STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Steven H. John, Circuit Court Judge

Appellate Case No. 2014-002241

THE STATE, ...RESPONDENT

v.

MICHAEL EDWARD WILLIAMS,.....APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Interim Senior Assistant Deputy Attorney General
S.C. Bar No. 1871

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

W. WALTER WILKINS
Solicitor, Thirteenth Judicial Circuit

305 E. North St. Suite 325
Greenville, SC 29601
(864) 467-8647

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Steven H. John, Circuit Court Judge

Appellate Case No. 2014-002241

THE STATE, ...RESPONDENT

v.

MICHAEL EDWARD WILLIAMS,.....APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Interim Senior Assistant Deputy Attorney General
S.C. Bar No. 1871

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

W. WALTER WILKINS
Solicitor, Thirteenth Judicial Circuit

305 E. North St. Suite 325
Greenville, SC 29601
(864) 467-8647

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Statutes:

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. The trial court did not err in admitting the videotape of the forensic interview because there was no violation of Appellant's right to confrontation when the victim testified and was subject to cross-examination in open court.

2. The trial court did not err in admitting the videotaped interview because the trial court, in a hearing outside the presence of the jury, properly found that the forensic interview shows particularized guarantees of trustworthiness based on the totality of the circumstances surrounding the making of the statement, and thus satisfies South Carolina Code Section 17-23-175. Additionally, Appellant's vague assertion that the forensic interviewer asked leading questions is not sufficiently specific to preserve the issue for appeal.

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Appellant on the charges of criminal sexual conduct with a minor under the age of eleven in the first degree and criminal sexual conduct with a minor in the third degree. On October 6, 2014, Appellant proceeded to trial before the Honorable Steven H. John, and a jury. At trial, Dorothy Manigault represented Appellant, and Lisa Bentley represented the State. (ROA. p. 1).

The jury found Appellant guilty of criminal sexual conduct with a minor in the third degree and not guilty criminal sexual conduct in the first degree. (ROA. p. 138-139). Judge John sentenced Appellant to fifteen years of imprisonment. (ROA. p. 138-1395). Appellant filed and served a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

On Saturday, March 31, 2012, Appellant Michael Williams spent the night at the home of Mother and her five-year-old daughter, the minor victim (Victim) in this case. (ROA. p. 32). Mother and Appellant were not romantically involved but were friends. Only Mother and Victim lived in Mother's home. (ROA. pp. 27; 29-32) While still in Mother's home the next day, Appellant spent about several hours in the playroom alone with Victim. Mother periodically checked on Victim during this time and Appellant acted strangely each time Mother walked by. (ROA. pp. 35-36). Around 6:00 p.m., when Mother was preparing to leave the home with Victim to pick up Victim's grandmother, Mother observed Appellant on the floor next to Victim. Appellant appeared "off guard." (ROA. pp. 33; 36; 38). When Mother entered the room, Appellant immediately got up while Victim remained lying on her left side. Mother observed Victim pulling and tugging at her shorts and panties. (ROA. p. 37).

Appellant left Mother's home. (ROA. p. 38). Because she observed uncharacteristic behavior from Victim, Mother asked Victim why she was tugging at her shorts. (ROA. p. 38). Mother then asked Victim whether Appellant touched her private. (ROA. p. 39) Victim began to cry. (ROA. p. 39). Mother noted that on March 31, Appellant oddly persisted in offers to babysit Victim which Mother declined. (SROA. p. 2).

Mother called law enforcement and met with Investigator Michael Robertson on April 3, 2012. (ROA. pp. 40; 77). After taking a written statement from Mother about the incident, Investigator Robertson advised Mother that he would schedule a forensic interview for Victim at the Julie Valentine Center. (ROA. pp. 39, 77).

The clinical coordinator at the Julie Valentine Center, Sarah Davis, conducted a forensic interview of Victim on April 30, 2012. (ROA. p. 61). The interview was preserved in an audio and video recording. (ROA. p. 62). Victim was five years old at the time of the interview. (ROA. p. 62).

