 2012, Victim 1 was interviewed by Dr. Alicia Benedetto and Victim 2 was interviewed by Ray Olszewski at the Assessment Resource Center. ROA. pp. 179-180; ROA. p. 230. A videotape of the forensic interviews was played for the jury. ROA. p. 186; ROA. p. 231. Victim 1 and Victim 2 both testified at trial regarding Appellant's inappropriate conduct that was disclosed in the interviews. ROA. pp.98-121; ROA. pp.

121-138. Victim 1 was eleven years old at the time of trial. ROA. p. 99. Victim 1 testified that Appellant touched her "private part" with his "private part." ROA. p. 106. Victim 1 also testified that Appellant touched her "butt" with his "private part." ROA. pp. 106-107. Victim 1 recounted one specific incident in South Carolina where Appellant forced her to pull down her pants and "put his private part into my butt." ROA. p. 108. Victim 1 also recalled one specific incident when the family was living in New Jersey where Appellant attempted to penetrate her anus but was unable to. ROA. p. 108. After assaulting her, Appellant told Victim 1 not to tell anyone about what he had done. ROA. p. 111. Victim 1 also witnessed Appellant sexually abuse Victim 2. ROA. p. 110. Victim 1 testified that Appellant entered the bedroom she shares with Victim 2 and "put his private part in her (Victim 2's) butt." ROA. p. 110.

Victim 2 was ten years old at the time of trial. ROA. p. 122. When asked to identify various parts of the body, Victim 2 identified both male and female genitals as "the middle part." ROA. pp. 125-126. Victim 2 testified that Appellant "sticks his middle part in my behind." ROA. p. 127. According to Victim 2, Appellant sexually abused Victim 2 on one occasion in New Jersey and on more than one occasion in South Carolina. ROA. p. 127. Victim 2 recounted the occasion in New Jersey where Appellant sexually abused her, stating that "he pulled my pants down and stick his middle part in my butt." ROA. p. 129. Victim 2 also detailed one of the occasions where Appellant sexually abused her in South Carolina, stating "He was like fake playing with me and my sister tickling us and so as we got to our room he pulled my pants down and stuck his middle part in my behind." ROA. p. 130. Appellant told Victim 2 to never tell anyone

what he did to her. ROA. p. 130. Victim 2 testified she never told her mother because she feared Appellant would do something to them. ROA. p. 130.

Susan Luberoff, the pediatrician at the Assessment Resource Center, examined Victim 1 and Victim 2 on May 22, 2012. ROA. p. 143. Dr. Luberoff did not notice any injury to the genitals or anus of Victim 1 or Victim 2. ROA. pp. 146-147. Dr. Luberoff testified that when children are sexually abused, the sexual aggressor is usually someone that knows the child and takes some amount of care not to cause the child pain. ROA. p. 147. Dr. Luberoff further testified that it is very rare to see an injury to the anus because children do not usually disclose the abuse immediately and that area of the body heals very quickly. ROA. p. 147.

Following the Assessment Resource Center interviews, Investigator Coleman reviewed the video and made contact with Appellant to check in. ROA. p. 164. Appellant told Investigator Coleman that his father's health had improved and that he wanted to come back to South Carolina for an interview. ROA. p. 164. Upon Appellant's return, Investigator Coleman picked up Appellant, took him to the police station, and placed him under arrest. ROA. p. 165.

At trial, the defense made a motion to exclude the qualification of any expert regarding child abuse accommodation syndrome. ROA. p. 189. The defense asserted the evidence was inadmissible on several grounds. Firstly, the defense argued that any testimony regarding children's behavioral characteristics is an attempt to circumvent State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). ROA. p. 189. Secondly, the defense argued the testimony violated Rule 702, SCRE, as it did not assist the trier of fact in understanding some component of the trial. ROA. p. 191. Thirdly, the defense made

vague arguments concerning the reliability of the expert testimony, asserting it was a "junk science." ROA. pp. 245-246.

