THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

The State,

Respondent,

v.

Bryant Christopher Gurley,

Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant, Bryant Christopher Gurley, was indicted in Florence County in 2013 on a charge of committing a lewd act upon a child under the age of 16, pursuant to former S.C. Code Ann. § 16-15-140. R. pp. 1-2. He was tried by a jury in Florence County General Sessions Court January 26-29, 2015, Judge William Seals, Jr., presiding. R. p. 4. He was found guilty, and Judge Seals sentenced him to eight years' imprisonment. R. pp. 3, 297-98, 300.

ARGUMENT

This case arose from allegations first made by a child in 2013, when she was eight years of age, that several years earlier appellant had touched her "privates" with his hand

on four occasions. The incidents were alleged to have occurred during a period of time when the child, her mother, and her older sister were living in the home of appellant's father, stepmother, and stepbrother, on occasions when appellant, who was then a teenager and living with his mother, was visiting.

The child's trial testimony about the alleged incidents was inconsistent with her earlier statements made in a forensic interview. Although she claimed there were four incidents and stated in the forensic interview that one was in the bedroom, at trial she denied having said an incident occurred in the bedroom and she could not say where the alleged fourth incident occurred. State's Exhibit 1; R. p. 88. Her trial testimony was also inconsistent with her counselor's testimony that the child described only three incidents. R. pp. 110, 113. Her testimony was also starkly inconsistent with the testimony of her mother, sister, and grandmother concerning the circumstances surrounding one of the alleged incidents, which the child claimed occurred in a car. The car incident was alleged to have occurred on an occasion when the child's mother drove herself, her daughters, and appellant to her mother's house in Lake City. R. pp. 16, 20-24, 26-27, 79-82. The child testified only the mother got out of the car and went inside, and the incident occurred while she, her sister, and appellant stayed in the car. R. pp. 81-82. The mother, sister, and grandmother contradicted this account, stating that everyone went inside and that, when they returned to the car to leave, the child refused to get in, became upset, and cried. R. pp. 16, 20-24, 26-27. The officer who took the initial report of the allegations and interviewed the mother did not include in his written report that the child was crying and had to be forced into the car, as these witnesses testified at trial. R. pp. 35, 37.

The child's testimony was also contradicted by defense witnesses who testified that appellant could not have been present for one incident alleged to have occurred during holidays because of where the family spent their holidays. R. pp. 199-203, 233-34, 255, 264-66, 277-78, 281. The defense also presented evidence to demonstrate that the other incidents could not have occurred in the manner described by the child. R. pp. 197-99, 231-32, 258-59, 267-68, 272, 274-75, 282-83.

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

The state introduced a video recording of the forensic interview, which the court admitted over defense objections. Near the close of the interview, the interviewer made the statement, "B.G. broke the rules." One of the defense's objections to admission of the video was based on this statement, which was an opinion expressed by the interviewer concerning the child's disclosures. R. pp. 136-37. The court admitted the video, it was published to the jury during the trial, and it was played for the jurors again during their deliberations. R. pp. 138-39, 148, 296. Admission of the video was reversible error.

The South Carolina Supreme Court has emphatically announced in recent decisions a clear directive that a forensic interviewer or expert witness may not render an opinion that an alleged victim of sexual assault has told the truth and may not otherwise vouch for or bolster the alleged victim's credibility. *See State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015); *State v. Kromah*, 401 S.C. 340, 358-360, 737 S.E.2d 490, 499-501 (2013); *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). This rule is grounded in the fundamental principle that the assessment of witness credibility is within the exclusive province of the jury. *See Kromah*, 401 S.C. at 358-59,

737 S.E.2d at 499-500; *State v. McKerley*, 397 S.C. 461, 464-65, 725 S.E.2d 139, 141-42 (Ct. App. 2012); Rule 608(a), SCRE.

In *Kromah*, the Court listed five examples of the kinds of statements that a forensic interviewer should avoid. Among those examples are "a direct opinion as to a child's veracity," "any statement that indirectly vouches for the child's believability," and "any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter." *See Kromah*, 401 S.C. at 360, 737 S.E.2d at 500.