The court held a pre-trial motion hearing to determine the admissibility of the out-of-court statement made by Victim pursuant to S.C. Code Ann. § 17-23-175 (2010). (SROA. p. 1). The State called Sarah Davis to testify out of the presence of the jury. (SROA. p. 1). Ms. Davis testified that she had conducted over five hundred and thirty forensic interviews with children. (ROA. p. 6). Ms. Davis has a bachelor's degree in psychology from Clemson University and a master's in social work from the University of South Carolina; she is a licensed social worker in South Carolina and attends classes regularly in social work and forensic interviewing. (ROA. p. 5). Ms. Davis defined a forensic interview as a semi-structured, developmentally appropriate non-leading method of questioning children about allegations of abuse. (ROA. p. 6). Ms. Davis testified that she is trained to use non-leading questions so that the information elicited does not stem from something she suggests. (ROA. p. 6). Davis testified that she knew Victim from the forensic interview she performed on April 30, 2012. (ROA. pp. 6-7). The interview was preserved in an audio and video recording marked as State's Exhibit 7. (ROA. p. 7).

Davis testified that the interview room is set up to minimize distractions for the child being interviewed. (ROA. p. 8). Although there were some questions that Victim had difficulty understanding, the responses were developmentally appropriate given that Victim was five years old. (ROA. pp. 8-9). To ensure she heard correctly, Ms. Davis

would repeat Victim's answers and allow Victim the opportunity to correct anything that was repeated back incorrectly. Victim corrected Ms. Davis during the interview. (ROA. p. 9). The State sought to move the recorded interview, State's Exhibit 7, into evidence for the purposes of the hearing. (R. p. 10). Appellant objected to the admissibility of State's Exhibit 7 on the grounds it violated the confrontation clause because Appellant was not present during the interview to cross-examine Victim and because the statement exceeded time and place restrictions. (ROA. pp. 10-11; 13). In response, the State clarified that, pursuant to section 17-23-175, it must make Victim available for cross examination at trial in order to address Confrontation Clause concerns and that Victim would be called to testify as a witness at trial. (ROA. p. 11).

At the conclusion of the pre-trial motion hearing, Judge John found that the out-of-court statement, State's Exhibit 7, was admissible given that Victim would testify and be subject to cross examination. (ROA. p. 17). Specifically, Judge John found that the statement was given in response to an investigative interview of Victim; that an audio and visual recording of the statement was preserved on film, videotape, or other electronic means; that the child would testify and be subject to cross examination; and, finally, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness. (ROA. p. 17). Judge John reiterated that based upon what he heard from the interviewer, Ms. Davis, and his observation of the interview, the requirements concerning the admissibility of the statement were met. (ROA. pp. 13-15; 17).

Judge John also made specific findings in determining that the statement possessed the particularized guarantees of trustworthiness. First, he found that the

interviewer's questions did not suggest answers. Second, Judge John concluded that the interviewer's training was substantial, and thus sufficient to allow her to conduct the interview. Third, he found that the statement represented a sufficiently detailed account of the offense such that if the evidence was believed by the jury, it would represent a detailed account of the offense. Fourth, he found that the nature of the questions did not obstruct the overall internal coherence of Victim's statements. Lastly, he concluded that the sworn testimony of Ms. Davis regarding the circumstances surrounding the interview was the only testimony necessary, in addition to the court's viewing of the videotape. (ROA. p. 17).

The trial commenced and the State called Victim to testify. Victim identified Appellant and Mother in the courtroom. She stated that she lives with Mother and has dogs. (ROA. pp. 48-51). Appellant cross-examined Victim on her age, birthday, school, address, sleep-overs, and what she does not make Mother feel better. (ROA. pp. 53-57).

The State also again called Ms. Davis to testify before the jury regarding the circumstances of the recorded interview of Victim. (ROA. p. 63). The State then sought to move State's Exhibit 7 into evidence. (ROA. p. 63). Appellant renewed his earlier challenge to the constitutionality of Section 17-23-175 on Confrontation Clause grounds. Appellant argued that the content of the recorded interview was suggestive in nature because leading and repetitive questions were employed. (ROA. pp. 63-64). Appellant also stated that a scientific method was not used to produce the recorded interview. (ROA. pp. 63-64).

Judge John allowed State's Exhibit 7 into evidence, rejecting Appellant's arguments that the statute was unconstitutional and that leading questions were

employed. (ROA. pp. 64-65). Instead, he found that all of the statutory requirements concerning the admissibility of an out-of-court statement by a child under twelve were met in that the statement was given in response to an investigative interview of the child; that an audio and visual recording of the statement was preserved on film, videotape, or other electronic means; that the child testified at the proceeding and was subject to cross examination; and, finally, that the totality of the circumstances surrounding the making of the statement provide particularized guarantees of trustworthiness. (ROA. pp. 64-69). Appellant's objections were overruled and the recorded interview was admitted as State's Exhibit 7. (ROA. p. 66).