To clarify what her testimony would be, the State called its expert, Allison Foster, to testify in camera. ROA. p. 192. Dr. Foster is employed as the chief psychologist at the Assessment Resource Center and also maintains a private practice. ROA. p. 193. Dr. Foster completed her undergraduate studies at Emory University and received a Ph.D. in clinical psychology from the University of South Carolina. ROA. p. 195. Over 90% of her career has been devoted to children who have been abused. ROA. p. 195. Dr. Foster frequently conducts lectures and training outside of the Assessment Resource Center for organizations like the National Children's Advocacy Center in Huntsville, Alabama, the National District Attorney's Association, and the National Child Protection Center. ROA. p. 195. Dr. Foster has conducted more than 1,000 forensic interviews and testified as an expert witness in more than 100 trials. ROA. p. 199. Dr. Foster's training includes the dynamics of child sexual abuse. ROA. p. 196. The study of the dynamics of child sexual abuse includes the disclosure of abuse by child victims, the study of how memories are encoded and retrieved, and child sexual abuse accommodation syndrome. ROA. p. 196.

Dr. Foster explained that the process of delayed disclosure is a professional terminology to describe the propensity of some children to not disclose instances of abuse. ROA. p. 197. There is also a phenomenon known as "piecemeal disclosure" where there are stages of disclosure that range from denial to more tentative or active stages of disclosure. ROA. pp. 197-198. Dr. Foster explained that her opinions regarding the process of disclosure are supported by research that is commonly accepted in the scientific community. ROA. p. 199. With respect to her expertise on how memories are

encoded and retrieved, Dr. Foster testified there is research to back up the information she would provide to the jury and the research was peer reviewed. ROA. p. 197. The research supporting Dr. Foster's position is commonly accepted in the psychology community. ROA. p. 198.

Dr. Foster also explained the concept of child abuse accommodation syndrome. ROA. p. 200. Child sexual abuse accommodation syndrome is a term coined by a psychiatrist by the name of Roland Summit. ROA. p. 200. Dr. Summit coined the term "child abuse accommodation syndrome" to describe the dynamics he observed in victims of interfamilial chronic child sexual abuse. ROA. p. 200. The phenomenon has five components: secrecy, helplessness, entrapment in accommodation, delayed tentative unconvincing disclosure, and recantation. ROA. p. 200. The concept of child abuse accommodation syndrome is a concept that continues to be considered clinically acute and helpful. ROA. p. 201. It is commonly taught in forensic interview academies as an aspect that investigators should understand about the dynamics of child sexual abuse. ROA. p. 201. The five characteristics discussed above are not used for diagnostic purposes. ROA. p. 201. Dr. Foster explained she would not be testifying as to whether a child had been abused if the child demonstrated any or all of the five characteristics of child abuse accommodation syndrome. ROA. p. 201.

In an effort to discredit the testimony of Dr. Foster, the defense called Dr. Julie Buck of San Diego, California, to testify in camera. Dr. Buck traveled from San Diego, California to testify in this case. ROA. p. 222. Dr. Buck has a Master's Degree in Research Psychology from the University of Tennessee-Chattanooga and a Ph.D. in psychology from Florida State University. ROA. p. 222. Dr. Buck currently works full

time as a consultant in eyewitness memory cases. ROA. p. 222. Dr. Buck agreed with Dr. Foster's testimony that most children don't disclose during childhood, agreeing that around 60% of children wait until after childhood to disclose. ROA. p. 226. When a child is interviewed in a high-quality interview setting around 85% of children will disclose the abuse to their interviewer. ROA. p. 226. Dr. Buck opined that she believed the 1983 article written by Dr. Roland Summit on child abuse accommodation syndrome was not supported by research. ROA. pp. 225-226. Dr. Buck further explained that the scientific community is not likely to support the theory of child abuse accommodation syndrome because the research is not there.

After hearing the in camera testimony of Dr. Foster and Dr. Buck, the trial judge ruled:

> I find that the testimony is admissible as far as this witness is allowed to testify as an expert witness in this case. I'm not prepared to go so far as to say that South Carolina should adopt this child abuse accommodation syndrome, I don't think that's particularly relevant to the issues in this case or the issues upon which the expert is likely to offer testimony. She is imminent qualified in the field of evaluating child sexual abuse cases and the behavioral characteristics of abused children. She had the necessary expertise, training, experience and skills that involves the subject matter based on the testimony of both experts here today that clearly involved matters that would be helpful to the jury in understanding issues in this case, it's involving matters in which the trier of fact may be assisted by a person with specialized knowledge and training. Though the whole field of behavioral characteristics of children who may have been sexual assault victims, child sexual abuse victims, it's difficult to place a scientific knowledge test to evaluate the reliability of the testimony based on the fact that it involves a particularized area of expertise. But I believe that from what I've heard I believe the testimony to be offered is sufficiently reliable that it meets the test for the Court in its gatekeeper function. There has been an adequate amount of scientific research and skills employed to assess the nature of the problems with child sexual abuse victims, this witness can testify generally to those issues involved without seeking to usurp the decision making function of the jury.