In this case, the interviewer's statement that "B.G. broke the rules" fits squarely within these categories of impermissible bolstering. The interviewer made the statement to the child after the child had told the interviewer what the child claimed had occurred. The interviewer's comment was one in a series of comments she made to the child near the end of the interview:

> Well, I am proud of you, [name redacted]. I want you to know you are not in any kind of trouble at all, and you haven't done anything wrong at all. Okay? None of this is your fault. B.G. broke the rules. Nobody ever gets to touch your private parts or make you touch theirs. I'm really, really proud of you. It takes a very brave girl to tell about what happened.

State's Exhibit 1. These comments were a clear and unequivocal expression by the interviewer that she believed the child had told the truth. Telling the child that "B.G. broke the rules" was the equivalent of telling the child she believed her. Allowing the jury to hear this opinion was tantamount to allowing the interviewer to tell the jury she believed the child. As trial counsel argued, the interviewer would not be allowed to state from the witness stand to the jury that "B.G. broke the rules." R. pp. 136-37. However, by admitting the video, the jury was able to hear exactly that statement. The prohibition against admission of such evidence is not limited to testimony from a witness; it also

applies to other forms of evidence containing an opinion as to the truthfulness of the alleged victim's account. *See Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 (written reports containing forensic interviewer's impermissible comment that children provided a compelling disclosure of abuse by defendant were inadmissible).

The comment by the interviewer at the conclusion of the interview, which unequivocally expressed her belief the child was being truthful, is the kind of opinion evidence the *Kromah* line of cases prohibits. *See, e.g., Chavis*, 412 S.C. at 108-09, 771 S.E.2d at 340 (expert's recommendation that victim "not be around [defendant] for any reason" could only be interpreted as her believing victim's claim that defendant sexually abused her); *Kromah*, 401 S.C. at 359, 737 S.E.2d at 500 (interviewer's report that child made "compelling finding" of abuse was equivalent of stating child was telling the truth); *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 (interviewer's reports that children made "compelling disclosure" could only be interpreted to mean interviewer believed children were being truthful). Like the comments in those cases, the statement that appellant "broke the rules" is the equivalent of the interviewer saying she believed the child, and the video containing this comment should not have been admitted into evidence.

The admission of the video containing this statement was not harmless. As noted above, the child's allegations were not contemporaneous with the alleged incidents. The state's evidence was not strong. The only inculpatory evidence against appellant was the testimony of the child. There was no corroborating physical evidence and no testimony from any eyewitness concerning the allegations. Indeed, according to the child, her college-aged sister, was ***present in the car*** when one of the incidents was alleged to have occurred, but the sister did not testify in corroboration of the child's account. In fact, the

sister, mother, and grandmother contradicted the particulars of the child's account of the incident in the car, undermining the child's credibility. Moreover, defense witnesses testified to the circumstances that existed on the occasions of other alleged incidents, circumstances that prevented those incidents from having occurred as the child alleged. The case depended entirely on whether the jury believed the child, and her credibility was questionable on many levels – the internal inconsistency of her own statements and the contradiction of those statements by both prosecution and defense witnesses. Where the case against appellant was very weak, the effect of admitting the interviewer's statement that appellant "broke the rules" and that vouched for the child's truthfulness cannot be deemed harmless.

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

The state also introduced the testimony of a counselor who had been seeing the child since May 2013 and was still seeing the child as of the trial in January 2015. R. pp. 108, 117. The defense objected to her testimony on multiple grounds, including that it was improper bolstering. R. p. 97. Over defense objections, the counselor was qualified as an expert in "child sexual trauma" and allowed to testify generally concerning child victims of sexual assault, delayed disclosure, and indicators a child can give to show sexual abuse has occurred. R. pp. 97, 102-07. Over a hearsay objection, she was allowed to testify concerning information contained in unspecified "studies" of behavior of children who are victims of child sexual abuse. R. p. 103.