During the direct examination of Ms. Davis, the State published State's Exhibit 7 to the jury. During the recorded interview, Victim referred to Appellant by name and stated that he touched her "bottom" with his finger and his tongue. [State's Exhibit 7, 14:40-15-10]. Victim described that the incident took place when she was five in the playroom at her house. [State's Exhibit 7, 15:40-16-50]. Victim, not the interviewer, is the first to mention the name of Appellant. In order to conduct an interview in an appropriate manner for a child, the interviewer followed a technique, known as RATAC, which is widely used in South Carolina and around the country. (ROA. p. 72). In this method, the interviewer uses a continuum of questions without suggesting information that the child has not already provided. (ROA. p. 73). The interviewer asks questions about the specific incident only after Victim identified Appellant and stated that he inappropriately touched her "bottom." [State's Exhibit 7, 14:40-25:00].

Forensic pediatrician Nancy Henderson examined Victim on May 3, 2012. Victim was five years old at the time of the examination. Dr. Henderson found the physical

examination was normal but explained that a normal examination does not preclude sexual touching and provided an explanation to the jury to support her testimony in this regard. (SROA. pp. 3-13).

Shauna Galloway-Williams testified that she does not know and has never met Victim. She explained disclosure behavior to the jury. (SROA. pp. 14-16).

ARGUMENT

I.

The trial court did not err in admitting the videotape of the forensic interview of the victim because there was no violation of Appellant's right to confrontation when the victim testified and was subject to cross-examination in open court.

Appellant argues on appeal that the trial court erred in admitting the forensic video of Victim because the statute authorizing admission, S.C. Code Ann. § 17-23-175, is unconstitutional in that it violates his Sixth Amendment Confrontation Clause rights. Specifically, Appellant contends his rights were violated because he did not have the opportunity to contemporaneously cross-examine Victim during the forensic interview and was denied effective cross-examination of Victim because the prosecutor failed to elicit testimony from Victim on the elements of the offense. He maintains the video was inadmissible under Crawford v. Washington, 541 U.S. 36 (2004), even though Victim testified at trial and was subject to cross-examination regarding the video recording and information contained in the recording. He argues that it would appear harsh to the jury for him to recall Victim as a witness, thus undermining his constitutional right to effective cross-examination under the Confrontation Clause.

However, it is because the victim was available, testified under oath in open court, and was subject to cross-examination by Appellant at trial that there is no violation of the Confrontation Clause which rendered the statute unconstitutional. Moreover, Appellant never supported his challenge to the constitutionality of the statute or admissibility of the videotaped interview with the argument that he was denied effective cross-examination of Victim because the prosecutor failed to elicit testimony from Victim at trial about the elements of the offense. This ground was **only** offered by Appellant in support of his

directed verdict motion and cannot be advanced now on appeal as support for trial court error in ruling on the constitutionality of the statute or admission of the videotaped interview when the objection or argument was never presented to the trial court for consideration and ruling.[1] See State v. Thompson, 413 S.C. 590, 608, 776 S.E.2d 413, 422 (Ct.App. 2015) ("For an objection to be preserved for appellate review, the objection must be made . . . with sufficient specificity to inform the [trial court] of the point being urged by the objector." Issues not specifically raised to and ruled upon by the trial court will not be considered on appeal); State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011)(an objection that the defendant's constitutional rights were violated must be made by offering a specific ground which is ruled upon by the trial court to be preserved for review on appeal).

The State submits that Appellant's arguments are completely without merit. The arguments Appellant presents were considered and rejected in State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015). The South Carolina Supreme Court determined in Anderson that a defendant's Sixth Amendment rights are satisfied when the minor testifies under oath and is subject to cross-examination. The fact that a criminal defendant might have to recall the child victim as a witness in order to examine her about a videotaped statement does not render the statute or the procedure a violation of a defendant's Sixth Amendment right to cross-examination. Id.

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion accompanied by

[1] In support of his motion for directed verdict, Appellant moved for dismissal of the charges on the ground Victim failed to testify at trial regarding the incident. (ROA. p. 91). The trial court denied the motion finding Victim's out-of-court videotaped statement respecting the incident was admitted and Appellant had the opportunity to cross-examine Victim about it but chose not to do so. (ROA. pp. 92-93).

prejudice. State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2103); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). An abuse of discretion occurs when the trial court's ruling lacks an evidentiary basis or is controlled by an error of law. Id.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The constitutional right to confront and cross examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial. State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987) (citing California v. Green, 399 U.S. 149 (1970); State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980)).