ROA. p. 254.

At trial, Dr. Foster was qualified as an expert in the area of the dynamics of child abuse.

ROA. p. 260. Following her qualification as an expert, the trial judge provided the jury a limiting instruction, stating:

> The testimony of this witness, Dr. Foster, is being offered to you and may be considered by you only for the purpose of understanding the behavior or the dynamics of the child sexual abuse victims in general and not as proof that molestation occurred as to any or more of the victims in this case.

ROA. p. 260. Dr. Foster's testimony before the jury mirrored her in camera testimony. Dr. Foster did not testify concerning specific details of Victim 1 and Victim 2's case. Dr. Foster did not review the interviews with Victim 1 or Victim 2. ROA. pp. 271-272. Dr. Foster also did not speak with Ray Olszewski or Alicia Benedetto about the facts of the case nor did she discuss the facts of the case with the State or hear testimony from any of the fact witnesses in the case. ROA. p. 272.

At the conclusion of trial, the jury found Appellant guilty of lewd act upon a child with respect to Victim 2. ROA. pp. 329-330. The jury found Appellant not guilty of criminal sexual conduct in the first degree with regard to Victim 2. ROA. p. 330. As to Victim 1, the jury found Appellant guilty of criminal sexual conduct with a minor in the first degree. ROA. p. 330.

ARGUMENT

I.

The trial judge did not err in qualifying Dr. Allison Foster as an expert in the dynamics of child sexual abuse where Dr. Foster testified only to common behavioral characteristics of juvenile victims of sexual abuse and Dr. Foster was qualified to testify on that subject based on her education, knowledge, training, and experience and because her testimony was beyond the common knowledge of the typical juror, could have assisted the jury in understanding the evidence presented during trial, and met a threshold level of reliability.

Appellant asserts the trial judge erred in qualifying Dr. Allison Foster as an expert in the dynamics of child abuse because there was insufficient evidence of the reliability of her testimony and there was insufficient evidence that the research Dr. Foster relied upon in her testimony was subjected to peer review. The State submits this argument is without merit, as Dr. Foster possessed expert qualifications based on her education, knowledge, training, and experience and her testimony regarding the common behavioral characteristics exhibited by juvenile victims of sexual abuse was sufficiently reliable to warrant its admission. Furthermore, any alleged error in admitting Foster's testimony is harmless due to overwhelming evidence of Appellant's guilt.

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably

relied upon in the field to make opinions." Id. at 445-446, 699 S.E.2d at 175. "The qualification of a witness as an expert falls largely within the discretion of the trial judge." State v. Myer, 301 S.C. 251, 255, 391 S.E.2d 551, 554 (1990).

Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

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

Rule 702, SCRE. Before admitting expert testimony, the trial judge must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011); see also State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 819 (2001) ("Scientific evidence is admissible under Rule 702, SCRE, if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable, applying the factors found in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); and (4) the probative value of the evidence outweighs its prejudicial effect.").

A witness can properly be qualified as an expert where "the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 467 (Ct. App. 1998). In determining whether a witness's knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. Henry, 329 S.C. at 274, 495

S.E.2d at 467. Instead, an expert can become sufficiently qualified to be able to provide an opinion helpful to the trier of fact in many ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008). "[D]efects in the amounts and quality of the expert's education or experience go to the weight to be accorded the expert's testimony and not to its admissibility." Henry, 329 S.C. at 274, 495 S.E.2d at 467.

In addition to ensuring the expert is qualified, the trial judge must also ensure the testimony "meets a threshold level of reliability, regardless of whether it is scientific or nonscientific." State v. Tapp, 387 S.C. 159, 165, 691 S.E.2d 165, 168 (Ct. App. 2010). In cases involving scientific expert testimony, the trial court should consider the following factors: (1) the publications and peer review of the technique; (2) prior application 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. State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). However, in cases involving nonscientific expert testimony, the factors applied in an analysis of scientific evidence cannot readily be applied. See State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009) ("The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony."). Accordingly, no formulaic approach can or must be applied to determine reliability in cases involving nonscientific expert testimony. Id.