But this witness's testimony was not limited to testimony about child victims of sexual abuse in general. Rather, she testified concerning her sessions with ***this particular child***, her methodology in eliciting information from the child, the child's account of the

alleged incidents, and her opinions about the information provided by the child, in particular that the child had not been coached. R. pp. 108-13. The defense asserted numerous objections to this testimony. It objected that the testimony was improper bolstering. R. p. 97. It objected because the witness would be testifying to her own interaction with the child, would be explaining the child's testimony piece by piece, and would be getting into the statements the child had made. R. p. 97. It objected to testimony about the child's statements in the counseling sessions because the statements had not been recorded in accordance with S.C. Code Ann. § 17-23-175. R. p. 97. It objected to testimony that this child's experience is typical of child victims, which would be highly prejudicial. R. p. 101.

The defense also objected to any testimony from this witness about post-traumatic stress disorder. R. pp. 50-54, 97. Over the defense's objections, the witness, who was a "licensed professional counselor" but not a medical doctor, psychiatrist, or licensed psychologist, was allowed to testify that she had diagnosed the child with "adjustment disorder with anxiety and depression with traits of PTSD, post-traumatic stress disorder," a diagnosis she testified was something normally seen in victims of sexual assault. R. pp. 53, 97, 99, 115-16. The defense also objected to this aspect of the witness's testimony because the state did not provide the defense with information concerning its expected use of an expert in this area until the week before trial, and the defense was thereby deprived of an opportunity to procure a rebuttal expert. R. pp. 100-01.

Significantly, the state asked the witness if she saw any evidence that the child had been coached. R. p. 112. The defense objected, arguing that the witness could not render an opinion on that issue, which was a jury question. R. p. 112. The court

overruled the objection, and the witness proceeded to explain that the child was "very detailed" and "consistent" in the information she provided, and the witness later ***twice*** reiterated that the child was "very consistent." R. pp. 112-13, 118. The defense reasserted the objection to this improper bolstering opinion testimony after the state rested its case. R. pp. 153-54. For the many reasons articulated by the defense in its multiple objections, all of the testimony of this witness should have been excluded.

A. Improper bolstering with opinion as to child's truthfulness.

This witness's testimony in general, and the testimony in response to the question about coaching in particular, was improper opinion testimony elicited to bolster and vouch for the child's credibility. Like the opinion evidence addressed in the cases cited in Argument I, *supra* pp. 3-5, the only purpose for the question about whether the child had been coached and the witness's response that the information provided by the child was very detailed and very consistent was to convey to the jury the counselor's belief that the child was being truthful. *See, e.g., Chavis*, 412 S.C. at 108-09, 771 S.E.2d at 340; *Kromah*, 401 S.C. at 359, 737 S.E.2d at 500; *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94. Like the offending evidence in those cases, this testimony cannot be interpreted in any other way.

This testimony is also akin to that disapproved by the Court of Appeals in *State v. McKerley*. There, a forensic interviewer testified about the factors she was evaluating during an interview, including, among other things, that she was "looking for accuracy"; looking for "a level of detail that . . . they would be able to tell [only] if something were to have happened"; "looking at . . . are there other possible reasons, are there other possible explanations," "looking to be sure it adds up," and "looking to see if what they

tell us throughout the interview is the same from the beginning to the end." *See McKerley*, 397 S.C. at 466, 725 S.E.2d at 142. She reiterated that she was looking for "whether it is detailed, does it have consistency, does it have the sensory level of detail that a child typically wouldn't have . . . ." *Id.*, 397 S.C. at 467, 725 S.E.2d at 142. The Court of Appeals disapproved, finding "none of this testimony has any relevance except insofar as it informs the jury [the witness] believes the story told by the victim." *Id.*, 397 S.C. at 467, 725 S.E.2d at 143. Similarly, the counselor's testimony in this case that the child's testimony was "very detailed" and "very consistent," in answer to the question whether she had seen evidence of coaching, had no relevance except to inform the jury that she believed the child. Such testimony is absolutely impermissible and inadmissible.

B. Improper qualification as expert and additional improper bolstering.

Moreover, the remainder of the witness's testimony was inappropriate and inadmissible for a number of reasons. First, the witness should not have been qualified as an expert. Testimony on the characteristics of child victims of sexual abuse and delayed disclosure is not a proper subject of expert testimony and improperly bolsters the child's credibility. *See* Rule 702, SCRE. Although the Court of Appeals rejected a similar argument in *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), that decision is not final – a petition for a writ of certiorari is currently pending in the South Carolina Supreme Court, challenging the Court of Appeals' holding that such testimony is a proper subject for expert testimony. If the Supreme Court reverses *Brown* on this basis, the qualification of the counselor as an expert in this case and the admission of her testimony concerning the characteristics and behaviors of child victims of sexual abuse, including her testimony about delayed disclosure, should also be reversed.