The purposes of confrontation is to:

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury;
> (2) forces the witness to submit to cross examination, the "greatest legal engine ever invented for the discovery of truth"; [and]
> (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

State v. Stokes, 381 S.C. 390, 401, 673 S.E.2d 434, 439 (2009) (quoting California v. Green, 399 U.S. 149 (1970) (footnote omitted)). In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court held that when the declarant appears for cross examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." Id. at 59, n.9 (citing Green, 399 U.S. at 162) (emphasis

added). The Court stated: "The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." Id. (emphasis added).

Further, the applicability of Crawford to a forensic interview video was analyzed by this Court in State v. Hill, 394 S.C. 280, 715 S.E.2d 368, (Ct. App. 2011). This Court determined that when the declarant, who is the minor victim of a sexual assault, testifies and the defendant has the opportunity to cross-examine the declarant, then the requirements of the Confrontation Clause have been met and there is no constitutional restriction on the use of the declarant's prior statements. Id. at 292, 715 S.E. 2d at 375.

Moreover, in State v. Anderson, 413 S.C 212, 776 S.E.2d 76 (2015), the South Carolina Supreme Court recently held that Section 17-23-175 does not violate the Sixth Amendment's Confrontation Clause when the minor victim testifies under oath in open court and was subject to cross examination. Our supreme court noted that the fact "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 Sixth Amendment right to cross examination." State v. Anderson, at 218, 776 S.E.2d at 79.

In the instant case, just as in Anderson, the declarant was available and testified at trial. Appellant had the opportunity to cross-examine Victim when she testified in open court regarding her interview process, the elements of the offense, and the substance of the information revealed during the interview. Appellant had the "opportunity for effective cross-examination" as guaranteed under the Confrontation Clause but simply chose not to exercise the right. See United States v. Owens, 484 U.S. 554, 559 (1988). Accordingly, the admission of Victim's videotaped statement during the forensic

interview neither implicated nor violated the Confrontation Clause of the Sixth Amendment.

As to the constitutionality of the statute, Section 17-23-175 provides:

> A) In a general sessions court proceeding or a delinquency proceeding in family court, an out of court statement of a child is admissible if:
> (1) the statement was given in response to questioning conducted during an investigative interview of the child;
> (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);
> (3) the child testifies at the proceeding and is subject to cross examination on the elements of the offense and the making of the out of court statement; and
> (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

S.C. Code Ann. § 17-23-175 (Supp. 2010) (emphasis added).

The statute requires the victim to testify and be subject to cross-examination prior to the forensic video being admitted into evidence. As a result, the Confrontation Clause restrictions imposed by Crawford are not implicated and the admission of the evidence is left to statute, rule, or judicial discretion. Nothing in the Confrontation Clause or its interpretation bears on the admissibility of a statement if the declarant is available for cross-examination by the accused.

Appellant offers State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002) as support for his argument. However, Mizzell is inapplicable. In Mizzell, our supreme court addressed the limitation imposed by the trial court to cross-examination of a co-conspirator. Our supreme court held that the reversible error at issue was the judge's prohibition of certain questions during cross-examination of a witness about his specific

sentence. Here, Appellant was never limited by the trial judge in cross-examination. He simply chose not to fully exercise the right. As noted in Hill:

> [T]he Confrontation Clause guarantees only the opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish. In addition, we note Hill does not assert he was in any way prohibited from recalling Victim to the stand to examine the child after introduction of the DVD through the forensic investigator.

Hill, 394 S.C. at 292-293, 715 S.E.2d at 375. Just as in Hill, Appellant does not present a valid reason for failing to cross-examine Victim about the interview and information divulged on the videotape either after the State's direct examination of Victim or by recalling Victim as a witness to answer questions after it was played for the jury. Instead, Appellant simply makes conclusory arguments that "[d]efense counsel in Williams' case was limited in her cross-examination of the child because the solicitor asked no questions of the child about the offense." Appellant fails to provide valid justification for his failure to question Victim.