In Appellant's case, the trial judge properly qualified Dr. Foster as an expert witness in light of her education, knowledge, training, and experience in regard to the

common behavioral characteristics exhibited by juvenile victims of sexual abuse. Based on that education, knowledge, training, and experience, Dr. Foster was qualified and able to testify before the jury in regard to an area of expertise that was beyond the common knowledge of the typical juror and was critical for the jurors in order to evaluate and understand the behavior exhibited by the victims prior to their disclosures of the sexual abuse.

Critically, in cases such as Appellant's case where there are allegations of juvenile sexual abuse, "[e]xpert testimony concerning child abuse typically comes from two sources: medical evidence provided by physicians and **behavioral science evidence** provided by psychiatrists, psychologists, and social workers." State v. Morgan, 326 S.C. 503, 508, 485 S.E.2d 112, 115 (Ct. App. 1997) (emphasis added), overruled on other grounds by State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). Significantly, in South Carolina, our appellate courts have consistently recognized "[e]xpert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible." State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999).

"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; see State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) ("The purpose of rape trauma evidence is to prove the elements of criminal sexual conduct since such evidence may make it more or less probable the offense occurred."). Rape trauma and behavioral characteristic evidence is often crucial in child sexual abuse cases because "[t]he inexperience and impressionability of children often render them unable to effectively

articulate the events giving rise to criminal sexual behavior." White, 361 S.C. at 414-15, 605 S.E.2d at 544. Furthermore, rape trauma and behavioral characteristic evidence is also particularly important to explain the often unusual behavior exhibited by victims of sexual abuse that might be beyond the knowledge of the average juror. See Weaverling, 337 S.C. at 475, 523 S.E.2d at 794 ("It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor."); see also People v. Carroll, 95 N.Y.2d 375, 387, 740 N.E.2d 1084, ___ (N.Y. 2000) ("We have long held that expert testimony regarding rape trauma syndrome, abused child syndrome or similar conditions may be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand[.]"); see generally United States v. Lukashov, 694 F.3d 1107, 1117 (9th Cir. 2012) ("[The expert witness'] testimony was helpful to the jury because some jurors would not have a general understanding of an eight-year-old's sexual knowledge and vocabulary and the level of sensory detail to look for in a child's allegations of sexual abuse."); People v. Baenziger, 97 P.3d 271, 275 (Colo. Ct. App. 2004) ("Because the 'lay notion of what behavior logically follows the experience of being raped may not be consistent with the actual behavior which social scientists have observed from studying rape victims,' expert testimony explaining these reactions is helpful to the jury in determining whether this delay should support the conclusion that the sexual assault did not occur.'" (citations omitted)). Accordingly, as this Court has recognized, "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." State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993).

Dr. Foster had specialized knowledge regarding the common behavioral characteristics exhibited by juvenile victims of sexual abuse based on her education, knowledge, training, and experience. Dr. Foster is the chief psychologist at the Assessment Resource Center at the Children's Advocacy Center in Columbia. She has a Ph.D. in clinical psychology from the University of South Carolina and was the program director at the Assessment Resource Center from 1995 to 2012. She conducted forensic interviews, therapy with child victims of sexual abuse, and training on things like child development, language, memory, dynamics of child sexual abuse, and the process of disclosure. Dr. Foster has conducted more than 1,000 forensic interviews and testified as an expert witness in more than 100 trials. In addition to testifying in South Carolina, she has testified in Utah, District Courts in Chicago, Colorado, Iowa, Georgia, and proceedings in the U.S. court martial system. ROA. pp. 259-260.

Dr. Foster did not conduct a forensic interview in this case nor was she proffered as an expert in forensic interviewing. The State did not call Dr. Foster to lend credibility to the testimony of Victim 1 and Victim 2. Instead, she simply explained the dynamics of sexual abuse and how being abused may affect a child's behavior. Dr. Foster testified only generally about the dynamics of child sexual abuse and how it led to things like delayed disclosure. She did not review any of the interviews with the victims, speak with the forensic interviewers about the case, discuss the facts of the case with the State prior to trial, or hear testimony from any of the fact witnesses.

Appellant greatly relies on the recent decision of the South Carolina Supreme Court in State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015). Appellant's comparisons of the current case to Chavis are inapposite. In Chavis, 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. 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. In the present case there is no "procedure" employed such as RATAC and no "result" was drawn. Instead, Dr. Buck only provided background information about the disclosure process of abused children.