However, even if *Brown* is upheld, the admission of the counselor's testimony in this case should nonetheless be reversed, because the circumstances of this case and this witness are outside the parameters for the admission of such expert testimony, as articulated by the Court of Appeals in *Brown* and endorsed more recently by the Supreme Court in *State v. Anderson*, 413 S.C. 212, 218-19, 776 S.E.2d 76, 79 (2015). Although the counselor was qualified as an expert on sexual abuse trauma and allowed to testify generally about child victims of sexual abuse, her involvement in the case and her testimony concerning ***this particular child*** went far beyond what *Brown* found to be admissible testimony from such an expert.

In *Brown*, the Court of Appeals upheld the admission of testimony by an expert on "child abuse dynamics and delayed disclosures." The Court rejected an argument that the witness's testimony improperly bolstered the victim's testimony, based on the fact that the witness "never interviewed the victims and had no knowledge of the facts of the case beyond her discussions with the solicitor's office prior to trial." *Brown*, 411 S.C. at 344, 768 S.E.2d at 252. In this case, however, the person qualified as an expert had ***extensive*** involvement with the case and the child. She had been the child's counselor for a year and eight months and was still the child's counselor at the time of trial. R. pp. 108, 117. She had met the child the Friday before trial and testified the child was afraid to come to trial and talk. R. p. 118. She had reviewed the police report. R. p. 114. In the counseling sessions, she had questioned the child about what had occurred and had elicited the child's statement through drawings and verbal descriptions of the alleged incidents. R. pp. 109-10, 113. After testifying about what the child told her, the counselor opined that the child might not remember the specific details, drawing a

comparison to people who have suffered severe trauma, but then stated the child "did not seem to block things out" and reiterated "[s]he was very consistent." R. p. 118. Unlike the expert who testified in *Brown*, this counselor was intricately and intimately involved with this child, had interviewed her repeatedly over a year-and-eight-month course of counseling sessions, and had extensive knowledge of the case and the details of the allegations.

In *Anderson*, the Supreme Court recognized the potential for improper vouching where the person offered as an expert was involved with the child:

> The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility.

See Anderson, 413 S.C. at 218-19, 776 S.E.2d at 79. Here, that very problem occurred. This counselor testified concerning the characteristics of child victims of sexual abuse with reference to the behaviors that this child had manifested and the "symptoms that she presented with," as described by the child and her mother and as observed by this counselor. R. pp. 19, 106, 115-16.

In *Brown*, the Court of Appeals also found that the expert testimony did not improperly bolster the victim's testimony because the witness "never commented – directly or indirectly – about the credibility of the victims' allegations or testimony, nor did she make any of the statements prohibited by our supreme court in *Kromah*." *Id.* (citation omitted). Here, as previously noted, *supra* pp. 7-9, the counselor ***did*** comment on the credibility of the child, stating the reasons she believed the child was not coached and further stating she did not seem to have difficulty remembering the alleged incidents

and was very consistent. R. pp. 113, 118. She expressed her opinion as to a diagnosis, made outside her field of expertise, that the child suffered from "adjustment disorder with anxiety and depression with traits of PTSD" and her further opinion that this diagnosis was normally seen in victims of sexual assault, a further comment on the credibility of the complaining witness. R. p. 116. Under these circumstances, unlike the admissible testimony in *Brown*, the testimony of this counselor was wholly inappropriate bolstering of the child and highly prejudicial to appellant. The court erred in admitting her testimony in its entirety.