Victim was called to testify. The State conducted its direct examination of Victim and obviously elicited all of the information it intended to present through Victim's live testimony to the jury. Immediately following, Appellant exercised the right to conduct his cross-examination of Victim. Appellant was aware of the trial court's pretrial ruling regarding admission of the videotaped interview and could have questioned Victim about what she divulged during the interview respecting the incident or could have recalled Victim to question her after the videotaped interview was played for the jury. The trial court never prevented Appellant from cross-examining Victim regarding her testimony or the content of the pretrial videotaped interview.

Finally, Appellant seems to argue he was not able to cross-examine the minor victim when she was interviewed by Smith. The right to confront the witness is a trial right and not a right that exists during the investigation. The Sixth Amendment to the United States Constitution guarantees: "**In all criminal prosecutions**, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI (emphasis added). "This constitutional right, which applies to the states through the Fourteenth Amendment, guarantees a defendant in a criminal trial the right to cross-examine the witnesses against him." State v. Henson, 407 S.C. 154, 162, 754 S.E.2d 508, 512 (2014) (citing Pointer v. Texas, 380 U.S. 400, 403–04 (1965)). "The right to confrontation has been referred to as a 'trial right.'" Starnes v. State, 307 S.C. 247, 249, 414 S.E.2d 582, 583 (1991) (quoting Barber v. Page, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968)).

Appellant did not have a Confrontation Clause right to be present and engage in cross-examination of Victim during the forensic interview. The right to confrontation does not apply until the time of trial. Moreover, in this case, there is no Confrontation Clause violation because Victim testified at trial and Appellant was offered the opportunity to cross-examine her regarding her prior statements and testimony at trial. Further, nothing in the statute violates the Confrontation Clause so as to render the Section 17-23-175 unconstitutional under the Sixth Amendment and its interpretation in Crawford. Accordingly, the trial court properly found the statute constitutional and properly admitted the recordings of the forensic interviews into evidence.

II.

The trial court did not err in admitting the videotaped interview because the trial court, in a hearing outside the presence of the jury, properly found that the forensic interview shows particularized guarantees of trustworthiness based on the totality of the circumstances surrounding the making of the statement, and thus satisfies South Carolina Code Section 17-23-175. Additionally, Appellant's vague assertion that the forensic interviewer asked leading questions is not sufficiently specific to preserve the issue for appeal.

Appellant argues that the trial court erred in admitting the videotape as evidence because the interviewer asked leading questions and used the RATAC method of interviewing. At trial, Appellant objected to admission of the interview arguing Appellant did not use a scientific method but used leading and misleading questions. (ROA. pp. 10-11; 13). The trial court ruled pretrial that the questions used were not leading and the interview had internal coherence. (ROA. pp. 13-16). When State's Exhibit 7 was offered as evidence during trial, Appellant renewed his objection. The trial court found that some questions might have been repeated but the repetition he observed did not violate Appellant's rights or the requirements of the statute because two separate charges were being discussed. (ROA. p. 13. The trial court specifically determined the questions were not leading, that answers were not suggested, and the interview was proper. Appellant did not challenge the RATAC protocol at trial but presents the issue for the first time on appeal.

The trial judge acted within his discretion in determining the factual trustworthiness of the recording and properly applied the relevant statutory framework to determine the trustworthiness of the interview after conducting a hearing outside the presence of the jury. Appellant's argument is without merit. Additionally, the issue raised here was not sufficiently specific to preserve the issue for appeal. Appellant also

misapplies statements he extracts from State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) and seems to incorrectly argues for the first time on appeal that Kromah bans the use of forensic interview evidence.

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion accompanied by prejudice. State v. Kromah, at 340, 737 S.E.2d at 490; State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). An abuse of discretion occurs when the trial court's ruling lacks an evidentiary basis or is controlled by an error of law. Id.

First, however, appellant faces a procedural bar because the issue was not sufficiently preserved for appeal. It is "the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 306 S.E.2d 750, 759 (1997). To adequately preserve an issue for appeal, the objection should be sufficiently specific to bring the exact error to the trial court's attention. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005).

Here, while Appellant objected generally to the video's admissibility on the grounds that the video itself was suggestive in nature and included leading questions, Appellant never objected to any specific questions that were purportedly leading. Appellant also never objected to the RATAC methodology. Therefore, Appellant's general objection to the interview is not sufficiently specific to bring the exact error to the trial court's attention. Instead, counsel's objection called for the trial judge to make a general determination as to the admissibility of the recorded interview as prescribed under S.C. Code Ann. § 17–23–175(A), which permits the admission of out-of-court

statements by a child under the age of twelve in criminal proceedings when the following conditions are met:

> (1) the statement was given in response to questioning conducted during an investigative interview of the child;
> (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means ...;
> (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
> (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

S.C. Code Ann. § 17-23-175 (Supp. 2010).