Even if the trial judge erred in qualifying Dr. Foster as an expert, any error would be harmless. Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). The key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) (citations and internal quotations are omitted)." The alleged error in this case did not contribute to the jury's verdict whatsoever, as the jury was presented with overwhelming evidence of Appellant's guilt. The jury heard unrebutted testimony from Victim 1 and Victim 2 vividly detailing personal accounts of sexual abuse by Appellant in both New Jersey and South Carolina. Victim 1 also recounted an occasion where Appellant sexually abused Victim 2, making her a third party witness to sexual abuse by Appellant. Appellant's only defense at trial

was an attempt to argue in his opening and closing statements that Mother somehow convinced her children to fabricate the story because she was angry at Appellant for engaging in an affair with a woman in Chicago. Appellant offered no evidence to support this theory. Mother offered unrebutted testimony at trial that she did not discover Appellant had been in communication with another woman until June 21, 2012, nearly two months after Victim 1 and Victim 2 initially disclosed Appellant had been abusing them. All the foregoing provides overwhelming evidence of Appellant's guilt.

II.

The trial judge did not err in qualifying Allison Foster as an expert where her testimony assisted the trier of fact and did not improperly bolster the Victims' credibility

Appellant next contends the trial judge abused his discretion in qualifying Dr. Foster as an expert on the grounds that her testimony did not assist the trier of fact as required by Rule 702, SCRE, and that her testimony improperly bolstered the credibility of the victims. Specifically, Appellant asserts the general knowledge provided by Dr. Foster could not assist the jury in determining whether Victim 1 and Victim 2 were telling the truth. Appellant also argues the jury did not need expert knowledge to explain the subject matter because it did not involve scientific, technical, or other specialized knowledge. Appellant further avers the only purpose of Dr. Foster's testimony was to improperly bolster the credibility of Victim 1 and Victim 2. The State submits these arguments are without merit, as Dr. Foster's testimony assisted the trier of fact and did not constitute improper bolstering of the credibility of Victim 1 and Victim 2. Furthermore, any alleged error in admitting Foster's testimony is harmless due to overwhelming evidence of Appellant's guilt.

Firstly, Dr. Foster's testimony assisted the trier of fact and assisted the jury in understanding the behavior of sexual abuse victims. Expert testimony concerning common behavioral characteristics of sexual assault victims, and the range of responses to sexual assault encountered by experts, is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787, 794 (Ct. App. 1999). It assists the jury in understanding some of the aspects of victims' behavior, and provides insight into a sexually abused child's often strange demeanor. Id. See also State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859, 862 (1993) (expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value outweighs the prejudicial effect).

Dr. Foster's testimony in this case is the type of expert behavioral testimony approved in Schumpert and Weaverling. Her testimony was relevant and assisted the jury in understanding the evidence and determining a fact in issue. Dr. Foster had specialized knowledge in the form of her intimate knowledge of the dynamics of child abuse, an area beyond the ken of a typical lay juror, thus necessitating an expert witness to familiarize the jury with the concept. See Rule 702, SCRE (expert with specialized knowledge may testify if it will assist the trier of fact to understand the evidence or determine a fact in issue). Therefore, the trial judge did not abuse his discretion in qualifying her as a witness.

Secondly, Dr. Foster's general testimony about the behavioral characteristics of child sexual abuse victims did not constitute improper bolstering. All of the case law cited by Appellant in support of his assertion that Dr. Foster improperly bolstered the

credibility of the victims is inapplicable to the current case. Petitioner relies on Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010), and State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012), as support for his contention Dr. Foster's testimony improperly bolstered the victims' testimony. Those cases involved forensic interviewers who actually interviewed the victims, and their testimony in some way indicated they believed the victims' allegations of sex abuse. Therefore, those cases are factually and legally inapplicable to the instant case.

Similarly, Petitioner's reliance on State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989), and State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000), is misplaced. In Jennings, this Court held the report prepared by a forensic interviewer regarding her interviews of the victims was inadmissible hearsay, and impermissibly vouched for the victims' credibility by concluding the victims "provided a 'compelling disclosure of abuse.'" 716 S.E.2d at 94. Both Dawkins and Dempsey involved testimony from therapists who were actually treating the victims, and their testimony clearly indicated they believed the victims were telling the truth. Dawkins, 377 S.E.2d at 302 (therapist testified his impression was that victim's symptoms were genuine); Dempsey, 532 S.E.2d at 308-310 (therapist testified children alleging sexual abuse were truthful 95% to 99% of the time, and he concluded victim was reliable). In this case, Dr. Foster was not testifying as a forensic interviewer. She never interviewed the victims, did not prepare a report, and did not express any opinion or belief regarding the credibility of victims' allegations in general or these victims in particular. Therefore, the analysis and holdings in Jennings, Dawkins and Dempsey do not apply to this case.