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

The witness's testimony about the pictorial statements of the child and the child's additional verbal statements to the counselor concerning the alleged incidents was also inadmissible under S.C. Code Ann. § 17-23-175. These out-of-court statements were not preserved with an audio and visual recording of the statements, as required by Section 17-23-175(A). Nor did the trial court conduct the required analysis, under Section 17-23-175(F), of an electronically unrecorded out-of-court statement made by a child to a professional in his professional capacity. After the defense objected on the basis that the statements were unrecorded, R. p. 97, the court failed to conduct the proper analysis under sub-part (F) of the statute and failed to make the requisite findings under each factor and, in particular, whether the statements possessed particularized guarantees of trustworthiness, in order to find the child's out-of-court statements to the counselor admissible under Section 17-23-175(F). Having failed to conduct the required analysis, the court erred in admitting the counselor's testimony concerning the statements.

The errors in admitting the counselor's testimony were highly prejudicial and not harmless. As explained in Argument I, *supra* pp. 5-6, the state's case was weak. The child's testimony was the ***only*** evidence against appellant, and it was contradicted by the child's own prior statements, by her mother, sister, and grandmother who testified for the state, and by defense witnesses. There was no corroborating physical evidence and no testimony from any eyewitness concerning the allegations, not even the sister who the child claimed was present during one of the incidents. The counselor's improper opinion testimony that bolstered the child's credibility and the comparison of the child's behavior to other child victims of sexual abuse told the jury, repeatedly, that the child was telling the truth. The impact of this improper bolstering was even greater because it was done under the imprimatur of an expert. Under these circumstances, the improper evidence was not harmless, and appellant is entitled to a new trial.

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

Appellant's father testified as a defense witness. During his testimony, he described several occasions when the child's mother was using his truck after she and the child had moved from his residence to a hotel room. He indicated that sometimes she came to pick him up and the child was not with her, the mother having left her in the hotel room, and he would tell the mother she should not do that. R. p. 207.

At the close of the defense's case, the state sought to call two rebuttal witnesses, one of whom had been the child's teacher the previous year. R. p. 286. The state sought to have the teacher testify about the child and the child's mother, ostensibly in rebuttal to the comment of appellant's father, above, but clearly also intended to dispel the

implication from other testimony that the child's mother may have stolen things from the family and lied about certain matters. R. p. 287. The state claimed the testimony was relevant to the fact that she is a good mother and took excellent care of her child. R. p. 287. The state said the witness would testify that the child was an excellent student, never got in trouble, was well cared for, was always clean, and was always prepared and that her mother was attentive and participated in the child's activities. R. p. 286. The defense argued this testimony was not proper rebuttal because there was no testimony concerning anything related to the school or the child being clean and the other testimony the state said it would elicit, and the only proper rebuttal of appellant's father's testimony would be to elicit evidence that the mother did not leave the child alone. R. p. 288. The defense contended testimony the state proposed to introduce was improper character evidence. R. p. 288. The court allowed the testimony. R. p. 288.

The teacher took the stand and proceeded to bestow accolades on both the child and the mother, painting a picture of a sweet, hard-working student who always did what she was supposed to do and who never got in trouble and further painting a picture of the perfect parent who was involved in the class, came to birthdays and brought treats, helped with parties, and did whatever the teacher needed; who signed everything that needed to be signed; and who was attentive to how the child was doing in school. R. pp. 290-91. She described the good parent/teacher relationship she had with the mother and provided details concerning the mother's participation in the child's schooling. R. pp. 291-92. She testified she never thought the mother neglected the child. R. p. 292.

This testimony was inadmissible character evidence – both with respect to the child and with respect to the mother. No evidence was presented by the defense to attack

the character of the child, but the teacher was allowed to describe the child in the most complimentary of terms. Generally, character evidence is not admissible, except as provided in Rule 404 of the South Carolina Rules of Evidence. The only exceptions applicable to an alleged victim are contained in Rule 404(a)(2). The relevant part of Rule 404(a)(2) allows "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same." Here, where the accused did not offer ***any*** evidence of a character trait of the child, the teacher's testimony about the child could not be evidence "by the prosecution to rebut the same." *See* Rule 404(a)(2), SCRE.

Nor did the defense introduce any character evidence about the mother. The only character evidence about the mother was elicited by the state, which presented evidence of the mother's extensive criminal history, including two convictions for breach of trust with fraudulent intent, three forgery convictions, a conviction for failure to return rented objects, and convictions for bank fraud and fraudulent checks. R. pp. 6-7. The evidence the state introduced through the teacher did not rebut any fact about which appellant's father testified. Rather, the teacher's testimony was pure character evidence, inadmissible under the rules of evidence pertaining to character evidence.