Even if the issue were properly preserved for appeal, the trial court correctly determined that that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness. (ROA. p. 17). Therefore, the trial court properly admitted the recording after conducting a hearing outside the presence of the jury and finding that the totality of the circumstances provides particularized guarantees of trustworthiness. The court reiterated that based upon what the court heard from the interviewer, Ms. Davis, and the court's observation of the interview, the requirements concerning the admissibility of the statement were appropriately met. (ROA. p. 17).

In determining whether the statement possesses the particularized guarantees of trustworthiness under S.C. Code Ann. § 17–23–175(B), the trial judge must make certain findings also identified by statute. S.C. Code Ann. § 17–23–175(B), grants the trial judge broad discretion. In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider, but is not limited to, the following factors:

> (1) whether the statement was elicited by leading questions;

(2) whether the interviewer has been trained in conducting investigative interviews of children;
(3) whether the statement represents a detailed account of the alleged offense;
(4) whether the statement has internal coherence; and
(5) sworn testimony of any participant which may be determined as necessary by the court.

S.C. Code Ann. § 17–23–175(B) (Supp. 2010).

Accordingly, Judge John acted well within his discretion as trial judge when he made the following factual findings in determining that the statement possessed the particularized guarantees of trustworthiness: first, the court found that the interviewer's questions did not suggest answers in the questions; second, the court concluded that the interviewer's training was substantial, and thus sufficient to allow her to conduct the interview; third, the court found that the statement represented a sufficiently detailed account of the offense such that if the evidence was believed by the jury, it would represent a detailed account of the offense; fourth, whether or not there were repetitive questions did not obstruct the overall internal coherence of the statements; fifth, the sworn testimony of Ms. Davis regarding the circumstances surrounding the interview was the only testimony necessary in addition to the court's viewing of the videotape. (ROA. p. 17).

Appellant's general and unspecified assertion that "the interview lacked trustworthiness because it failed on three of the requirements as outlined in Section 17-23-175(B) for trustworthiness," is, at best, merely conjecture. While the aforementioned "three requirements" are unclear, appellant appears to suggest that the instance when "the interviewer told her the three body parts being the breasts, bottom, and front bottom," is one of those reasons. Appellant begins this apparent list of requirements, however, by

stating that leading questions were asked. Immediately thereafter, Appellant suggests that one of the three "requirements" fails because the child did not give an answer to one question in an interview that lasts more than thirty minutes. Importantly, Section 17–23–175(B) provides a list of factors, not requirements, that the court "may consider." Notably, the trial judge considered all of these factors and found each of them to favor admissibility. Even if Section 17–23–175(B) contained a list of requirements, the cherry-picked instances generally described in Appellant's brief are hardly reason to question the trial judge's factual determination based on the totality of the circumstances, particularly where the specific instances were not preserved by being presented to the trial court in support of the objection.

The interview included numerous statements by Victim elicited by open-ended, non-leading questions. Without any prior mention of Appellant, Victim states on her own accord and not in response to any question that Appellant touched her "bottom" with his finger and his tongue. (Exhibit 7, 14:40-15-10). There was no error in the trial court's admission of the videotaped interview.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Interim Senior Assistant Deputy Attorney General

W. WALTER WILKINS
Solicitor, Thirteenth Judicial Circuit

BY: _____
J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
January 25, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Steven H. John, Circuit Court Judge

Appellate Case No. 2014-002241

THE STATE,.....RESPONDENT

v.

MICHAEL EDWARD WILLIAMS,.....APPELLANT.

CERTIFICATE OF COUNSEL

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

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Interim Senior Assistant Deputy Attorney General

W. WALTER WILKINS
Solicitor, Thirteenth Judicial Circuit

BY: _____
J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
January 25, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Steven H. John, Circuit Court Judge

Appellate Case No. 2014-002241

THE STATE, ...RESPONDENT

v.

MICHAEL EDWARD WILLIAMS,.....APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated January 25, 2016, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Lanelle C. DuRant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 25th, day of January, 2016.

Angela Bennett
Administrative Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727