Dr. Foster's testimony about general behavioral characteristics did not rise to the level of improper bolstering. "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). Dr. Foster gave general testimony on the dynamics of child sexual abuse, specifically testifying about the disclosure of abuse by child victims, the study of how memories are encoded and retrieved, and child sexual abuse accommodation syndrome. Dr. Foster offered no testimony where she offered any opinion on whether the victims were telling the truth. In fact, she specifically testified she had not reviewed the forensic interviews, spoken with the forensic interviewers about the facts of the case, or heard any testimony from the fact witnesses in the case. This establishes that Dr. Foster was testifying generally and was disengaged from the facts in this particular case. The fact that Dr. Foster's testimony provided insight into the behavioral characteristics does not equate improper bolstering.

As Appellant concedes in his brief, this issue was recently addressed by this Court in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), cert denied August 6, 2015. The appellant in Brown argued the circuit court abused its discretion in allowing a witness qualified as an expert in child abuse dynamics and delayed disclosure to testify regarding the general behavioral characteristics of sexual abuse victims. Id. at 339. At trial, the expert witness testified she did not review any incident reports or statements associated with this case, never met with or interviewed the minor victims prior to trial,

and was not present for their testimony during trial. Id. at 337. The expert's only knowledge concerning the case came from discussions with the Solicitor's office. Id. In support of this argument, Brown asserted the trial judge erred in allowing an expert to testify because the subject matter of her testimony was not beyond the ordinary knowledge of the jury and the jury did not require an expert's knowledge or opinions to understand why minor victims delayed disclosing abuse. Id. This Court held that the trial court properly admitted the expert's testimony because child abuse dynamics and delayed disclosure were subjects beyond the ordinary knowledge of the jury. Id. at 342. Brown also argued the trial judge erred in admitting the testimony of the expert witness because the testimony constituted improper bolstering. Id. at 343. This Court found the trial judge properly admitted the expert's testimony because she did not inappropriately vouch for the victims' allegations and therefore did not bolster their testimony. Id. In the instant case, like Brown, Dr. Foster did not improperly vouch for the victims' credibility when she merely provided general background information on the behaviors of abused children.

As discussed in Respondent's Issue I, the State submits that any alleged error with respect to the qualification of Dr. Foster as a witness is harmless due to overwhelming evidence of Appellant's guilt.

III.

The trial judge did not err in admitting the videotaped forensic interviews where the statute is constitutional and does not violate the Confrontation Clause of the Sixth Amendment.

Appellant's final contention is that the trial judge erred in admitting the videotaped forensic interviews of the victims under S.C. Code Ann. § 17-23-175, alleging

the statute is unconstitutional as it is violative of the Confrontation Clause of the Sixth Amendment. In support of his argument, Appellant makes four separate arguments. Firstly, Appellant asserts S.C. Code Ann. § 17-23-175 is unconstitutional because it violates the Confrontation Clause of the Sixth Amendment to the Constitution as interpreted in Crawford v. Washington, 541 U.S. 36, (2004). Secondly, Appellant argues the "particularized guarantees of trustworthiness" enumerated in S.C. Code Ann. § 17-23-175 are not adequate to protect a defendant's right of confrontation under Crawford. Thirdly, Appellant avers S.C. Code Ann. § 17-23-175 violates Maryland v. Craig, 497 U.S. 836 (1990), because it does not require the child to be under oath or subject to contemporaneous cross-examination. Lastly, Appellant contends the admission of videotaped interviews pursuant to S.C. Code Ann. § 17-23-175 should be limited to situations where the court makes specific findings regarding the necessity of admitting the evidence. The State submits that all four of these arguments are without merit. Appellant's first three arguments were conclusively dealt with in the recent decision by the South Carolina Supreme Court in State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), which found that S.C. Code Ann. § 17-23-175 did not violate the Confrontation Clause. As to Appellant's fourth Argument, this argument is not preserved for appellate review. Even if it were preserved, it would be error to limit the admission of the evidence to situations where the court makes specific findings regarding the necessity of admitting the evidence, where the legislature has already pre-determined the evidence is necessary.