Rule 404(a)(3) of the South Carolina Evidence Rules allows evidence of the character of a witness, as provided in Rules 607, 608, and 609. Only Rule 608, which pertains to evidence of a witness's character for truthfulness or untruthfulness, is relevant to the issue presented here. The state asserted and the court found that the defense put the mother's character for truthfulness in issue. If this finding were correct, this rebuttal testimony offered by the state is not within the requirements of Rule 608(a), which

provides "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." The rebuttal testimony of the child's teacher was not "evidence of truthful character" allowed by Rule 608(a). Rather, it was evidence designed to convey to the jury that the child's mother was a good person and a good mother, a purpose not allowed by the rules pertaining to character evidence. As the defense correctly argued, this evidence was not proper rebuttal of the testimony of appellant's father, and it should not have been admitted.

The evidence was prejudicial. The state's evidence was not strong. The child's credibility was very much an issue for the jury, and the defense had pointed out the many inconsistencies in the child's accounts of what she claimed had occurred and the contradictions of her account by her mother, sister, and grandmother and by defense witnesses. There was no corroboration of her account, except for the improper corroborating, bolstering evidence discussed in Arguments I and II, *supra* pp. 3-13. The last evidence the jury heard before beginning its deliberations was the teacher's improper testimony with respect to the character of both the child and the mother. This improper rebuttal evidence was offered by the state to enhance its case and its chances of obtaining a guilty verdict. The evidence played to the jury's prejudices, invoking sympathy for the child and mother. The evidence likely influenced the jury to reach a guilty verdict on the basis of that sympathy, rather than upon the evidence that was relevant and probative of appellant's guilt or innocence. The court's ruling allowing this improper character evidence cannot be deemed harmless.

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

During the examination of the child's mother, the defense objected to testimony concerning statements the child had made to her. R. p. 15. The court overruled the objection, under the place and time exception to the hearsay rule. R. p. 16. The witness then testified concerning what the child had described. Exceeding the scope of the exception for such testimony as to time and place only, the witness testified appellant went into the room to the child. R. p. 17. The defense again objected on hearsay grounds, because the witness had gone beyond time and place. R. p. 17. The state contended the witness was testifying from her own personal knowledge, and the court allowed the testimony on this basis. R. p. 18. When the testimony resumed, the witness stated that her testimony was based on what she saw herself "as she [the child] explained them to me" and remembering "everything she was explaining to me." R. pp. 18-19. This testimony, based on ***what the child had explained to her***, was improper bolstering hearsay testimony.

The rule against hearsay prohibits admission of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. *See* Rules 801(c), 802, SCRE; *Dawkins v. State*, 346 S.C. 151, 156, 551 S.E.2d 260, 263 (2001); *Jolly v. State*, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994). Where the alleged victim of a sexual assault testifies and is subject to cross-examination, evidence that she reported the alleged assault may be introduced to corroborate her testimony, but such evidence is strictly limited to time and place. *See* Rule 801(d)(1)(D), SCRE; *Smith v. State*, 386 S.C. 562, 566, 689 S.E.2d 629, 631-32 (2010); *Dawkins*, 346 S.C. at 156, 551 S.E.2d at 263; *Jolly*,

314 S.C. at 20, 443 S.E.2d at 568; *State v. Barrett*, 299 S.C. 485, 486-87, 386 S.E.2d 242, 243 (1989). The details and particulars of the assault set forth in the prior statement are inadmissible. *Smith*, 386 S.C. at 566, 689 S.E.2d at 632; *Dawkins*, 346 S.C. at 156, 551 S.E.2d at 263; *Jolly*, 314 S.C. at 20, 443 S.E.2d at 568; *Barrett*, 299 S.C. at 486-87, 386 S.E.2d at 242; *Vail v. State*, 402 S.C. 77, 85, 738 S.E.2d 503, 507 (Ct. App. 2013). The details other than time or place are not allowed because such evidence impermissibly corroborates the victim and bolsters her credibility. *Smith*, 386 S.C. at 567, 689 S.E.2d at 632; *Jolly*, 314 S.C. at 21, 443 S.E.2d at 569; *Barrett*, 299 S.C. at 487, 386 S.E.2d at 242.