A. The South Carolina Supreme Court's decision in State v. Anderson conclusively establishes S.C. Code Ann. § 17-23-175 does not violate the Confrontation Clause of the Sixth Amendment of the Constitution as interpreted by the U.S. Supreme Court in Crawford and Craig (Appellant's Issue IIIA, IIIB, and IIIC).

In Anderson, the appellant contended the trial court erred in admitting the forensic video of the minor victim because the admission violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. 413 S.C. at 215-16. As in the current case, the appellant in Anderson cited Crawford and Craig in support of his proposal that despite the fact the victim testified and was subject to cross-examination regarding the video recordings, the admission of the video still somehow violated the Confrontation Clause. The Court found that Appellant's reliance on Craig as requiring contemporaneous cross-examination during the statutory videotaping process or at trial immediately following the playing of the videotape is misplaced, finding:

> Here, the minor testified under oath in open court and was subject to cross-examination. Thus, Appellant's right to the opportunity for effective cross-examination was satisfied during the minor's actual trial testimony. That is all the Confrontation Clause requires.. That Appellant would have to recall the child as an adverse witness in order to examine her about her videotaped statement does not render the statute or the procedure followed here violative of a defendant's right to cross examination.

Id. at 217-18

Appellant also contends the "particularized guarantees of trustworthiness" contained in § 17-23-175 do not adequately protect the right of confrontation under Crawford. Again, Appellant ignores crucial facts in this case: the minor victim actually testified under oath at trial and was subject to the crucible of cross-examination. As the Court held in Anderson, under those facts, there simply is no confrontation issue.

B. Appellant's argument that the application of S.C. Code Ann. §17-23-175 should be limited to situations where the Court makes specific findings regarding the necessity of admitting the evidence is not preserved for Appellate review. Even if the issue were preserved, in codifying §17-23-175, the legislature has already made a clear determination that the evidence is necessary (Appellant's Issue IIID).

Appellant failed to argue at trial that the application of S.C. Code Ann. § 17-23-175 should be limited to situations where the trial court makes specific findings regarding the necessity of admitting the evidence. An argument not raised and ruled on by the trial court is not preserved for appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (objection must be entered on a specific ground at trial to preserve an appeal); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). Appellant's failure to include this argument in his objection to the admission on the basis of Crawford and Craig precludes him from being able to make the argument for the first time on appeal.

Even if Appellant's argument were preserved, the argument lacks merit. Citing Craig, Appellant argues § 17-23-175 should be limited to cases where the trial court specifically finds admitting the forensic interview videotape in evidence is a "necessity." As support for this argument, Appellant conflates the investigative interview videotape admissible under § 17-23-175, with closed circuit testimony where the minor testifies at trial, but outside the courtroom and the defendant's presence, to avoid traumatizing the minor. This conflation is readily apparent from the fact Appellant seeks to apply a "necessity" test.

Imposing a rule that requires a trial judge to make specific findings regarding the necessity of admitting the evidence is clearly contrary to the intent of the Legislature. The South Carolina Legislature has determined the type of videotape at issue is necessary to protect minor victims under the age of twelve and is admissible as evidence if it meets the requirements of § 17-23-175. The statute was enacted as part of the "Sex Offender Accountability and Protection of Minors Act of 2006," 2006 S.C. Act 342, section 8, which clearly reveals the legislative intent to protect minor victims by allowing

admission of investigative interview videotapes under specific guidelines expressly intended to provide "particularized guarantees of trustworthiness," and the statute must be construed accordingly. See State v. Elwell, 403 S.C. 606, 743 S.E.2d 802, 806 (2013) ("The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature.") (quoting State v. Scott, 351 S.C. 584, 571 S.E.2d 700, 702 (2002)). The Legislature, thus, already made a threshold determination that the admission of the investigative interview videotapes is necessary so long as the statement provides "particularized guarantees of trustworthiness."

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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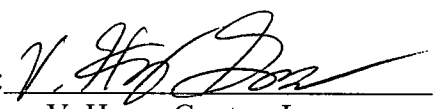
BY: 
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January 28, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal From Richland County
Clifton Newman, Circuit Court Judge

THE STATE, Respondent,

v.

WAYLAND PURNELL, 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: Lara M. Caudy, Esquire, Appellate Defender, 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 28TH day of January, 2016.

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