This witness's testimony that appellant went into the bedroom to the child was clearly based on what the child told the mother and clearly exceeded the limitation as to time and place. The mother's own testimony established that it was premised on ***what the child explained to her***. Her claim that she then remembered the occasion after hearing what the child said does not negate the fact that her testimony also informed the jury the child had stated appellant came into the bedroom where she was. This is the very kind of corroboration testimony prohibited under the limitation as to time and place. It was highly prejudicial because no other testimony or corroborative evidence tended to establish an incident in the bedroom, and the child herself gave inconsistent accounts with respect to an incident in the bedroom. Admission of this bolstering testimony was error, and the error was not harmless. As is more fully discussed in Arguments I and II, *supra* pp. 5-6, 12-13, the state's case was weak and turned entirely on the credibility of the child, whose account was contradicted by her own statements, the testimony of other prosecution witnesses, and the evidence offered by the defense. The improper evidence that bolstered the child's credibility can only be deemed prejudicial, not harmless.

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

As argued throughout this brief, each of appellant's claims of error was prejudicial and cannot be deemed harmless in light of the weakness of the state's case. However, if this Court finds error with respect to all or some of the issues argued above but finds that no single error sufficiently prejudiced appellant that it undermined his right to a fair trial, it should nonetheless find that the cumulative effect of the errors was so prejudicial as to deprive appellant of the fairness required by due process. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3; *State v. Blurton*, 342 S.C. 500, 512-13, 537 S.E.2d 291, 297-98 (Ct. App. 2000) (finding cumulative effect of improper comments in closing argument and erroneous exclusion of certain evidence warranted reversal), *rev'd on other grounds*, 352 S.C. 203, 573 S.E.2d 802 (2002) (finding additional error with respect to a jury charge); *State v. Freeman*, 319 S.C. 110, 123-24, 459 S.E.2d 867, 875 (Ct. App. 1995) (reversing conviction based on combined effect of court's limitation of cross-examination and court's improper comments interjected during the trial).

The cumulative error doctrine requires reversal when multiple errors, deemed insignificant or harmless in isolation, in combination prevent the defendant from receiving a fair trial and affect the outcome of his trial. In this case, where there was no physical evidence and no proper corroborative evidence, the outcome depended entirely on the credibility of the complaining witness. The trial court admitted improper evidence to corroborate her testimony and to bolster her credibility, rulings challenged in this appeal. The court also allowed improper character evidence with respect to both the

child and her mother and allowed improper bolstering testimony through the child's out-of-court statements to her mother. If this Court finds no single error was sufficiently prejudicial to warrant reversal, it should review the prejudicial effect of the errors in combination. The multiple trial errors viewed together so tainted these proceedings that they deprived appellant of a fair trial.

CONCLUSION

For the foregoing reasons, this Court should reverse and grant appellant a new trial.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

The State,

Respondent,

v.

Bryant Christopher Gurley,

Appellant.

CERTIFICATE OF COUNSEL

Counsel hereby certifies that the final brief and final reply brief of appellant comply with Rule 211(b) of the South Carolina Appellate Court Rules. Counsel further certifies that the final brief and final reply brief of appellant comply with the Order of the Supreme Court of South Carolina, *Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings* (April 15, 2014).

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PROOF OF SERVICE

I, Kellie A. Switzer, certify that I have served the Final Brief of Appellant and Final Reply Brief of Appellant on the following, by depositing a copy of it in the United States Mail, postage prepaid, on March 10, 2016, addressed to:

Jennifer Ellis Roberts, Assistant Attorney General
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March 10, 2016

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March 10, 2016

VIA HAND-DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: The State v. Bryant Christopher Gurley
Appellate Case No.: 2015-000235

Dear Ms. Kitchings:

Enclosed for filing are fifteen (15) copies of the Final Brief of Appellant and Final Reply, along with Proof of Service, in the above referenced matter.

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

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

Very truly yours,

Jack B. Swerling

JBS/kas
Enclosures

cc: Jennifer Ellis Roberts, Assistant Attorney General
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